



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

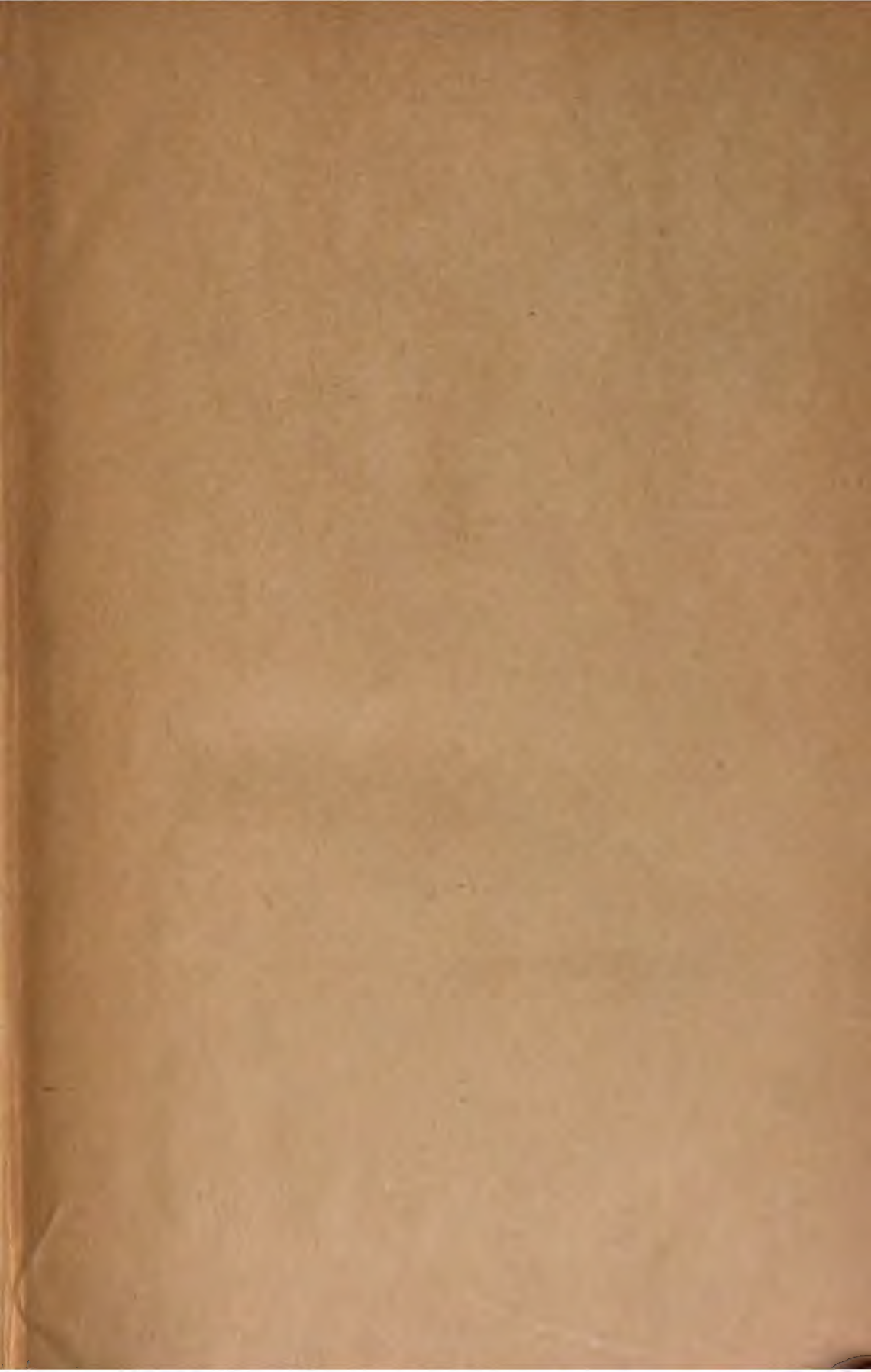
3 2044 103 142 204

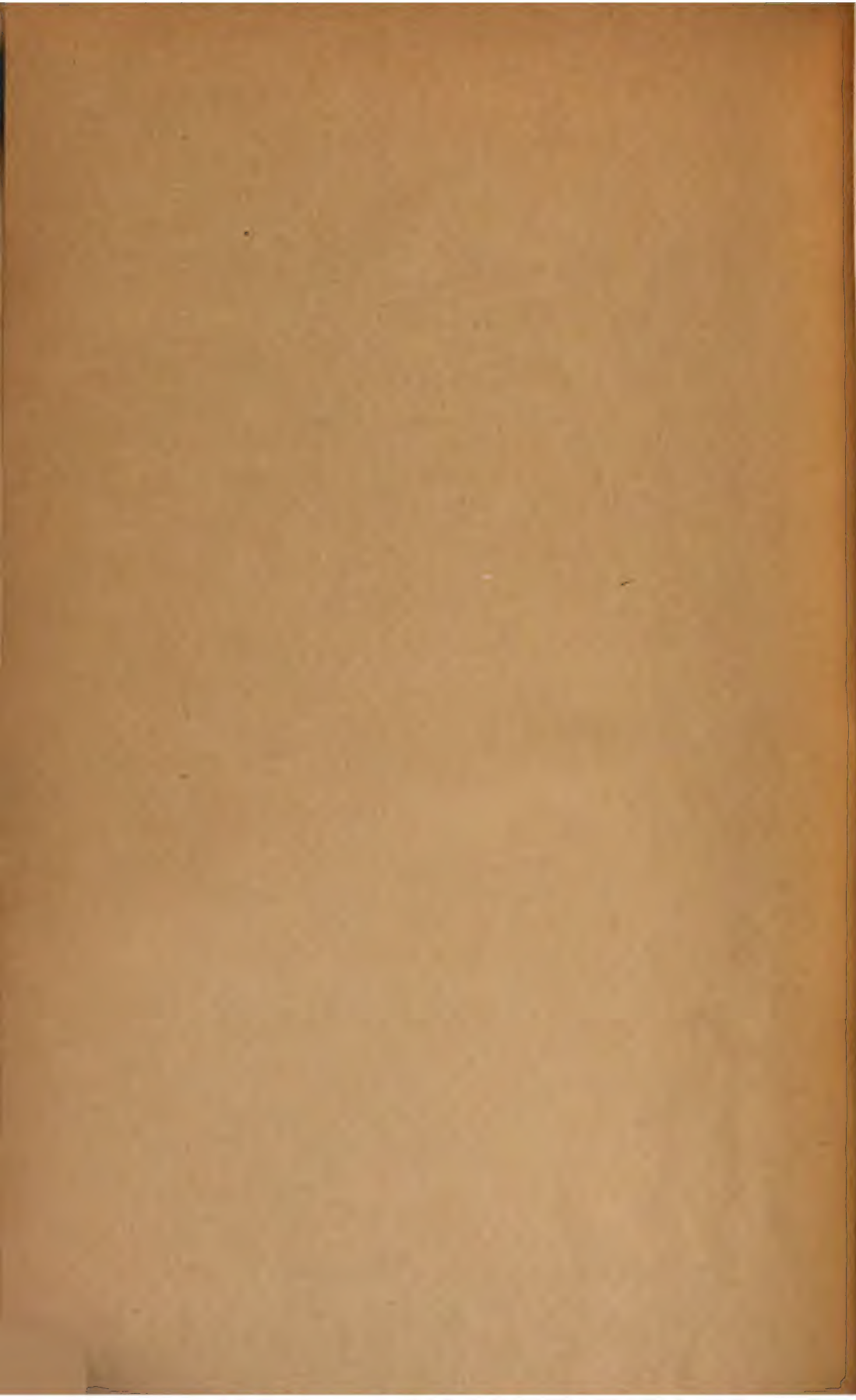
Bd July 1939

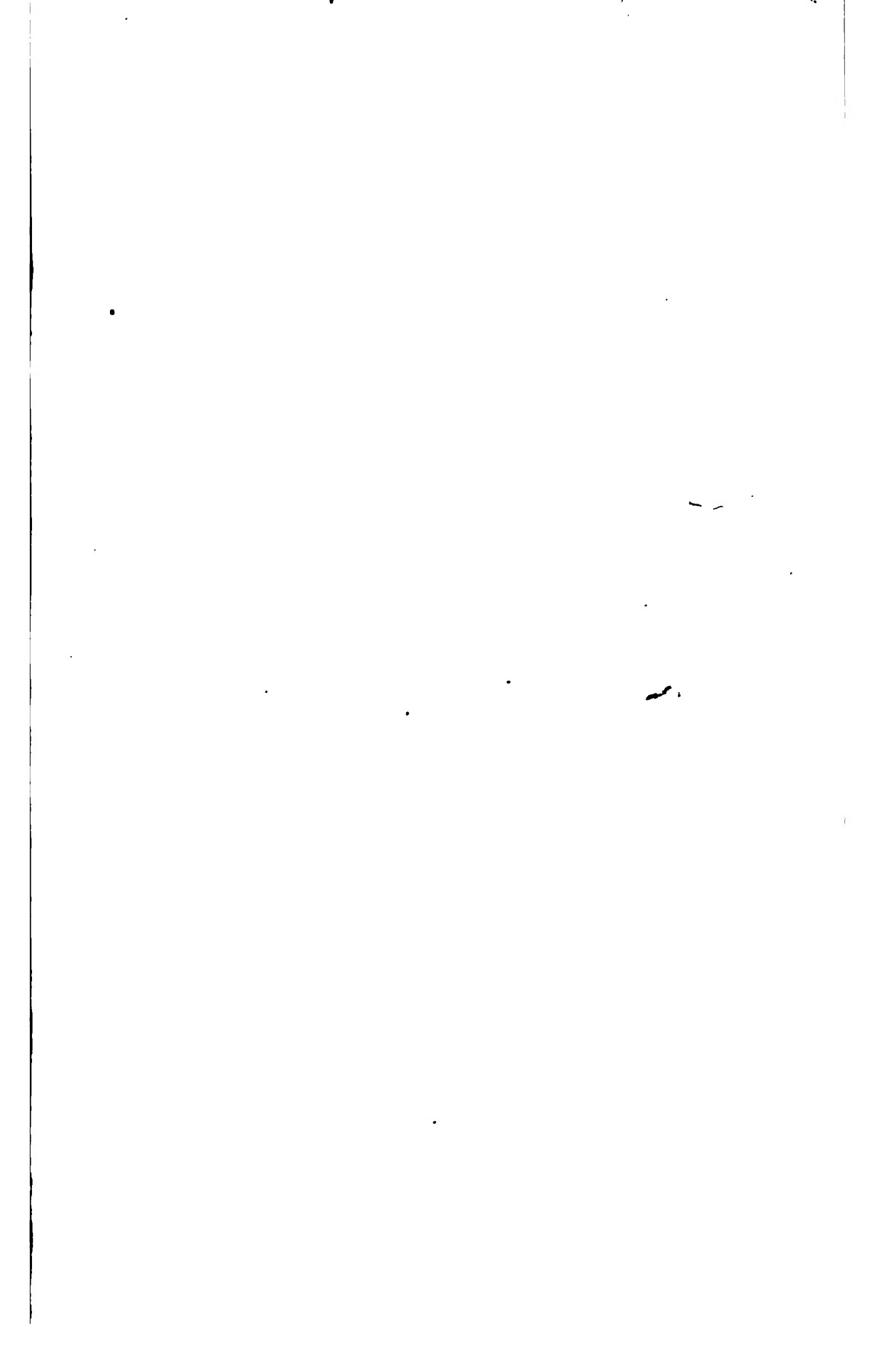


HARVARD LAW SCHOOL
LIBRARY

Received *Nov 9 1896*







1875

SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED, BOOK 31,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

Adams & W. Co. v. Devette (8 S. D. 119	497	Easton v. Huott (95 Iowa, 473)	- 177
Anderson v. Miller (96 Tenn. 35)	- 604	Edwards v. Lesuer (132 Mo. 410)	- 815
Anniston Loan & T. Co. v. Stickney (108		Eichengreen v. Louisville & N. R. Co.	
Ala. 146)	- 234	(96 Tenn. 229)	- 702
Baltimore & P. R. Co. v. Swann (81 Md.		Evans v. Consumers' Gas Trust Co.	
400)	- 313	(— Ind. —) No Off. Rep.	- 673
Barrett v. Mt. Greenwood Cemetery As-		Fairchild v. Hedges (14 Wash. 117)	- 851
so. (159 Ill. 385)	- 109	Farmers' Loan & T. Co. v. Bankers' & M.	
Beavan v. Went (155 Ill. 592)	- 85	Teleg. Co. (148 N. Y. 315)	- 403
Beverly v. Barnitz (55 Kan. 466)	- 74	Gage v. Fisher (5 N. D. 297)	- 557
Blair v. Illinois Steel Co. (159 Ill. 350)	- 269	Gillfillan v. Schmidt (64 Minn. 29)	- 547
Board of Children's Guardians v. Shut-		Grand Lodge A. O. U. W. v. Graham	
ter (139 Ind. 268)	- 740	(96 Iowa, 592)	- 133
Bolton Mines Co. v. Stokes (82 Md. 50)	- 789	Haigh v. Bell (41 W. Va. 19)	- 131
Braithwaite v. Jordan (5 N. D. 196)	- 233	Hayes v. Douglas County (92 Wis. 429)	- 213
Brown v. Foster (88 Me. 49)	- 116	Hearns v. Waterbury Hospital (66	
Buckley v. Gray (110 Cal. 339)	- 862	Conn. 98)	- 224
Butte, A. & P. R. Co. v. Montana Union		Heidel v. Benedict (61 Minn. 170)	- 422
R. Co. (16 Mont. 504)	- 298	Heintz v. Burkhard (29 Or. 55)	- 508
Cameron v. Chicago, M. & St. P. R. Co.		Holdom v. Ancient Order of U. W. (159	
(63 Minn. 384)	- 553	Ill. 619)	- 67
Carrollton v. Bazzette (159 Ill. 284)	- 522	Hoyt v. J. T. Lovett Co. 39 U. S. App. 1,	
Case v. Smith (107 Mich. 416)	- 282	17 C. C. A. 652 (71 Fed. Rep.	
Cawood v. Wolfley (56 Kan. 281)	- 538	173)	- 44
Chicago, M. & St. P. R. Co. v. Stark-		Huber v. La Crosse City R. Co. (92 Wis.	
weather (97 Iowa, 159)	- 183	636)	- 583
Cicero & P. Street R. Co. v. Meixner		Hunter v. Hunter (111 Cal. 261)	- 411
(160 Ill. 320)	- 331	Illinois Steel Co. v. O'Donnell (156 Ill.	
Cincinnati, H. & D. R. Co. v. Metropol-		624)	- 265
itan Nat. Bank (54 Ohio St. 60)	- 653	Indianapolis v. Wann (144 Ind. 175)	- 743
Citizens' Gaslight Co. v. Wakefield (161		Jackson Bank v. Durfey (72 Miss. 971)	- 470
Mass. 432)	- 457	Jarvis v. Manhattan Beach Co. (148 N.	
City Electric Street R. Co. v. Conery (61		Y. 652)	- 776
Ark. 381)	- 570	Jeffrey v. Detroit, L. & N. R. Co. (108	
City Electric Street R. Co. v. First Nat.		Mich. 221)	- 170
Exch. Bank (62 Ark. 33)	- 535	Keeler Ex parte, (45 S. C. 537)	- 678
Clarendon Land Invest. & A. Co. v. Mc-		Knox v. Eden Musee American Co. (148	
Clelland Bros. (89 Tex. 483)	- 669	N. Y. 441)	- 779
Clutton v. Clutton (108 Mich. 267)	- 160	Koen v. Bartlett (41 W. Va. 559)	- 128
Com. v. Junkin (170 Pa. 194)	- 124	Lacy, Ex parte (93 Va. 159)	- 822
Com. v. Myers (92 Pa. 809)	- 379	Lake Shore & M. S. R. Co. v. Salzman	
Consolidated Gas Co. v. Crocker (82		(52 Ohio St. 558)	- 261
Md. 113)	- 785	Latta v. Brown (96 Tenn. 343)	- 840
Corliss v. E. W. Walker Co. (57 Fed.		Lewis v. Terry (111 Cal. 39)	- 220
Rep. 434, and 64 Fed. Rep. 280)	- 282	Leyson v. Davis (17 Mont. 220)	- 429
Danforth v. Danforth (88 Me. 120)	- 608	Louisville & N. R. Co. v. Johnson (108	
Denny v. State, Basler (144 Ind. 503)	- 726	Ala. 62)	- 372
Denver Consol. Electric Co. v. Simpson		Lucy v. Chicago G. W. R. Co. (64 Minn.	
(21 Colo. 371)	- 563	7)	- 551
Detroit v. Detroit Water Comrs. (108		Lynch v. Rosenthal (144 Ind. 86)	- 835
Mich. 494)	- 463	McCook County v. Kammos (7 S. D.	
De Wolf v. Middleton (18 R. I. 814)	- 146	558)	- 461
Dowling v. Lancashire Ins. Co. (92 Wis.		McCutcheon v. Merz Capsule Co. 37 U.	
63)	- 112	S. App. 586, 19 C. C. A. 108 (71	
Doyle v. Whalen (87 Me. 414)	- 118	Fed. Rep. 787)	- 415
Duke v. Taylor (37 Fla. 64)	- 484	McBean v. Fresno (112 Cal. 159)	- 794

SUPPLEMENTAL TABLE OF CASES.

McKay v. Southern Bell Teleph. & T. Co. (111 Ala. 337) -	589	Scott v. Standard Oil Co. (106 Ala. 475) 374	
McManus v. Weston (164 Mass. 263) 174		Snyder Mfg. Co. v. Snyder (54 Ohio St. 86) -	657
Mahler v. Brumder (92 Wis. 477) -	695	Southern Bell Teleph. & T. Co. v. Allen (109 Ala. 224) -	193
Martin v. Elliott (106 Mich. 130) -	169	Southern Bell Teleph. & T. Co. v. Francis (109 Ala. 224) -	193
Menneiley v. Employers' Liability Assur. Corp. (148 N. Y. 596) -	686	Southern Bldg. & L. Asso. v. Norman (98 Ky. 294) -	41
Metropolitan Sav. Bank v. Murphy (82 Md. 314) -	454	State v. Conlon (65 Conn. 478) -	55
Mexican Nat. R. Co. v. Jackson (89 Tex. 107) -	276	State v. Duket (90 Wis. 272) -	515
Michener v. Springfield Engine & T. Co. (142 Ind. 130) -	59	State v. Gardner (54 Ohio St. 24) -	660
Minnesota Lumber Co. v. Whitebreast Coal Co. (160 Ill. 85) -	529	State v. Gaymon (44 S. C. 333) -	489
Mitchell v. Charleston Light & P. Co. (45 S. C. 146) -	577	State v. Gleim (17 Mont. 17) -	294
Nelson v. Davidson (160 Ill. 254) -	325	State v. Old (95 Tenn. 723) -	837
Nelson v. The Willamette, 44 U. S. App. 26, 18 C. C. A. 366 (70 Fed. Rep. 874) -	715	State, Board of Transp., v. Sioux City, O. & W. R. Co. (46 Neb. 682) -	47
Newberry v. Carpenter (107 Mich. 567) 163		State, Laclede Gaslight Co., v. Murphy (130 Mo. 10) -	798
Normal School Dist. Board of Edu. v. Blodgett (155 Ill. 441) -	70	State, Lamar, v. Johnson (35 Fla. 2) -	357
Norwegian Plow Co. v. Bollman (47 Neb. 186) -	747	State, Overton County, v. Copeland (96 Tenn. 296) -	844
Nowack v. Berger (133 Mo. 24) -	810	State, Taylor, v. Lord (28 Or. 489) -	473
O'Reilly v. New York Elev. R. Co. (148 N. Y. 347) -	407	State, Thomas Cruse Sav. Bank v. Gilliam (18 Mont. 94) -	721
Owens v. Van Winkle Gin & M. Co. (96 Ga. 408) -	767	State, West, v. Des Moines (96 Iowa, 521) -	186
Park v. Champlin (96 Iowa, 55) -	141	Stevens v. Carter (27 Or. 553) -	342
Parker v. Bethel Hotel Co. (96 Tenn. 252) -	706	Svensden v. State Bank (64 Minn. 40) 552	
Payton v. McQuown (97 Ky. 757) -	33	Tanner v. Merrill (108 Mich. 58) -	171
Pennsylvania Co. v. McCann (54 Ohio St. 10) -	651	Texas & P. R. Co. v. Smith, 30 U. S. App. 176, 14 C. C. A. 509 (67 Fed. Rep. 524) -	321
People v. Adelphi Club (149 N. Y. 5) 510		Texas M. R. Co. v. Wright (88 Tex. 346) -	200
People v. Bendit (111 Cal. 274) -	831	Third Nat. Bank, Re (148 N. Y. 315) 403	
People v. Havnor (149 N. Y. 195) -	689	Thornhill v. O'Rear (108 Ala. 299) -	792
People, McClelland, v. Roberts (148 N. Y. 360) -	399	Tradesman Pub. Co. v. Knoxville Car-Wheel Co. (95 Tenn. 634) -	593
Pickering v. Moore (67 N. H. 533) -	698	Violett v. Alexandria (92 Va. 561) -	382
Queen City Mfg. Co. v. Blalack (— Mass. —) No Off. Rep. -	222	Waco Water & L. Co. v. Waco (86 Tex. 661) -	392
Rector v. McCarthy (61 Ark. 420) -	121	Wallace v. Driver (61 Ark. 429) -	317
Rice v. Wood (61 Ark. 442) -	609	Walser v. Board of Edu. of School Dist. No. 1 (160 Ill. 272) -	329
Richberger v. American Exp. Co. (73 Miss. 161) -	390	Western U. Teleg. Co. v. Nelson (82 Md. 293) -	572
Rogers v. State (60 Ark. 76) -	465	White v. Farmers' Highline Canal & R. Co. (22 Colo. 191) -	828
Rogers & B. Hardware Co. v. Cleveland Bldg. Co. (132 Mo. 442) -	335	Willamette, The (44 U. S. App. 26, 18 C. C. A. 366, 70 Fed. Rep. 874) -	715
Roth v. Union Depot Co. (13 Wash. 525) 855		Young v. College of Physicians & Surgeons (81 Md. 358) -	540
Schuyler v. Curtis (147 N. Y. 434) -	280		

106
june 8

THE LAWYERS REPORTS ANNOTATED

BOOK XXXI

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.
BURDETT A. RICH, EDITOR, AND
HENRY P. FARNHAM, ASST.

ROCHESTER, N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.

1896.

15
17
L38
P

Entered according to Act of Congress, in the year eighteen hundred and ninety-six, by

THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,

In the Office of the Librarian of Congress, at Washington, D. C.

Dec Nov. 9, 1896.

TABLE OF CASES REPORTED

IN
LAWYERS' REPORTS, ANNOTATED, BOOK XXXI.

A.		<i>Brown v. Foster</i> (Me.) - - - - -	116
		<i>Latta v.</i> (Tenn.) - - - - -	840
<i>Adams & W. Co. v. Deyette</i> (S. D.) -	497	<i>Brumder, Mahler v.</i> (Wis.) - - - -	695
<i>Adelphi Club, People v.</i> (N. Y.) - -	510	<i>Buckley v. Gray</i> (Cal.) - - - - -	863
<i>Alexandria, Violet v.</i> (Va.) - - - -	382	<i>Burkhard, Heintz v.</i> (Or.) - - - - -	508
<i>Allen, Southern Bell Teleph. & Teleg.</i>		<i>Butte, A. & P. R. Co. v. Montana U. R.</i>	
<i>Co. v.</i> (Ala.) - - - - -	193	<i>Co.</i> (Mont.) - - - - -	298
<i>American Exp. Co., Richberger v.</i> (Miss.)	390	C.	
<i>Ancient Order of U. W., Holdom v.</i> (Ill.)	67	<i>Cameron v. Chicago, M. & St. P. R. Co.</i>	
<i>Anderson v. Miller</i> (Tenn.) - - - -	604	<i>(Minn.)</i> - - - - -	553
<i>Anniston Loan & T. Co. v. Stickney</i> (Ala.)	234	<i>Carpenter, Newberry v.</i> (Mich.) - -	163
B.		<i>Carrollton v. Bazzette</i> (Ill.) - - -	522
<i>Baltimore & P. R. Co. v. Swann</i> (Md.)	313	<i>Carter, Stevens v.</i> (Or.) - - - - -	342
<i>Bank, First Nat. Exch., City Electric</i>		<i>Case v. Smith</i> (Mich.) - - - - -	282
<i>Street R. Co. v.</i> (Ark.) - - - - -	535	<i>Caywood v. Wolfley</i> (Kan.) - - - -	538
<i>Jackson, v. Durfey</i> (Miss.) - - - -	470	<i>Champlin, Park v.</i> (Iowa) - - - - -	141
<i>Metropolitan Nat., Cincinnati, H.</i>		<i>Charleston Light & P. Co., Mitchell v.</i>	
<i>& D. R. Co. v.</i> (Ohio) - - - - -	653	<i>(S. C.)</i> - - - - -	577
<i>Metropolitan Sav., v. Murphy</i> (Md.)	454	<i>Chicago G. W. R. Co., Lucy v.</i> (Minn.)	551
<i>State, of Duluth, Svendsen v.</i>		<i>Chicago, M. & St. P. R. Co., Cameron v.</i>	
<i>(Minn.)</i> - - - - -	552	<i>(Minn.)</i> - - - - -	553
<i>Third Nat., Re</i> (N. Y.) - - - - -	403	<i>v. Starkweather</i> (Iowa) - - - - -	183
<i>Thomas Cruse Sav., State, ex rel.,</i>		<i>Children's Guardians v. Shutter</i> (Ind.)	740
<i>v. Gilliam</i> (Mont.) - - - - -	721	<i>Cicero & P. Street R. Co. v. Meixner</i> (Ill.)	331
<i>Bankers' & M. Teleg. Co., Farmers'</i>		<i>Cincinnati, H. & D. R. Co. v. Metropolitan</i>	
<i>Loan & T. Co. v.</i> (N. Y.) - - - -	403	<i>Nat. Bank</i> (Ohio) - - - - -	653
<i>Barnitz, Beverly v.</i> (Kan.) - - - - -	74	<i>Citizens' Gaslight Co. v. Wakefield</i> (Mass.)	457
<i>Barrett v. Mt. Greenwood Cemetery Asso.</i>		<i>City Electric Street R. Co. v. Conery</i>	
<i>(Ill.)</i> - - - - -	109	<i>(Ark.)</i> - - - - -	570
<i>Bartlett, Koen v.</i> (W. Va.) - - - - -	128	<i>v. First Nat. Exch. Bank</i> (Ark.)	535
<i>Basler, State, ex rel., Denney v.</i> (Ind.)	726	<i>Clarendon Land, I. & A. Co. v. McClel-</i>	
<i>Bazzette, Carrollton v.</i> (Ill.) - - -	522	<i>land Bros.</i> (Tex.) - - - - -	669
<i>Bell, Haigh v.</i> (W. Va.) - - - - -	181	<i>Cleveland Bldg. Co., Rogers & B. Hard-</i>	
<i>Bendit, People v.</i> (Cal.) - - - - -	331	<i>ware Co. v.</i> (Mo.) - - - - -	335
<i>Benedict, Heidel v.</i> (Minn.) - - - -	422	<i>Clutton v. Clutton</i> (Mich.) - - - -	160
<i>Berger, Nowack v.</i> (Mo.) - - - - -	810	<i>College of Physicians & S., Young v.</i>	
<i>Bethel Hotel Co., Parker v.</i> (Tenn.) -	706	<i>(Md.)</i> - - - - -	540
<i>Bevan v. Went</i> (Ill.) - - - - -	85	<i>Com. v. Junkin</i> (Pa.) - - - - -	124
<i>Beverly v. Barnitz</i> (Kan.) - - - - -	74	<i>v. Myers</i> (Va.) - - - - -	379
<i>Blair v. Illinois Steel Co.</i> (Ill.) - - -	269	<i>Conery, City Electric Street R. Co. v.</i>	
<i>Blalack, Queen City Mfg. Co. v.</i> (Miss.)	222	<i>(Ark.)</i> - - - - -	570
<i>Blodgett, Board of Education v.</i> (Ill.) -	70	<i>Conlon, State v.</i> (Conn.) - - - - -	55
<i>Board of Education v. Blodgett</i> (Ill.) -	70	<i>Consolidated Gas Co. v. Crocker</i> (Md.)	785
<i>Walser v.</i> (Ill.) - - - - -	329	<i>Consumers' Gas Trust Co., Evans v.</i>	
<i>Board of Transportation, State, ex rel., v.</i>		<i>(Ind.)</i> - - - - -	673
<i>Sioux City, O. & W. R. Co.</i>		<i>Copeland, State, Overton County, v.</i>	
<i>(Neb.)</i> - - - - -	47	<i>(Tenn.)</i> - - - - -	844
<i>Board of Water Comrs., Detroit v.</i> (Mich.)	463	<i>Corliss v. E. W. Walker Co.</i> (C. C. D.	
<i>Bollman, Norwegian Plow Co. v.</i> (Neb.)	747	<i>Mass.)</i> - - - - -	283
<i>Bolton Mines Co. v. Stokes</i> (Md.) - -	789	<i>Crocker, Consolidated Gas Co. v.</i> (Md.)	785
<i>Braithwaite v. Jordan</i> (N. D.) - - -	238	<i>Curtis, Schuyler v.</i> (N. Y.) - - - -	286
31 L. R. A.		1	

D.		H.	
Danforth v. Danforth (Me.)	608	Haigh v. Bell (W. Va.)	131
Davidson, Nelson v. (Ill.)	325	Havnor, People v. (N. Y.)	689
Davis, Leyson v. (Mont.)	429	Hayes v. Douglas County (Wis.)	213
Denney v. State, Basler (Ind.)	726	Hearns v. Waterbury Hospital (Conn.)	224
Denver Consol. Electric Co. v. Simpson (Colo.)	566	Hedges, Fairchild v. (Wash.)	851
Des Moines, State, West, v. (Iowa)	186	Heidel v. Benedict (Minn.)	422
Detroit v. Detroit Water Comrs. (Mich.)	463	Heintz v. Burkhard (Or.)	508
Detroit, L. & N. R. Co., Jeffrey v. (Mich.)	170	Holdom v. Ancient Order of U. W. (Ill.)	67
Detroit Water Comrs., Detroit v. (Mich.)	463	Hoyt v. J. T. Lovett Co. (C. C. App. 3d C.)	44
DeWolf v. Middleton (R. I.)	146	Huber v. La Crosse City R. Co. (Wis.)	583
Deyette, Adams & W. Co. v. (S. D.)	497	Hunter v. Hunter (Cal.)	411
Douglas County, Hayes v. (Wis.)	213	Huott, Easton v. (Iowa)	177
Dowling v. Lancashire Ins. Co. (Wis.)	112	I.	
Doyle v. Whalen (Me.)	118	Illinois Steel Co., Blair v. (Ill.)	269
Driver, Wallace v. (Ark.)	317	v. O'Donnell (Ill.)	265
Duke v. Taylor (Fla.)	484	Indianapolis v. Wann (Ind.)	743
Duket, State v. (Wis.)	515	Insurance Co., Lancashire, Dowling v. (Wis.)	112
Durfey, Jackson Bank v. (Miss.)	470	J.	
E.		Jackson, Mexican Nat. R. Co. v. (Tex.)	276
Easton v. Huott (Iowa)	177	Jackson Bank v. Durfey (Miss.)	470
Eden Musee Americain Co., Knox v. (N. Y.)	779	Jarvis v. Manhattan Beach Co. (N. Y.)	776
Edwards v. Lesueur (Mo.)	815	Jeffrey v. Detroit, L. & N. R. Co. (Mich.)	170
Eichengreen v. Louisville & N. R. Co. (Tenn.)	702	Johnson, Louisville & N. R. Co. v. (Ala.)	372
Elliott, Martin v. (Mich.)	169	State, Lamar, v. (Fla.)	357
Employers' L. Assur. Corp., Menneiley v. (N. Y.)	686	Jordan, Braithwaite v. (N. D.)	238
Evans v. Consumers' Gas Trust Co. (Ind.)	673	J. T. Lovett Co.; Hoyt v. (C. C. App. 3d C.)	44
E. W. Walker Co., Corliss v. (C. C. D. Mass.)	283	Junkin, Com. v. (Pa.)	124
Ex parte Keeler (S. C.)	678	K.	
Lacy (Va.)	822	Kammoss, McCook County v. (S. D.)	467
F.		Keeler, Ex parte (S. C.)	678
Fairchild v. Hedges (Wash.)	851	Knox v. Eden Musee Americain Co. (N. Y.)	779
Farmers' Highline Canal & R. Co., White v. (Colo.)	828	Knoxville Carwheel Co., Tradesman Pub. Co. v. (Tenn.)	593
Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co. (N. Y.)	403	Koen v. Bartlett (W. Va.)	128
First Nat. Exch. Bank, City Electric Street R. Co. v. (Ark.)	535	L.	
Fisher, Gage v. (N. D.)	557	Laclede Gaslight Co., State, ex rel., v. Murphy (Mo.)	798
Foster, Brown v. (Me.)	116	La Crosse City R. Co., Huber v. (Wis.)	583
Francis, Southern Bell Teleph. & Teleg. Co. v. (Ala.)	193	Lacy, Ex parte (Va.)	822
Fresno, McBean v. (Cal.)	794	Lake Shore & M. S. R. Co. v. Salzman (Ohio)	261
G.		Lamar, State, ex rel., v. Johnson (Fla.)	357
Gage v. Fisher (N. D.)	557	Lancashire Ins. Co., Dowling v. (Wis.)	112
Gardner, State v. (Ohio)	660	Latta v. Brown (Tenn.)	840
Gaymon, State v. (S. C.)	489	Lesueur, Edwards v. (Mo.)	815
Gilfillan v. Schmidt (Minn.)	547	Lewis v. Terry (Cal.)	220
Gilliam, State, Thomas Cruse Sav. Bank, v. (Mont.)	721	Leyson v. Davis (Mont.)	429
Gleim, State v. (Mont.)	294	Lord, State, Taylor, v. (Or.)	473
Graham, Grand Lodge A. O. U. W. v. (Iowa)	133	Louisville & N. R. Co., Eichengreen v. (Tenn.)	702
Grand Lodge A. O. U. W. v. Graham (Iowa)	133	v. Johnson (Ala.)	372
Gray, Buckley v. (Cal.)	862	Lucy v. Chicago G. W. R. Co. (Minn.)	551
31 L. R. A.		Lynch v. Rosenthal (Ind.)	835

M.

McBean v. Fresno (Cal.)	794
McCann, Pennsylvania Co. v. (Ohio)	651
McCarthy, Rector v. (Ark.)	121
McClelland Bros., Clarendon Land, I. & A. Co. v. (Tex.)	669
People, <i>ex rel.</i> , v. Roberts (N. Y.)	399
McCook County v. Kammos (S. D.)	461
McCutcheon v. Merz Capsule Co. (C. C. App. 6th C.)	415
McKay v. Southern Bell Teleph. & Teleg. Co. (Ala.)	589
McManus v. Weston (Mass.)	174
McQuown, Payton v. (Ky.)	83
Mahler v. Brumder (Wis.)	695
Manhattan Beach Co., Jarvis v. (N. Y.)	776
Martin v. Elliott (Mich.)	169
Meixner, Cicero & P. Street R. Co. v. (Ill.)	331
Menneiley v. Employers' L. Assur. Corp. (N. Y.)	686
Merrill, Tanner v. (Mich.)	171
Merz Capsule Co., McCutcheon v. (C. C. App. 6th C.)	415
Metropolitan Nat. Bank, Cincinnati, H. & D. R. Co. v. (Ohio)	653
Metropolitan Sav. Bank v. Murphy (Md.)	454
Mexican Nat. R. Co. v. Jackson (Tex.)	276
Michener v. Springfield Engine & T. Co. (Ind.)	59
Middleton, DeWolf v. (R. I.)	146
Miller, Anderson v. (Tenn.)	604
Minnesota Lumber Co. v. Whitebreast Coal Co. (Ill.)	529
Mitchell v. Charleston Light & P. Co. (S. C.)	577
Montana U. R. Co., Butte, A. & P. R. Co. v. (Mont.)	298
Moore, Pickering v. (N. H.)	693
Mt. Greenwood Cemetery Asso., Barrett v. (Ill.)	109
Murphy, Metropolitan Sav. Bank v. (Md.)	454
State, Laclede Gaslight Co., v. (Mo.)	798
Myers, Com. v. (Va.)	379

N.

Nelson v. Davidson (Ill.)	325
v. The Willamette (C. C. App. 9th C.)	715
State, <i>ex rel.</i> , Western U. Teleg. Co., v. (Md.)	572
Newberry v. Carpenter (Mich.)	163
New York Elev. R. Co., O'Reilly v. (N. Y.)	407
Normal School Dist. Bd. of Edu. v. Blodgett (Ill.)	70
Norman, Southern Bldg. & L. Asso. v. (Ky.)	41
Norwegian Plow Co. v. Bollman (Neb.)	747
Nowack v. Berger (Mo.)	810

O.

O'Donnell, Illinois Steel Co. v. (Ill.)	265
Old, State v. (Tenn.)	837
C'Rear, Thornhill v. (Ala.)	792
O'Reilly v. New York Elev. R. Co. (N. Y.)	407

Overton County, State, <i>ex rel.</i> , v. Cope-land (Tenn.)	884
Owens v. Van Winkle Gin & M. Co. (Ga.)	767

P.

Park v. Champlin (Iowa)	141
Parker v. Bethel Hotel Co. (Tenn.)	706
Payton v. McQuown (Ky.)	33
Pennsylvania Co. v. McCann (Ohio)	651
People v. Adelphi Club (N. Y.)	510
v. Bendit (Cal.)	831
v. Havnor (N. Y.)	689
People, <i>ex rel.</i> McClelland, v. Roberts (N. Y.)	399
Pickering v. Moore (N. H.)	698

Q.

Queen City Mfg. Co. v. Blalack (Miss.)	222
--	-----

R.

Railroad Co., Baltimore & P., v. Swann (Md.)	313
Cincinnati, H. & D., v. Metroplitan Nat. Bank (Ohio)	653
Detroit, L. & N., Jeffrey v. (Mich.)	170
Lake Shore & M. S., v. Salzman (Ohio)	261
Louisville & N., Eichengreen v. (Tenn.)	702
Louisville & N., v. Johnson (Ala.)	372
Mexican Nat., v. Jackson (Tex.)	276
New York Elev., O'Reilly v. (N. Y.)	407
Sioux City, O. & W., State, Board of Transportation, v. (Neb.)	47
Railway Co., Butte, A. & P., v. Montana U. R. Co. (Mont.)	298
Chicago G. W., Lucy v. (Minn.)	551
Chicago, M. & St. P., Cameron v. (Minn.)	553
Chicago, M. & St. P., v. Stark-weather (Iowa)	183
Cicero & P. Street, v. Meixner (Ill.)	331
City Electric Street, v. Conery (Ark.)	570
City Electric Street, v. First Nat. Exch. Bank (Ark.)	535
La Crosse City, Huber v. (Wis.)	583
Montana, U., Butte, A. & P. R. Co. v. (Mont.)	298
Texas & P., v. Smith (C. C. App. 5th C.)	321
Texas M., v. Wright (Tex.)	200
Rector v. McCarthy (Ark.)	121
R. Third Nat. Bank (N. Y.)	403
Rice v. Wood (Ark.)	609
Richberger v. American Exp. Co. (Miss.)	390
Roberts, People, McClelland, v. (N. Y.)	399
Rogers v. State (Ark.)	465
Rogers & B. Hardware Co. v. Cleveland Bldg. Co. (Mo.)	335
Rosenthal, Lynch v. (Ind.)	835
Roth v. Union Depot Co. (Wash.)	855

S.

Salzman, Lake Shore & M. S. & R. Co. v. (Ohio)	261
Schmidt, Gilfillan v. (Minn.)	547

Schuyler v. Curtis (N. Y.)	296	Terry, Lewis v. (Cal.)	220
Scott v. Standard Oil Co. (Ala.)	374	Texas & P. R. Co. v. Smith (C. C. App. 5th C.)	321
Shutter, Children's Guardians v. (Ind.)	740	Texas M. R. Co. v. Wright (Tex.)	200
Simpson, Denver Consol. Electric Co. v. (Colo.)	566	The Willamette (C. C. App. 9th C.)	715
Sioux City, O. & W. R. Co., State, Board of Transportation, v. (Neb.)	47	Nelson v. (C. C. App. 9th C.)	715
Smith, Case v. (Mich.)	282	Third Nat. Bank, <i>Re</i> (N. Y.)	408
Texas & P. R. Co. v. (C. C. App. 5th C.)	821	Thomas Cruse Sav. Bank, State, <i>ex rel.</i> , v. Gilliam (Mont.)	721
Snyder, Snyder Mfg. Co. v. (Ohio)	657	Thornhill v. O'Rear (Ala.)	792
Snyder Mfg. Co. v. Snyder (Ohio)	657	Tradesman Pub. Co. v. Knoxville Car-wheel Co. (Tenn.)	593
Southern Bell Teleph. & Teleg. Co. v. Allen (Ala.)	193		
v. Francis (Ala.)	193	U.	
McKay v. (Ala.)	589	Union Depot Co., Roth v. (Wash.)	855
Southern Bldg. & L. Asso. v. Norman (Ky.)	41		
Springfield Engine & T. Co., Michener v. (Ind.)	59	V.	
Standard Oil Co., Scott v. (Ala.)	374	Van Winkle Gin & M. Co., Owens v. (Ga.)	767
Starkweather, Chicago, M. & St. P. R. Co. v. (Iowa)	183	Violet v. Alexandria (Va.)	382
State v. Conlon (Conn.)	55		
v. Duket (Wis.)	515	W.	
v. Gardner, (Ohio)	660	Waco, Waco Water & L. Co. v. (Tex.)	392
v. Gaymon (S. C.)	489	Waco Water & L. Co. v. Waco (Tex.)	392
v. Gleim (Mont.)	294	Wakefield, Citizens' Gaslight Co. v. (Mass.)	457
v. Old (Tenn.)	887	Wallace v. Driver (Ark.)	317
Rogers v. (Ark.)	465	Walser v. Board of Education (Ill.)	329
State, <i>ex rel.</i> Basler, Denney v. (Ind.)	726	Wann, Indianapolis v. (Ind.)	743
Board of Transportation, v. Sioux City, O. & W. R. Co. (Neb.)	47	Waterbury Hospital, Hearn v. (Conn.)	224
Laclede Gaslight Co., v. Murphy (Mo.)	798	Went, Bevan v. (Ill.)	85
Lamar, v. Johnson (Fla.)	357	West, State, <i>ex rel.</i> , v. Des Moines (Iowa)	186
Nelson, Western U. Teleg. Co. v. (Md.)	572	Western U. Teleg. Co. v. State, Nelson, (Md.)	572
Overton County, v. Copeland (Tenn.)	844	Weston, McManus v. (Mass.)	174
Taylor, v. Lord (Or.)	478	Whalen, Doyle v. (Me.)	118
Thomas Cruse Sav. Bank, v. Gilliam (Mont.)	721	White v. Farmers' Highline Canal & R. Co. (Colo.)	828
West, v. Des Moines (Iowa)	186	Whitebreast Coal Co., Minnesota Lumber Co. v. (Ill.)	529
State Bank, Svendsen v. (Minn.)	552	Willamette, The (C. C. App. 9th C.)	715
Stevens v. Carter (Or.)	342	Nelson v. (C. C. App. 9th C.)	715
Stickney, Anniston Loan & T. Co. v. (Ala.)	284	Wolfley, Cawood v. (Kan.)	538
Stokes, Bolton Mines Co. v. (Md.)	739	Wood, Rice v. (Ark.)	609
Svendsen v. State Bank (Minn.)	552	Wright, Texas M. R. Co. v. (Tex.)	200
Swann, Baltimore & P. R. Co. v. (Md.)	313		
		Y.	
T.		Young v. College of Physicians & S. (Md.)	540
Tanner v. Merrill (Mich.)	171		
Taylor, Duke v. (Fla.)	484		
State, <i>ex rel.</i> , v. Lord (Or.)	478		
81 L. R. A.			

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Abbott v. Gilchrist, 38 Me. 280	510
Aberdeen Female Academy v. Aberdeen, 18 Smedes & M. 645	78
Abernethy v. Hutchinson, 8 L. J. Ch. 209	286
Ackroyd v. Smith, 10 C. B. 164	698
Adams v. Thompson, 18 Neb. 541	255
Etna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314	655
Ah Lee, Re, 5 Fed. Rep. 599	664
Albany County Supers. v. Dorr, 25 Wend. 440	854
Alberger v. National Bank of Commerce, 123 Mo. 318	505
Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688	792
Allen v. Center Valley Co. 21 Conn. 180, 54 Am. Dec. 333	471
v. Hannum, 15 Kan. 625	842
v. Hopper, 24 N. J. L. 514	256
v. Pioneer Press Co. 40 Minn. 117, 3 L. R. A. 532	555
Allerton v. Lang, 10 Bosw. 362	450
Alligator, The, 1 Gall. 145, Fed. Cas. No. 248	244
Allis v. Jones, 45 Fed. Rep. 148	505
Allison v. Coal Creek & N. R. Coal Co. 87 Tenn. 62	601
Almy v. California, 65 U. S. 24 How. 169, 16 L. ed. 644	826
American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112	225
American Bridge Co. v. Murphy, 13 Kan. 35	572
American Exch. Nat. Bank v. Oregon Pottery Co. 55 Fed. Rep. 255	536
American Exp. Co. v. Patterson, 73 Ind. 430	591
American Ins. Co. v. 355 Bales of Cotton, 25 U. S. 1 Pet. 511, 7 L. ed. 242	253
American Print Works v. Lawrence, 21 N. J. L. 248	680
American S. B. Co. v. Chace, 83 U. S. 16 Wall. 322, 21 L. ed. 369	247, 248, 719
Ames v. Union F. R. Co. 64 Fed. Rep. 165, 4 Inters. Com. Rep. 835	53
Amis v. Witt, 33 Beav. 619	446
Amoskeag Mfg. Co. v. Garner, 55 Barb. 151	140
v. Spear, 2 Sandf. 599	139
v. Trainer, 101 U. S. 55, 25 L. ed. 994	377, 378
Anchor Mill Co. v. Walsh, 30 Mo. App. 107	792
Anderson v. Manchester F. Assur. Co. (Minn.) 25 L. R. A. 610	116
v. Nicholas, 28 N. Y. 600	763
v. Schubert, 158 Ill. 75	528
v. Shockey, 82 Mo. 250	513
v. State, 63 Ga. 675	296
Andrews, Ex parte, 15 Cal. 685	662
Andrews v. Etna L. Ins. Co. 92 N. Y. 596	461
v. Swartz, 155 U. S. 272, 39 L. ed. 425	679
Annapolis & E. R. Co. v. Anne Arundel County Comrs. 108 U. S. 4, 23 L. ed. 360	185
Anniston & C. R. Co. v. Jacksonville, G. & A. R. Co. 82 Ala. 297	310
Anonymous Case, 1 Sal. 405, *3	497
Antoni v. Greenhow, 107 U. S. 789, 27 L. ed. 468, 76 Armstrong v. Park, 9 Humph. 195	723, 944
Arnold v. Frost, Fed. Cas. No. 558	249
v. Hagerman, 45 N. J. Eq. 189	471, 472
v. State, 9 Tex. App. 435	296
Asberry v. Roanoke (Va.) 22 S. E. 361	389
Ashurst's Appeal, 60 Pa. 314	506
Astrom v. Hammond, 3 McLean, 107	403
Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 867, 28 L. ed. 291	53, 54
v. Weber, 33 Kan. 543, 52 Am. Rep. 543	264
Atkinson v. Dunlap, 50 Me. 111	73
v. Goodrich Transp. Co. 60 Wis. 141, 50 Am. Rep. 352	597
Atlantic City Waterworks Co. v. Read, 60 N. J. L. 663	787
Atlas, The, 93 U. S. 302, 23 L. ed. 836	717
31 L. R. A.	

Atty. Gen. v. Bank of Niagara, Hopk. Ch. 354	711
v. Blossom, 1 Wis. 278	478
v. Brown, 1 Swanst. 265	477
v. Chicago & N. W. R. Co. 35 Wis. 513, 478, 479	
v. Continental L. Ins. Co. 71 N. Y. 325, 27 Am. Rep. 55	655
v. Delaware & B. R. Co. 27 N. J. Eq. 631	477
v. Dublin, 1 Bligh, N. R. 312	477
v. East India Co. 11 Sim. 380	482
v. Eastlake, 11 Hare, 218	477
v. Eau Claire, 37 Wis. 425	478
v. Heelis, 2 Sim. & Stu. 77	477
v. Nichol, 16 Ves. Jr. 339	698
v. Pearson, 8 Meriv. 409	144
v. Price, 17 Ves. Jr. 871	120
v. Vivian, 1 Russ. Ch. 236	461
Atwater v. American Exch. Nat. Bank, 152 Ill. 905	273
Augusta Sav. Bank v. Stelling, 31 S. C. 399	683
Ayerst v. Jenkins, L. R. 16 Eq. 285	421
Ayres v. Gartner, 90 Mich. 390	161

B.

Bache v. Nashville Horticultural Soc. 10 Lea, 439	711
Bacon v. Mississippi Ins. Co. 31 Miss. 116	536
v. United States Mut. Acc. Asso. 123 N. Y. 304, 9 L. R. A. 617	688
Badeau v. Mead, 14 Barb. 328	698
Bailey v. Day, 26 Me. 88	172
Baily v. Com. (Pa.) 10 Ad. 764	854
Baker v. Johnson County, 33 Iowa, 151	140
v. Merriam, 97 Ind. 559	65
v. Normal, 81 Ill. 108	195
Baldro v. Toimic, 1 Or. 176	72
Baldwin v. Canfield, 26 Minn. 43	711, 712
v. Oskaloosa Gaslight Co. 57 Iowa, 51	140
Ball v. Gilbert, 12 Met. 438	793
v. Wyeth, 99 Mass. 538	73
Baltic, The, Fed. Cas. No. 826	244
Baltimore v. Warren Mfg. Co. 59 Md. 96	111
Baltimore & O. R. Co. v. Schwindling, 101 Pa. 258, 47 Am. Rep. 706	858
v. State, 62 Md. 479	858
v. State, Hauer, 60 Md. 462	316
v. Worthington, 21 Md. 233	316
Bangor v. Rising Virtue Lodge No. 10, F. & A. M. 73 Me. 438, 40 Am. Rep. 309	120
Bangor Electric Light & P. Co. v. Robinson, 52 Fed. Rep. 520	783
Bank of Augusta v. Earle, 38 U. S. 13 Pet. 519, 10 L. ed. 274	486
Commerce v. Goos, 39 Neb. 437, 23 L. R. A. 180	553
Ireland v. Evans's Charities, 5 H. L. Cas. 389	785
Montreal v. J. E. Potts Salt & L. Co. 90 Mich. 545	505
Banks v. Gibson, 34 Beav. 568	659
Barbier v. Connolly, 118 U. S. 27, 28 L. ed. 823	894
Barclay v. Talman, 4 Edw. Ch. 123	711
Barden v. Montana Club, 10 Mont. 330, 11 L. R. A. 543	513
Barre R. Co. v. Montpelier & W. R. R. Co. 61 Vt. 1, 41 R. A. 785	311
Barry v. Koyles, 26 U. S. 1 Pet. 314, 7 L. ed. 158	719
v. New York C. & H. R. R. Co. 92 N. Y. 280, 44 Am. Rep. 377	860
Barstow v. Savage Min. Co. 64 Cal. 388, 49 Am. Rep. 705	783
Bartelott v. International Bank, 119 Ill. 259	332
Bartlett v. Bangor, 67 Me. 460	698
v. Spicer, 75 N. Y. 523	244, 247
Barton v. Brown ("The Corsair"), 145 U. S. 335, 36 L. ed. 727	719, 720
v. Pepin County Agri. Soc. 83 Wis. 19	587

Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500.	445, 451	Braceville v. Doherty, 30 Ill. App. 645.	525
Bates v. Kempton, 7 Gray.	582	Bradbury v. Dickens, 27 Beav. 53.	659
Batstone's Estate, 12, 133 Pa.	307	Bradford v. Shine, 13 Fla. 393, 7 Am. Rep. 239.	73
Baugh Case, 149 U. S. 391, 37 L. ed. 779.	325	Bradley v. New York & N. H. R. Co. 21 Conn.	188
Baxendale v. Bennett, L. R. 3 Q. B. Div. 530.	754		259
Baylor v. Baltimore & O. R. Co. 9 W. Va. 270.	151	Bradwell v. Weeks, 1 Johns. Ch. 325.	258
Beach v. Miller, 130 Ill. 162.	266	Braithwaite v. Aikin, 1 N. D. 475, 2 N. D. 57, 3	242
Beall v. Pearra, 12 Md. 566.	570	N. D. 395.	242
Bean v. Hyde Park, 143 Mass. 245.	176	v. Power, 1 N. D. 455.	508
Beaston v. Farmers' Bank, 37 U. S. 12 Pet. 139.	9 L. ed. 1031	Branch v. Port Royal & W. C. R. Co. 35 S. C.	582
Beckman v. Saratoga & S. R. Co. 3 Paige. 45, 22	Am. Dec. 679		711
Beers v. Houghton, 84 U. S. 9 Wheat. 329, 9 L.	ed. 145	Brandon Iron Co. v. Gleason, 24 Vt. 228.	235
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232	33 L. ed. 892	Brandreth v. Lance, 8 Paige. 24, 34 Am. Dec. 368.	285
Bemis v. Springfield, 122 Mass. 110.		Brannum v. O'Connor, 77 Iowa. 682.	280
Bennet v. Porter, 60 U. S. 9 How. 235, 13 L. ed.	119	Brantford City, The, 32 Fed. Rep. 324.	254, 258
Bennett v. Mulry, 6 Misc. 304.		Brass & I. Works Co. v. Payne, 50 Ohio St. 115,	659
Benson v. Baltimore Traction Co. 77 Md. 535.	857	19 L. R. A. 82.	527
Bentlock v. Franklin & G. City Co. 38 Tex. 458	73	Braun v. Chicago, 110 Ill. 186.	528
Benton v. Boston City Hospital, 140 Mass. 13, 54	Am. Rep. 438	Brennan v. Merchants' & Mfrs. Nat. Bank, 62	655
Benyon v. Nettlefold, 3 Macn. & G. 102.	230, 421		297
Berry v. Hartzell, 81 Mo. 132.	813	Bressler v. People, 117 Ill. 422.	51
Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep.	323	v. Wayne County, 25 Neb. 498.	258
Bevans v. United States, 80 U. S. 13 Wall. 56, 20	L. ed. 531	Brewster v. Cowen, 55 Conn. 152.	656
Beverly v. Barnitz, 55 Kan. 466, 31 L. R. A. 74	845	Brice v. King, 1 Head. 152.	173
Biddle v. Bayard, 13 Pa. 150.	723	Brick v. Plymouth County, 63 Iowa. 462.	185
Bigelow v. Bemis, 2 Allen. 496.	72	Bridgeport v. New York & N. H. R. Co. 36 Conn.	185
v. Hartford Bridge Co. 14 Conn. 578, 36	Am. Dec. 502	255, 4 Am. Rep. 63.	65
Bills v. Belknap, 38 Iowa. 583.	195	Bridge v. Blake, 108 Ind. 335.	848
Bird v. St. Marks Church, 62 Iowa. 573.	144	v. Perry, 14 Vt. 262.	587
Bishop v. Moorman, 99 Ind. 1, 49 Am. Rep. 731	87	Bright v. Barnett & R. Co. 88 Wis. 307, 21 L. R.	711
Hishop's Fund v. Eagle Bank, 7 Conn. 478.	225	A. 524.	711
Bixby v. Adams County, 49 Iowa. 507.	139	Brinkerhoff v. Brown, 7 Johns. Ch. 217.	711
Black v. Delaware & R. Canal Co. 22 N. J. Eq.	416	Broadwell v. Merritt, 87 Mo. 95.	72
v. Oliver, 1 Ala. 450, 35 Am. Dec. 381.	794	Bronson v. Kinzie, 42 U. S. 1 How. 811, 11 L. ed.	143
v. Zacharie, 44 U. S. 3 How. 513, 11 L. ed.	704	75, 80, 81, 723, 725.	553
Blackburn v. Morton, 18 Ark. 392.	469	Brooke v. Tradersmen's Nat. Bank, 69 Hun, 202.	529
Black Rabbitt Assn. v. Munday, 21 Abb. N. C.	99	Brooks v. Mangan, 86 Mich. 578.	172
Bladen v. Philadelphia, 60 Pa. 464.	746	v. White, 2 Met. 283, 37 Am. Dec. 95.	701
Blaine v. Chesapeake & O. R. Co. 9 W. Va. 252.	131	Brown v. Crump, 1 Marsh. 567.	844
Blair v. Hinrichsen, 151 Ill. 41, 25 L. R. A. 143	476, 479	v. Hunt, 12 Heisk. 405.	663
v. Illinois Steel Co. 31 L. R. A. 269, 159 Ill.	350.	v. O'Connell, 38 Conn. 432, 4 Am. Rep. 80	72
Blanchard v. Ayer, 148 Mass. 174.	175	v. Parker, 28 Wis. 21.	514
v. Lake Shore & M. R. Co. 128 Ill. 416.	858	v. United States, 113 U. S. 568, 28 L. ed.	159
v. Western U. Teleg. Co. 60 N. Y. 510.	576	1079.	169
Blanche Page, The, 16 Blatchf. 1, 17 Blatchf. 221	244, 248, 254	v. Williams, 5 R. I. 309.	742
Bliss v. Kaweah Canal & Irrig. Co. 65 Cal. 504.	536	Bryan v. Lyon, 104 Ind. 227.	340
Block v. Milwaukee Street R. Co. 89 Wis. 371,	27 L. R. A. 305.	Bryant v. Russell, 127 Mo. 422.	247
570, 572, 587.	691	Brymer v. Atkins, 1 H. Bl. 164.	255
Bloom v. Richards, 2 Ohio St. 387.		Buchanan v. Milligan, 125 Ind. 362.	419
Board of Liquidation v. McComb, 92 U. S. 541,	23 L. ed. 628.	Buckeye Marble & F. Co. v. Harvey, 92 Tenn.	482
Bobbett v. State, 10 Kan. 15.	482	115, 18 L. R. A. 252.	51
Bobyshall v. Oppenheimer, Fed. Cas. No. 1, 562	249	Buck Mountain Coal Co. v. Lehigh Coal & Nav.	482
Boettcher v. Colorado Nat. Bank, 15 Colo. 16.	655	Co. 50 Pa. 100.	247
Bohl v. State, 3 Tex. App. 683.	691	Budd v. People, 143 U. S. 517, 36 L. ed. 247.	51
Bolton v. Lambert, L. R. 41 Ch. Div. 295.	461	Bull v. Buckingham, 16 Iowa. 284, 85 Am. Dec.	506
Bonner v. State, Pitts. 7 Ga. 473.	371	516.	185, 309, 312
Booker v. Smith, 38 S. C. 288.	683	Buffalo, Re, 68 N. Y. 167.	307
Bookman v. New York Elev. R. Co. 147 N. Y.	288.	Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y.	307
Booske v. Gulf Ice Co. 24 Fla. 550.	410	109.	831
Born v. Hortsman, 80 Cal. 452.	488	Buffalo East Side R. Co. v. Buffalo Street R. Co.	249
Boston v. Richardson, 13 Allen. 146.	194	111 N. Y. 132, 2 L. R. A. 384.	655
Boston & A. R. Co., Re, 53 N. Y. 576.	185	Buford v. Strother, 10 Fed. Rep. 406.	158
Boston & M. Railroad v. Lowell & L. R. Co. 124	Mass. 368.	Bullard v. Randall, 1 Gray. 605, 61 Am. Dec. 433.	562
Boston Beer Co. v. Massachusetts, 97 U. S. 25,	24 L. ed. 989.	Bullock v. Downs, 9 H. L. Cas. 1.	562
Boston Diatite Co. v. Florence Mfg. Co. 114	Mass. 69, 19 Am. Rep. 310.	Bumgardner v. Leavitt, 35 W. Va. 194, 12 L. R.	320
Boston Water Power Co. v. Boston & W. R.	Corp. 23 Pick. 390.	A. 776.	272
Bourgeois v. Mutual F. Ins. Co. 86 Wis. 402.	116	Buras v. O'Brien, 42 La. Ann. 527.	413
v. Northwestern Nat. Ins. Co. 86 Wis. 609	114	Burch v. West, 134 Ill. 258.	132
Bouton v. Smith, 113 Ill. 481.	266, 273	Burden v. Shannon, 3 Gray. 387.	836
Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302.	809	Burdett v. Allen, 35 W. Va. 347, 14 L. R. A. 397.	259
v. United States, 116 U. S. 616, 29 L. ed. 746	164, 165, 167	Burger v. Rice, 3 Ind. 127.	656
Boyden v. United States, 80 U. S. 13 Wall. 17,	20 L. ed. 527.	Burke v. Browne, 15 Ves. Jr. 184.	371
	845, 852	Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327.	175
		v. Leicester, 121 Mass. 242.	661
		Burt v. Winona & St. P. R. Co. 31 Minn. 472.	244
		Burtus v. McCarty, 13 Johns. 424.	655
		Bush v. Foote, 58 Miss. 5, 38 Am. Rep. 310.	69
		v. Royal, 2 Barn. & Ald. 73.	226
		v. Steinman, 1 Bos. & P. 404.	320
		Butler v. Grand Rapids & I. R. Co. 85 Mich. 246	712
		Buton v. Hoffman, 61 Wis. 20, 50 Am. Rep. 131.	705
		Byram v. McGuire, 3 Head. 530.	576
		Byrne v. Boadle, 2 Hurst. & C. 722.	
		v. New York C. & H. R. Co. 104 N. Y. 362,	
		58 Am. Rep. 512.	
		C.	
		Cahill v. Kalamazoo Mut. Ins. Co. 2 Dougl.	711
		(Mich.) 124, 43 Am. Dec. 457.	159
		Cain v. Teare, 7 Jur. 567.	266
		Caird v. Sime, L. R. 12 App. Cas. 326.	173
		Calkins v. State, 13 Wis. 389.	842
		Callahan v. Robinson, 30 S. C. 249, 3 L. R. A. 497	680
		Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223.	

Callender v. Marsh, 1 Pick. 417	175	Cincinnati, W. & Z. R. Co. v. Clinton County	662
Camden & A. Land Co. v. Lippincott, 45 N. J. L. 408	318	Comrs. 1 Ohio St. 88	114
Cameron v. Chicago, M. & St. P. R. Co. (Minn.) 61 N. W. 814	555	Citizens' Nat. Bank v. Piolet, 126 Pa. 104, 4 L. R. A. 180	237
Camp's Appeal, 35 Conn. 88, 4 Am. Rep. 39	449	City of Norwalk, The, 55 Fed. Rep. 98	719
Campbell v. Com. 96 Pa. 344	684	City of Panama, The, v. Phelps ("The City of Panama"), 101 U. S. 453, 25 L. ed. 1061	245, 250, 257, 720
v. Hadley, 1 Sprague, 470	249	City Sav. Bank v. North Ala. Lumber & Mfg. Co. 91 Tenn. 15	597
v. Holt, 115 U. S. 620, 29 L. ed. 483	73	Clare v. People, 9 Colo. 122	297
v. Phelps, 1 Pick. 62, 11 Am. Dec. 139	198	Clark, R. v. Conn. 17, 28 L. R. A. 242	57
Cantrell v. Colwell, 3 Head, 471	705	Clark v. Com. 29 Pa. 129	604
Capital Bank v. Huntton, 35 Kan. 578	80	v. Inhabitants of the Hundred of Blything, 2 Barn. & C. 254	606
Carleton v. People, 10 Mich. 250	668	v. Jones, 87 Ala. 474	488
Carpenter v. Providence Washington Ins. Co. 41 U. S. 16 Pet. 501, 10 L. ed. 1047	605	v. Miller, 54 N. Y. 528	408
Carr v. National Security Bank, 107 Mass. 48, 9 Am. Rep. 6	655	v. Heyburn, 75 U. S. 8 Wall. 318, 19 L. ed. 354	79, 723
Carroll v. Campbell, 108 Mo. 559	809	v. Ricker, 14 N. H. 44	283
Carroll's Will, 53 Wis. 228	219	v. Wilson, 103 Mass. 219, 4 Am. Rep. 532	605
Carter v. Beaman, 6 Jones, L. 44	471	Clatsop Chief, The, 3 Fed. Rep. 163	719
v. Hodge, 6 Misc. 575	255	Clay v. Fry, 3 Bibb, 243, 6 Am. Dec. 654	776
Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178	692	Clayton v. Andrews, 4 Burr. 2101	509
Cartmel v. Newton, 79 Ind. 1	746	v. Gosling, 5 Barn. & C. 360	237
Casady v. Woodbury County, 13 Iowa, 113	585	Clements v. Jessup, 36 N. J. Eq. 569	471
Case v. Beauregard, 90 U. S. 119, 25 L. ed. 370	471	Clews v. Bank of New York Nat. Bkg. Asso. 105 N. Y. 308	778
v. Johnson, 91 Ind. 479	747	Clinton v. Englebrecht, 80 U. S. 13 Wall 434, 20 L. ed. 659	253
v. State, 5 Ind. 1	663	Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459	165, 166
Cashman v. Harrison, 90 Cal. 297	655	Coats v. Donnell, 94 N. Y. 188	605
Cason v. Cheely, 6 Ga. 564	510	Coe v. Washington Mills, 149 Mass. 543	120
Cassaday v. American Ins. Co. 72 Ind. 95	747	v. Wise, 5 Best & S. 440	227
Cassel v. Scott, 17 Ind. 514	742	Coffeen v. Bruuton, 5 McLean, 256	140
Casner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369	328	Cohen v. Solomon, 66 Fed. Rep. 411	249
Caswell v. Hazard, 121 N. Y. 484	659	Cohens v. Virginia, 19 U. S. 6 Wheat. 443, 5 L. ed. 300	826
Carlin v. Eagle Bank, 6 Conn. 233	505	Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601	796
v. Springfield F. Ins. Co. 1 Sumn. 434	60	Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538	406
v. Valentine, 9 Paige, 573, 38 Am. Dec. 567	111	v. Hills, 44 N. H. 227	714
Caulkins v. Caulman, 17 Serg. & R. 26	842	Cole Co. v. Madden, 91 Mo. 585	369
Caulkins v. Memphis Gaslight Co. 85 Tenn. 683	713	Coleman v. Bean, 1 Abb. App. Dec. 394	256
Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 220, 26 L. ed. 1041	458	v. St. Paul, M. & M. R. Co. 38 Minn. 260	555
Central Railroad v. Brinson, 10 Ga. 207	357	Coles v. Pilkington, L. R. 19 Eq. 174	814
Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475	419	Collector, The, 19 U. S. 6 Wheat. 194, 5 L. ed. 239	259
Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55	420	Collingwood v. Pace, 1 Vent. 413, 1 Keb. 611	104, 108
Central Trust Co. v. McGeorge, 151 U. S. 129, 38 L. ed. 98	719	Colorado Eastern R. Co. v. Union P. R. Co. 41 Fed. Rep. 203	310, 311
Chafee v. Postal Teleg. Co. 35 S. C. 378	681	Coltsmann v. Coltsmann, L. R. 3 H. L. 121	159
Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469	813	Columbia Ins. Co. v. Lawrence, 35 U. S. 10 Pet. 507, 9 L. ed. 512	69
v. Sneed, 39 Conn. 413	701	Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144	45, 47, 139
Chas. S. Higgins Co. v. Higgins Soap Co. 144 N. Y. 462, 27 L. R. A. 42	138	Columbus & W. R. Co. v. Witherow, 82 Ala. 190	194
Chavannah v. State, 49 Ala. 896	836	Columbus City Bank v. Bruce, 17 N. Y. 507	502
Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407	402	Columbus, H. V. & T. R. Co. v. Erick, 51 Ohio St. 146	651
Chenery v. Fitchburg R. Co. 160 Mass. 211, 22 L. R. A. 535	857	Colvert v. Wood, 93 Tenn. 454	842
Cheriot v. Foussat, 3 Binn. 220	247	Com. v. Alger, 7 Cush. 87	132
Cherokee v. Sioux City & L. F. Town Lot & L. Co. 52 Iowa, 280	185	v. Baldwin, 11 Gray, 199, 71 Am. Dec. 708	834
Cherry v. Frost, 7 Lea. 1	713	v. Brown, 91 Va. 762, 28 L. R. A. 110	824
Chesham, Re, L. R. 31 Ch. Div. 466	792	v. Comly, 3 Pa. 372	853
Cheshire R. Co. v. Foster, 51 N. H. 490	701	v. Crompton, 137 Pa. 138	450
Chewacla Lime Works v. Dismukes, 87 Ala. 344, 5 L. R. A. 100	501	v. Crowell, 156 Mass. 215	57
Chicago & A. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60	363	v. Dana, 2 Met. 329	167
Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 38 L. ed. 176	51	v. Ewig, 145 Mass. 119	513
Chicago & N. W. R. Co. v. Chicago & E. R. Co. 112 Ill. 589	186	v. Foster, 114 Mass. 311, 19 Am. Rep. 353	834
v. Dey, 35 Fed. Rep. 896, 1 L. R. A. 744, 2 Inters. Com. Rep. 325	116	v. Has, 122 Mass. 40	691
v. Dunleavy, 129 Ill. 132	332	v. Jones, 10 Bush. 749	40
v. James, 22 Wis. 197	596	v. Knapp, 10 Pick. 477, 20 Am. Dec. 534	296
v. States, 30 Ill. 586	333	v. Mudgett (Holmes), 4 Pa. Dist. R. 739	168
Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527	304	v. Myers, (Va.) 31 L. R. A. 379	826
Chicago, B. & Q. R. Co. v. Cutts, 94 U. S. 155, 24 L. ed. 94	51	v. Ober, 12 Cush. 493	381
Chicago Dock & C. Co. v. Garrity, 115 Ill. 155	304	v. Pomphret, 137 Mass. 564	513
Chicago Marine & F. Ins. Co. v. Stanford, 23 Ill. 168, 81 Am. Dec. 270	655	v. Vrooman, 164 Pa. 306, 25 L. R. A. 250	132
Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970	51-53	v. York, 9 Met. 93, 43 Am. Dec. 373	206, 447
v. Ross, 112 U. S. 377, 28 L. ed. 787	324	Comer v. Himes, 58 Ind. 573	67
Chicago Pkg. & P. Co. v. Chicago, 88 Ill. 221, 30 Am. Rep. 545	625	Comfort v. McTeer, 7 Lea. 690	597
Chicago, R. I. & P. R. Co. v. Lake, 71 Ill. 333	311	v. Patterson, 2 Lea. 672	597, 848
Chicago, W. D. R. Co. v. Metropolitan W. S. Elev. R. Co. 152 Ill. 519	815	Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 54 Am. Rep. 36	165, 166
Chichester v. Vass, 1 Munf. 98, 4 Am. Dec. 531	184	Comstock v. Van Deusen, 5 Pick. 163	697
Child v. Dodd, 51 Ind. 484	742	Concordia Sav. & Aid Asso. v. Read, 124 N. Y. 189	256
Cincinnati, S. & C. R. Co. v. Belle Centre, 48 Ohio St. 273	185	Concord Union Mut. F. Ins. Co. v. Woodbury, 45 Me. 453	606
31 L. R. A.		Cone v. Cone, 58 N. H. 152	522
		v. Russell, 48 N. J. Eq. 206	564
		Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347	421
		Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648	76, 79, 723-726

Connehan v. Ford, 9 Wis. 240.	697	Davidson v. Koehler, 76 Ind. 308.	742
Constitutional Prohibitory Amendment, 24 Kan. 709.	820	v. New Orleans, 96 U. S. 104, 24 L. ed. 619.	386, 387
Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 323.	312	Davis v. Barger, 57 Ind. 54.	747
Conway v. Nolte, 11 Mo. 74.	339, 341	v. Bible, 134 Ind. 108.	742
v. Starkweather, 1 Denio, 113.	700	v. Central Cong. Soc. 129 Mass. 367, 37 Am. Rep. 368.	857
Cook v. Burlington, 30 Iowa, 105, 6 Am. Rep. 649.	184	v. Chicago & N. W. R. Co. 58 Wis. 646, 46 Am. Rep. 676.	981
v. Cook, 56 Wis. 207, 43 Am. Rep. 706.	519	v. Gillet, 7 Johns. 318.	244
v. Dickerson, 1 Duer, 691.	259	v. Lynchburg, 84 Va. 870.	387
v. Lum, 55 N. J. L. 373.	450	v. Minor, 1 How. (Miss.) 183, 28 Am. Dec. 325.	72
v. McClure, 58 N. Y. 437, 17 Am. Rep. 270.	320	v. Packard, 6 Wend. 327.	244
v. State, 90 Tenn. 407, 13 L. R. A. 183.	839	v. Packard, 32 U. S. 7 Pet. 276, 8 L. ed. 684.	243
Cooke v. Baltimore Traction Co. 80 Md. 568.	787	v. Snyder, 45 Neb. 415.	751
v. Millard, 65 N. Y. 352, 22 Am. Rep. 619.	510	v. State, 45 Ark. 484.	497
Cooper v. Elston, 7 T. R. 14.	509	Dawley v. Van Court, 21 Ill. 460.	328
v. Wandsworth Dist. Bd. of Works, 14 C. B. N. S. 181.	386	Day v. Gardner, 42 N. J. Eq. 190.	172
Cooesaw Min. Co. v. South Carolina, 144 U. S. 566, 36 L. ed. 543.	481	Dayton Gold & S. Min. Co. v. Seawell, 11 Nev. 394.	306
Corbin v. Gould, 133 U. S. 308, 33 L. ed. 611.	139	Dean v. Hart, 62 Ala. 310.	842
Corey v. Bishop, 48 N. H. 146.	701	Deansville Cemetery Assn. v. Re, 66 N. Y. 569, 23 Am. Rep. 86.	691
v. Wadsworth, 99 Ala. 68, 23 L. R. A. 618.	508	Decker v. Judson, 16 N. Y. 439.	256
Cornick v. Richards, 3 Len. 25.	713	Delhi v. Ottenville, 14 Lea. 191.	705
Corning v. Troy Iron & N. Factory, 40 N. Y. 191.	411	Delaney v. Milwaukee & St. P. R. Co. 33 Wis. 67.	981
Coster v. Albany, 43 N. Y. 330.	656	Delaware & H. Canal Co. v. Clark, 80 U. S. 13 Wall 311, 20 L. ed. 581.	46, 139
Cota v. Buck, 7 Met. 558, 41 Am. Dec. 464.	237	Demarest v. Flack, 128 N. Y. 205, 13 L. R. A. 854.	487
Couch v. McKee, 6 Ark. 484.	73	Deming v. Merchants' Cottonpress Storage Co. 90 Tenn. 353, 13 L. R. A. 518.	606
Coughty v. Globe Woollen Co. 56 N. Y. 127, 15 Am. Rep. 387.	221	Demsey v. Chambers, 154 Mass. 330, 13 L. R. A. 219.	461
Coulson v. Portland, Deady, 481, Fed. Cas. No. 3, 275.	746	Dennehy v. Chicago, 120 Ill. 627.	527
Covert v. Rhodes, 48 Ohio St. 66.	656	Denniston v. Clark, 125 Mass. 216.	175, 176
v. Rogers, 38 Mich. 363, 31 Am. Rep. 319.	506	Den, Wooden, v. Shotwell, 23 N. J. L. 470.	837
Coyle v. Com. 104 Pa. 117.	661, 664	Detroit v. Laughna, 34 Mich. 402.	463
Cox v. Conway, 35 Mo. App. 490.	672	v. Robinson, 38 Mich. 108.	747
v. Arnold (Mo.) 81 S. W. 562.	318, 320	De Vignier v. New Orleans, 16 Fed. Rep. 11.	42
v. James, 45 N. Y. 557, 59 Barb. 144.	668	Dickenson v. Breeden, 30 Ill. 279.	328
v. Keahy, 36 Ala. 340, 76 Am. Dec. 325.	196	Dietrich v. Murdoch, 42 Mo. 279.	306
Cracker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 604.	391	Dietz v. Mitchell, 12 Helsk. 676.	849
Craft v. South Boston R. Co. 150 Mass. 206, 5 L. R. A. 641.	536	District of Columbia v. Woodbury, 186 U. S. 463, 34 L. ed. 477.	582
Cragie v. Mellen, 6 Mass. 7.	175, 176	Ditson v. Ditson, 4 R. I. 87.	519
Craig v. Kitteredge, 46 N. H. 57.	447	Dixon v. Holden, L. R. 7 Eq. 488.	283
Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756.	714	Doane v. Penhallow, 1 U. S. 1 Dall. 218, 1 L. ed. 108.	247
Crawford v. Edwards, 38 Mich. 354.	656	Dobson v. Sotheby, Moody & M. 90.	69
Credit Foncier, Ex parte, L. R. 7 Ch. 161.	502	Doe, King, v. Frost, 3 Barn. & Ald. 546.	156
Creighton v. Piper, 14 Ind. 182.	663	Pilkinton, v. Spratt, 5 Barn. & Ad. 731.	159
Creveling v. Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.	655	Smith, v. Grady, 2 Dev. L. 366.	130
Crews v. State, 38 Ind. 28.	836	Donaldson v. General Public Hospital Comrs. 30 N. H. 279.	230
Cribb v. Morse, 77 Wis. 322.	471	Donnelly v. Boston Catholic Cemetery Assn. 146 Mass. 163.	231
v. Rogers, 12 S. C. 564, 32 Am. Rep. 511.	130	Donohoo v. Murray, 62 Wis. 100.	698
Crocket v. Trotter, 1 Stew. & P. (Ala.) 446.	237	Donohugh's Appeal, 86 Pa. 306.	120
Cron v. Cron's Estate, 56 Mich. 8.	471	Dougherty v. Moore, 71 Md. 248.	457
Cronise v. Cronise, 54 Pa. 255.	519	v. Van Nostrand, Hoffm. Ch. 58.	659
Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187.	509	Douglass v. Byrnes, 59 Fed. Rep. 31.	305
Cross v. Kent, 32 Md. 581.	69	Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 50.	51
v. Truesdale, 28 Ind. 44.	650	Dowling v. Egglemann, 47 Mich. 171.	173
Crouch v. Crouch, 80 Wis. 697.	522	Downes v. Harper Hospital, 101 Mich. 555, 25 L. R. A. 602.	231
v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528.	130	Downs v. Ross, 23 Wend. 270.	509
Crowder v. Sullivan, 128 Ind. 486, 13 L. R. A. 647.	745	Doyle v. Metropolitan Elev. R. Co. 136 N. Y. 505.	410
Crowell v. Lambert, 10 Minn. 369 (Gil. 295).	354, 371	v. Tess, 5 Ill. 202.	532
v. Woodbury, 52 N. H. 613.	701	Druke v. Helken, 61 Cal. 346, 44 Am. Rep. 553.	450
Crowley v. Genesee Min. Co. 65 Cal. 278.	586	Drury v. Smith, 1 P. Wms. 405.	443
Cumberland County v. Pennell, 69 Me. 357, 31 Am. Rep. 284.	846, 854	Dryfus v. Moline, M. & S. Co. 49 Neb. 238.	751
Cumberland Valley Mut. Protection Co. v. Douglas, 58 Pa. 423, 38 Am. Dec. 298.	69	Dublin Twp. v. Milford Five Cent Sav. Inst. 128 U. S. 513, 32 L. ed. 534.	398
Cummings v. Stark, 138 Ind. 94.	742	Dubuque v. Illinois C. R. Co. 39 Iowa, 56.	73
Currier v. Labanon Slate Co. 50 N. H. 362.	501	Ducat v. Chicago, 67 U. S. 10 Wall. 410, 19 L. ed. 472.	43
Curtis v. Whitney, 80 U. S. 13 Wall. 68, 20 L. ed. 513.	76, 77, 723	Duffield v. Elwes, 1 Sim. & Stu. 243.	447
Cusick's Election, Re, 136 Pa. 476, 10 L. R. A. 228.	840	Duffy's Election, Re, 4 Brewst. (Pa.) 531.	448
Cyr v. Dufour, 68 Me. 492.	175	Dugan v. Giddings, 3 Gill. 138.	814
		Duke Queensberry v. Shebbear, 2 Eden, 329.	236
		Dulin v. Lillard, 91 Va. 718.	827
		Duncan v. Findlater, 6 Clark & F. 894.	228, 227, 229, 238
Dabney v. Stevens, 40 How. Pr. 341.	586	Duncombe v. New York, H. & N. R. Co. 84 N. Y. 190, 88 N. Y. 1.	506
Daly v. Hosmer, 102 Mich. 392.	161, 162	Dunlap v. Stetson, 4 Mason, 349.	318
Dana v. Bank of United States, 5 Watts & S. 223.	505	Dunn v. People, 40 Ill. 463.	838
Daniels v. Brown, 34 N. H. 454, 69 Am. Dec. 505.	701, 702	Durham v. Taylor, 29 Ga. 166.	814
v. Chicago & R. I. R. Co. 70 U. S. 3 Wall. 250, 18 L. ed. 224.	368	Dutcher v. Woodhull, Fed. Cas. No. 4, 204.	259
Darby v. Gilligan, 33 W. Va. 246, 6 L. R. A. 740.	471	Dwight v. Hayes, 150 Ill. 273.	111
Davenport v. Kleinschmidt, 6 Mont. 502.	797	v. St. John, 25 N. Y. 203.	429
		Dygert v. Remerschnider 32 N. Y. 629.	814

R.

Eastland v. Fogo, 66 Wis. 133.	697
East St. Louis v. East St. Louis Gaslight & C. Co. 98 Ill. 415, 38 Am. Rep. 97.	797
East Tennessee, V. & G. R. Co. v. Kelly, 91 Tenn. 699, 17 L. R. A. 691.	606
Eckert v. Binkley, 134 Ind. 614.	737
Eckstein v. Downing, 64 N. H. 248.	562
Eclipse Case, The, 2 Conkling, Admiralty, 385.	258
Edes v. Garey, 46 Md. 24.	790
Eddy v. Lafayette, 49 Fed. Rep. 807, 4 U. S. App. 247.	719
Edwards v. Kearzey, 96 U. S. 566, 24 L. ed. 793.	726
Ellenbecker v. Plymouth County District Ct. 134 U. S. 31, 33 L. ed. 801.	679
Eley's Appeal, 103 Pa. 307.	130
"Elize Cornish," The, 2 Spinks, Ecol. & Adm. Rep. 34.	260
Elkins v. McKean, 79 Pa. 496.	221
Elliot v. Stevens, 38 N. H. 311.	471
Elliot v. Oliver, 22 Or. 47.	482
Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691.	737
Elmer v. Sand Creek Twp. 38 Ind. 56.	676
Elston v. Chicago, 40 Ill. 514, 89 Am. Dec. 361.	381
Emert v. Missouri, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68.	381, 536
Emmitt v. Brophy, 42 Ohio St. 82.	655
Enos v. Buckley, 94 Ill. 458.	328, 529
Enterprise Sav. Assn. v. Zumstein, 15 C. C. A. 153, 67 Fed. Rep. 1000.	480
Entick v. Carrington, 19 How. St. Tr. 1029, 2 Wils. 275.	167
Entwistle v. Shepherd, 2 T. R. 78.	258
Eppendorf v. Brooklyn City & N. R. Co. 69 N. Y. 195, 25 Am. Rep. 171.	338
Erie's Appeal, 91 Pa. 496.	797
Ersline v. Whitehead, 84 Ind. 357.	742
Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 185.	655
Evans, <i>Ex parte</i> , 8 T. R. 172.	464
Evans v. Chicago, St. P. & O. R. Co. 86 Wis. 603.	697
v. Mason, 64 N. H. 98.	702
v. Sanders, 8 Port. (Ala.) 497, 38 Am. Dec. 297.	538
v. Savannah & W. R. Co. 90 Ala. 54.	194
Evansville v. State, Blend, 118 Ind. 428, 4 L. R. A. 93.	730
Evansville & T. H. R. Co. v. McKee, 99 Ind. 159, 50 Am. Rep. 102.	704
Evergreen Cemetery Assn. v. New Haven, 43 Conn. 234, 21 Am. Rep. 643.	184
Express Cases, 117 U. S. 1, 29 L. ed. 791.	53-55

F.

Fagan v. Roster, 68 Ill. 84.	328
Falls v. Cairo, 58 Ill. 403.	331
Fanning v. Gregoire, 57 U. S. 16 How. 534, 14 L. ed. 1047.	809
Fargo v. Stevens, 121 U. S. 230, 30 L. ed. 888.	42
Farwell v. Myers, 59 Mich. 179.	791
Favorite, The, 2 Flipp. 86.	246
Ferguson v. Mason, 60 Wis. 383.	697
Field v. Clark, 143 U. S. 650, 36 L. ed. 294.	114
Fifield v. Marinette County, 62 Wis. 532.	217
Fifth Avenue Bank v. Forty-second Street & G. S. R. Co. 137 N. Y. 231, 19 L. R. A. 331.	778
Filley v. Child, 16 Blatchf. 376.	140
Findlay v. Smith, 8 Munf. 143, 8 Am. Dec. 733.	130
Finney v. Aprar, 31 N. J. L. 296.	510
Fire Assn. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342.	43
Fire Ins. Assn. v. Wickham, 141 U. S. 577, 35 L. ed. 866.	172
v. Wickham, 128 U. S. 434, 32 L. ed. 506.	398
Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L. R. A. 417.	231
First Nat. Bank v. Carson, 60 Mich. 432.	237
v. Dovetall, B. & G. Co. (Ind.) 40 N. E. 810.	506
v. Hogan, 47 Mo. 472.	536
v. Lanier, 74 U. S. 11 Wall. 378, 20 L. ed. 175.	453
v. Morgan, 132 U. S. 141, 32 L. ed. 282.	719
v. Shoemaker, 117 Pa. 94.	655
v. Turnbull, 83 U. S. 16 Wall. 190, 21 L. ed. 296.	249
v. Whitman, 94 U. S. 343, 24 L. ed. 229.	655
Fischer v. Laak, 76 Wis. 313.	697
Fish v. Kelly, 17 C. B. N. S. 194.	863
Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 16 L. R. A. 453.	139
Fisher v. Clark, 41 Barb. 329.	672
v. Hildreth, 117 Mass. 558.	793
v. Boyce, 81 Md. 46.	790

31 L. R. A.

Fishkill v. Fishkill & B. Pl. Road Co. 22 Barb. 634.	825
Fitzgerald v. Barker, 70 Mo. 686.	656
Flack v. Sharron, 29 Md. 311.	471
Flash v. Dillon, 22 Fed. Rep. 1.	249
Fleming v. Bills, 3 Or. 286.	836
Fletcher v. Sharpe (Ind.) 1 L. R. A. 179.	471
v. Tuttle, 151 Ill. 41, 25 L. R. A. 143.	476, 479
Floaten v. Ferrell, 24 Neb. 347.	568
Florence Min. Co. v. Brown, 124 U. S. 391, 31 L. ed. 427.	655
Floyd Acceptances, The, 74 U. S. 7 Wall. 666, 19 L. ed. 169.	537
Flynn v. Dougherty (Cal.) 14 L. R. A. 230.	510
Fogarties v. State Bank, 12 Rich. L. 518, 78 Am. Dec. 468.	655
Foland v. Frankton (Ind.) 41 N. E. 1031.	745
Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671.	562
Folsom v. Marsh, 2 Story, C. C. 100.	236
Fonda v. Borst, 2 Keyes, 48.	697
v. VanHorne, 15 Wend. 631, 30 Am. Dec. 77.	283
Fonner v. Smith, 31 Neb. 107, 11 L. R. A. 528.	655
Forbes v. McDonald, 54 Cal. 98.	734
Ford v. Ford, 70 Wis. 55.	842
v. Stuart, 15 Heav. 499.	814
Foreman v. Canterbury, L. R. 6 Q. B. 214.	229
Fort Wayne v. Lake Shore & M. S. R. Co. 132 Ind. 565, 18 L. R. A. 367.	145
Fosselman v. Springfield, 38 Ill. App. 296.	529
Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168.	196
v. Wright, L. R. 4 C. P. Div. 438.	318
Fox v. Union Sugar Refinery, 109 Mass. 292.	696
Franklin v. Kelley, 2 Neb. 79.	51
Fraser v. Thompson, 1 Giff. 62.	814
Freeman v. Hill, 45 Kan. 435.	252
v. Stewart, 41 Miss. 138.	797
French, <i>Re</i> , 81 Wis. 597.	522
French v. Lovejoy, 12 N. H. 458.	471
v. State, 85 Wis. 400, 21 L. R. A. 402.	522
Frue v. Houghton, 6 Colo. 318.	464
Fuller v. Kemp, 138 N. Y. 234, 20 L. R. A. 785.	172
Fulton v. Prandolph, 63 Tex. 330.	702
Funk v. Davis, 163 Ind. 281.	67

G.

Gage v. Gage, 66 N. H. 282, 28 L. R. A. 829.	702
Gainer v. Gates, 73 Iowa, 149.	842
Gaines v. Thompson, 74 U. S. 7 Wall. 347, 19 L. ed. 62.	480
Gaither v. Stockbridge, 67 Md. 222.	603
Galey Bros. v. Kellerman, 123 Pa. 491.	676
Gallagher's Appeal, 87 Pa. 200.	843
114 Pa. 263, 60 Am. Rep. 350.	471
Galliber v. Cadwell, 145 U. S. 368, 36 L. ed. 738.	140
Galveston, H. & S. A. R. Co. v. Ware, 74 Tex. 47.	213
Ganiard v. Rochester City & B. R. Co. 50 Hun, 22.	333
Garbutt v. Watson, 5 Barn. & Ald. 613.	409
Gardiner v. Burbam, 12 Johns. 459.	244
Gardner v. Donnelly, 86 Cal. 387.	255
v. Dutch, 9 Mass. 427.	701
v. Gordon, 41 Ind. 92.	742
v. Joy, 9 Met. 177.	510
v. Thomas, 14 Johns. 134, 7 Am. Dec. 445.	279, 281
Garland, <i>Ex parte</i> , 71 U. S. 4 Wall. 383, 18 L. ed. 366.	522
Garrett v. Belmont Land Co. 94 Tenn. 460.	712
v. Burlington Plow Co. 70 Iowa, 697.	506
Garrison v. Chicago, 7 Biss. 480.	748
Gartside v. East St. Louis, 43 Ill. 47.	528
Gass v. Simpson, 4 Coldw. 238.	445
Gates v. Buckl, 12 U. S. App. 69, 4 C. C. A. 116.	338
53 Fed. Rep. 961.	
v. Madison County Mut. Ins. Co. 5 N. Y. 469, 55 Am. Dec. 360.	69
Gaynor v. Old Colony & N. R. Co. 103 Mass. 206.	857
97 Am. Dec. 96.	293
Gee v. Pritchard, 2 Swanst. 402.	286
Geekie v. Kirby Carpenter Co. 106 U. S. 886, 27 L. ed. 160.	140
Gelpcke v. Dubuque, 68 U. S. 1 Wall. 175, 17 L. ed. 520.	537
Genesee Chief, The, 53 U. S. 12 How. 443, 13 L. ed. 1058.	320
George v. Bischoff, 68 Ill. 236.	255
Georgia v. Madrazo, 26 U. S. 1 Pet. 110, 7 L. ed. 73.	248
Gibbons v. Ogden, 22 U. S. 9 Wheat. 188, 6 L. ed. 68.	521
Gibson, <i>Re</i> , 154 Mass. 378.	742
Gibson v. Leonard, 143 Ill. 182, 17 L. R. A. 588.	858
Giddings v. Blacker, 93 Mich. 1, 16 L. R. A. 402.	749

Gilbert v. Trinity House, L. R. 17 Q. B. Div. 795	230	Hand v. Cole, 88 Tenn. 402, 7 L. R. A. 96	801
Gill v. Read, 5 R. I. 843, 73 Am. Dec. 73	414	Hand Gold Min. Co. v. Parker, 59 Ga. 419	305
Gillis v. Pennsylvania R. Co. 59 Pa. 129, 98 Am. Dec. 817	858	Handy v. Handy, 134 Mass. 394	522
Gilman v. Hill, 36 N. H. 311	701	Hannah v. Savage, 8 Wash. 432	255
v. Hunnewell, 122 Mass. 139	138	Hanson v. Taylor, 23 Wis. 547	697
Gillott v. Esterbrook, 47 Barb. 463	139	v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215	132
Girdner v. Stephens, 1 Henk. 280, 2 Am. Rep. 700	72	Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237	719
Glass v. Hulbert, 102 Mass. 36, 3 Am. Rep. 418	815	Harness v. Cravens, 126 Mo. 235	539
v. Memphis & C. R. Co. 94 Ala. 561	858	Harper v. Graham, 20 Ohio, 105	172
Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675	231	Harris v. Woman's Hospital, 27 Abb. N. C. 37	231
Glen Cove Mfg. Co. v. Ludeling, 22 Fed. Rep. 826	46	Harrisburg, The, v. Rickards ("The Harrisburg"), 119 U. S. 199, 30 L. ed. 358	719
Glenn v. State, Clow, 46 Ind. 368	737	Harrison v. Hoyle, 24 Ohio St. 254	144
Glover v. Lee, 140 Ill. 102	266, 274	v. Stacy, 6 Rob. (La.) 15	73
Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112	510	v. Wright, 100 Ind. 538, 58 Am. Rep. 806	655
Goff v. Dabbs, 4 Baxt. 300	715	Hart v. Albany, 3 Falke, 381	259
v. Great Northern R. Co. 30 L. J. Q. B. 148	706	v. Western R. Corp. 13 Met. 99, 43 Am. Dec. 719	606
Goodhue v. Palmer, 13 Ind. 457	714	Hartnall v. Ryde Comrs. 33 L. J. Q. B. 39	227
Goodright v. Seale, 2 Wils. 29	159	Harts v. Brown, 77 Ill. 230	268, 506
Goodwin v. Bunzl, 102 N. Y. 224	256	Haskel v. Burlington, 90 Iowa, 232	189, 190
Goodwin Gas Stove & M. Co.'s Appeal, 117 Pa. 514	562	Haslem v. Lockwood, 37 Conn. 600, 9 Am. Rep. 350	701
Gordon, <i>Ex parte</i> , 104 U. S. 515, 26 L. ed. 814	719	Hassan v. Rochester, 67 N. Y. 528	218
Gordon v. Muchler, 34 La. Ann. 608	655	Hasted v. Dodge (Iowa) 35 N. W. 462	172
Goshorn v. Purcell, 11 Ohio St. 641	652	Haswell v. Bates, 9 Johns. 80	244
Gottlieb v. Miller, 154 Ill. 44	368, 274, 527	Hatch v. Thompson, 3 Dev. L. 411	130
Gould v. Atlanta, 55 Ga. 678	527	Hatcher v. Buford, 60 Ark. 169, 27 L. R. A. 507	448
v. Little Rock, M. R. & T. R. Co. 52 Fed. Rep. 680	505	Hathaway v. Davis, 33 Cal. 161	255
Gouraud v. Gouraud, 3 Redf. 262	414	Havens v. Hartford & N. H. R. Co. 28 Conn. 69	167
Gourley v. Linsenbiger, 51 Pa. 345	446	Hay v. Weber, 37 Wis. 591	697
Gove v. Farmers' Mut. F. Ins. Co. 48 N. H. 41, 2 Am. Rep. 182	69	Hayes v. Massachusetts Mut. L. Ins. Co. 125 Ill. 624, 1 L. R. A. 393	172
Governor, The, v. McEwen, 5 Humph. 265	848	v. Miscourt, 120 U. S. 68, 30 L. ed. 578	693, 694
Graff v. Evans, L. R. 8 Q. B. Div. 373	513	Hayford v. Griffith, Fed. Cas. No. 6, 283	258
Graham v. LaCrosse & M. R. Co. 102 U. S. 148, 26 L. ed. 108	504	Haynes v. Raleigh Gas Co. 114 N. C. 203, 26 L. R. A. 810	569-572, 578
Grammel v. Carmer, 55 Mich. 301, 54 Am. Rep. 363	655	Hays v. Armstrong, 7 Ohio, pt. 1, p. 248	682
Granger v. Parker, 142 Mass. 138	256	Hayward v. Cain, 105 Mass. 213	605
Granger Cases (Munn v. Illinois), 94 U. S. 113, 24 L. ed. 77	830	Hazen v. Essex Co. 12 Cush. 475	306
* "Gran Para, The," 23 U. S. 10 Wheat. 497, 6 L. ed. 375	280	Hazlehurst v. Savannah, G. & N. A. R. Co. 48 Ga. 57	419
Grant v. Davenport, 36 Iowa, 368	797	Healey v. Simpson, 118 Mo. 940	813
Graveley v. Graveley, 30 S. C. 104	681	Health Department v. Trinity Church, 145 N. Y. 82, 27 L. R. A. 710	691
Graves v. Battle Creek, 95 Mich. 266, 19 L. R. A. 641	169	Healy v. Newton, 96 Mich. 228	255
v. People, 18 Colo. 185	297	Heaven v. Pender, L. R. 11 Q. B. Div. 508	797
Gray v. Obear, 54 Ga. 231	107	Heavenridge v. Mondy, 34 Ind. 23	747
v. Manhattan R. Co. 128 N. Y. 499	410	Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 305, 28 L. ed. 733	326
Great Falls Mfg. Co. v. Fernald, 47 N. H. 444	306	Heilbronn, Re, 1 Park. Crim. Rep. 434	838
Gregg v. Wilson, 50 Ind. 490	65	Heim v. Vogel, 69 Mo. 529	656
Gregory v. Piper, 9 Barn. & C. 591	196	Heiser v. Kingsland & D. Mfg. Co. 110 Mo. 605, 15 L. R. A. 821	221, 222
Green v. Biddle, 21 U. S. 8 Wheat. 1, 5 L. ed. 547	726	Heister v. Metropolitan Bd. of Health, 37 N. Y. 661	691
r. Mills, 18 C. C. A. 516, 69 Fed. Rep. 852, 30 L. R. A. 90	479, 483	Hellen v. Noe, 3 Fred. L. 498	133
v. Morrison, 5 Colo. 18	656	Heller v. Crawford, 37 Ind. 279	747
v. Ward, 82 Va. 324	387	Henderson v. Green, 34 Iowa, 437, 11 Am. Rep. 149	842
v. Winter, 1 Johns. Ch. 77	259	v. Indiana Trust Co. (Ind.) 40 N. E. 516	275, 508
Greene v. Cramer, 2 Con. & L. 60	814	Hennessey v. New Bedford, 153 Mass. 260	175, 178
Greensborough v. Underhill, 12 Vt. 604	414	Henry v. Heeb, 114 Ind. 275	747
Greenwood v. Butler, 82 Kan. 424, 22 L. R. A. 465	81	Hernot's Hospital v. Ross, 12 Clark & F. 507	226, 227
Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 15 L. R. A. 369	480	Hern v. Nichols, 1 Salk. 289	784
Griffin v. Mississippi Levee Comrs. 71 Miss. 767	853	Hester v. Keith, 1 Ala. 316	255
Griswold v. Stewart, 4 Cow. 453	139	Hewes v. Philadelphia, W. & B. R. Co. 76 Md. 159	316
Grogan v. San Francisco, 18 Cal. 590	73	H. E. Willard, The, 62 Fed. Rep. 387	720
Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319	449, 450	Hewitt v. Board of Education, 94 Ill. 529	71
Groves v. Buck, 3 Maule & S. 178	509	v. Kaye, L. R. 6 Eq. 198	448
Grymes v. Hone, 49 N. Y. 21, 10 Am. Rep. 313	445, 450	Hibbard v. People, 4 Mich. 135	165
Gudner v. Kilpatrick, 14 Neb. 847	255	Hibernia Underground R. Co. v. DeCamp, 47 N. J. L. 518, 54 Am. Rep. 197	306
Guernsey v. Cook, 120 Mass. 501	564	Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255	185
Gulf, C. & S. F. R. Co. v. Rawlins, 80 Tex. 581	213	Higgins v. Miner, 13 Ind. 846	836
Gunter v. Graniteville Mfg. Co. 15 S. C. 443	582	v. Murray, 73 N. Y. 252	510
Gupton v. Gupton, 47 Mo. 37	813	v. Watervliet Turnp. & R. Co. 46 N. Y. 27, 7 Am. Rep. 238	391
		Hight v. Ripley, 19 Me. 137	510
		Hildreth v. McIntire, 1 J. J. Marsh. 208, 19 Am. Dec. 611	661
		Hill v. Alston, 12 Heisk. 569	848
		v. Boston, 122 Mass. 344, 23 Am. Rep. 332	230, 231
		v. Burke, 62 N. Y. 111	256
		v. DeRochemont, 48 N. H. 87	700, 701
		v. Stevenson, 63 Me. 364, 18 Am. Rep. 231	450
		v. Winsor, 118 Mass. 258	587
		Hills v. Sommer, 53 Hun. 392	173
		Hinkley v. Green, 52 Ill. 223	328
		Hintinger v. Traut, 69 Iowa, 746	140
		Hodges v. New England Screw Co. 1 R. I. 312, 63 Am. Dec. 624	419
		v. Spicer, 79 N. C. 223	130
		Hodgson v. Farrell, 15 N. J. Eq. 88	339
		Holbrook v. Bowman, 62 N. H. 313	702
		Holdane v. Cold Springs, 21 N. Y. 474	697

H.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569	387
Halbert v. State, Martin County Comrs. 22 Ind. 125	853
Haley v. Colcord, 59 N. H. 8, 47 Am. Rep. 176	702
Hall v. Smith, 2 Bing. 156	226, 227, 232
Hallam v. Indianapolis Hotel Co. 56 Iowa, 178	506
Halloway v. Clark, 27 Ill. 484	328
Hallowell & A. Bank v. Hamlin, 14 Mass. 180	536
Hamden v. Rice, 24 Conn. 350	225
Hamilton v. Van Rensselaer, 43 N. Y. 244	123
Hamlin v. Kassafer, 15 Or. 457	352
Hammersley v. Baron de Biel, 12 Clark & F. 45	814
31 L. R. A.	

Holden v. Hoyt, 34 Mass. 181.....	538
Holder v. Dickeson, Freem. C. L. Rep. 96.....	814
v. State, 58 Ark. 482.....	470
Holdsworth v. Shannon, 113 Mo. 508.....	339
Holladay v. Marsh, 3 Wend. 142, 20 Am. Dec. 678.....	131
Holland v. Dickerson, 41 Iowa, 367.....	652
Holliday v. St. Leonard's, 11 C. B. N. S. 192.....	227, 229, 232, 233
Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113.....	504
Holloway v. Memphis, E. P. & P. R. Co. 23 Tex. 465, 76 Am. Dec. 68.....	487, 488
Holmes v. Oregon & C. R. Co. 5 Fed. Rep. 75.....	719
Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 252.....	420
Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. 37 Conn. 278, 9 Am. Rep. 324.....	188
Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025.....	43
Honore v. Lamar F. Ins. Co. 51 Ill. 410.....	605
Hooker v. Chicago & St. P. R. Co. 76 Wis. 542.....	860
Hopcraft v. Kittredge, 162 Mass. 788.....	453
Hopkinson v. Forster, L. R. 19 Eq. 74.....	655
Hornbuckle v. Toombs, 85 U. S. 18 Wall. 648, 21 L. ed. 966.....	253
Hornor v. Henning, 93 U. S. 231, 23 L. ed. 679.....	601
Horton Mfg. Co. v. Horton Mfg. Co. 18 Fed. Rep. 816.....	659
Hospest v. Northwestern Mfg. & Car Co. 48 Minn. 174, 15 L. R. A. 470.....	505
Hough v. Hunt, 2 Ohio, 495, 15 Am. Dec. 569.....	565
Hough Case, 100 U. S. 213, 25 L. ed. 612.....	325
Houghton v. Ross, 54 Mich. 335.....	173
Houghton County Supers. v. Blacker, 92 Mich. 638, 18 L. R. A. 432.....	729, 735
Hounsell v. Smyth, 7 C. B. N. S. 738.....	868
Houseman v. The North Carolina, 40 U. S. 15 Pet. 40, 10 L. ed. 653.....	245, 250
Houston v. Moore, 18 U. S. 5 Wheat. 1, 5 L. ed. 19.....	729
Howard v. Bugbee, 65 U. S. 24 How. 461, 16 L. ed. 753.....	81, 723
v. Moot, 64 N. Y. 262.....	652
Howe v. Boston Carpet Co. 16 Gray, 493.....	419
Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754.....	381
Howland v. Chicago, 108 Ill. 496.....	526, 527
Howser's Case, 80 Md. 148, 27 L. R. A. 154.....	576
Howson v. Hancock, 8 T. R. 575.....	798
Huckins v. People's Mut. F. Ins. Co. 31 N. H. 247.....	69
Hudelson v. State, 94 Ind. 423, 48 Am. Rep. 171.....	836
Huffman v. Mills, 39 Kan. 577.....	371
Hull v. Ruggles, 56 N. Y. 424.....	836
Hull & Selby Railway, <i>Re</i> , 5 Mees. & W. 327.....	318
Humboldt Lumber Mfrs. Assn., <i>Re</i> , 60 Fed. Rep. 428.....	719
Humphreys v. McKissock, 140 U. S. 304, 35 L. ed. 473.....	698, 712
Hunter v. Manhattan R. Co. 141 N. Y. 281.....	410
v. Westbrook, 2 Car. & P. 578.....	283
Hurley v. State, 29 Ark. 17.....	449
Hurn, <i>Ex parte</i> , 92 Ala. 102, 13 L. R. A. 120.....	164, 166
Hurst v. Hurst, 7 W. Va. 289.....	130
Hutchinson v. Boston Gaslight Co. 122 Mass. 219.....	788
Huyler v. Atwood, 26 N. J. Eq. 504.....	656
Hyde v. Larkin, 35 Mo. App. 365.....	536

I.

Illingsworth v. Boston Electric Light Co. 161 Mass. 563, 25 L. R. A. 562.....	588
Illinois C. R. Co. v. Chambers, 71 Ill. 519.....	353
v. Chicago, B. & N. R. Co. 122 Ill. 473.....	311
v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112.....	858
v. Hammer, 72 Ill. 347.....	859
v. Latham (Miss.) 16 So. 757.....	382
v. Lutz, 84 Ill. 598.....	333
v. Slattery, 54 Ill. 133.....	333
Iwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446.....	861
Indianapolis v. Indianapolis Gaslight Co. 66 Ind. 396.....	797
Ingles v. Strauss, 91 Va. 209.....	824
Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. ed. 118.....	826
Iron Mountain R. Co. v. Bingham, 87 Tenn. 523, 4 L. R. A. 622.....	607
Iroquois County Supers. v. Keady, 34 Ill. 296.....	482
Irwin v. Cook, 17 Colo. 16.....	256
Isbell v. New York & N. H. R. Co. 27 Conn. 393, 71 Am. Dec. 78.....	372, 373
Ives v. Merchant's Bank, 53 U. S. 12 How. 159, 13 L. ed. 936.....	248

J.

Jack Jewett, <i>The</i> , 2 Ben. 353.....	250
Jackson v. Phillips, 14 Allen, 539.....	120
v. Saunders, 2 Leigh, 109.....	109
Jackson, Doran, v. Green, 7 Wend. 333.....	104, 108
Fitz Simmons v. Fitz Simmons, 10 Wend. 9, 24 Am. Dec. 198.....	104, 108
Murphy, v. Van Hoosen, 1 Sharswood & B. Lead. Cas. Real Prop. 191.....	130
Jackson Sharp Co. v. Holland, 14 Fla. 384.....	488
Jacobs, <i>Re</i> , 98 N. Y. 98, 50 Am. Rep. 636, 690, 691.....	694
James v. Howell, 41 Ohio St. 696.....	320
Jameson v. People, 16 Ill. 257.....	191
Jeffers v. East Omaha Land Co. 134 U. S. 178, 33 L. ed. 872.....	317, 318
Jefferson County Comrs. v. Lineberger, 3 Mont. 231, 35 Am. Rep. 432.....	850
Jelley v. Dills, 27 W. Va. 267.....	132
Jenness v. Chicago, 24 Ind. 369, 87 Am. Dec. 335.....	162
Jennings v. Carson, 8 U. S. 4 Cranch, 5, 2 L. ed. 542.....	247
v. Jennings, 21 Ohio St. 56.....	842
Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484.....	409, 410
Jersey City Gaslight Co. v. Consumers Gas Co. 40 N. J. Eq. 427.....	711
Jewell v. Knight, 123 U. S. 432, 31 L. ed. 192.....	348
John, <i>The</i> , 2 Hagg. Adm. Rep. 305.....	280
Johnson v. Berkshire Mut. F. Ins. Co. 4 Allen, 388.....	69
v. Brannan, 5 Johns. 268.....	173
v. Chicago, M. & St. P. R. Co. 29 Minn. 425.....	556
v. Chicago, R. I. & P. R. Co. 58 Iowa, 348.....	372
v. Dalton, 1 Cow. 543, 13 Am. Dec. 564.....	279, 281
v. Milwaukee, 40 Wis. 315.....	217, 218
Johnston v. Dillard, 1 Bay, 232.....	814
v. Latin, 103 U. S. 800, 26 L. ed. 532.....	451, 453
v. Spicer, 107 N. Y. 185.....	825
Jonas v. Cincinnati, 18 Ohio. 318.....	746
Jones v. Detroit Water Comrs. 34 Mich. 273.....	464
v. Jones, 18 Ala. 248.....	73
v. Knappen, 63 Vt. 361, 14 L. R. A. 293.....	842
Jugiro v. Brush, 140 U. S. 297, 35 L. ed. 513.....	679
J. W. Butler Paper Co. v. Robbins, 151 Ill. 568.....	266, 273, 274
J. W. French, <i>The</i> , 13 Fed. Rep. 918.....	719

K.

Kahl v. Love, 37 N. J. L. 5.....	868
Kanne v. Minneapolis & St. L. R. Co. 33 Minn. 419.....	429
Kansas v. Bradley, 26 Fed. Rep. 289.....	453
Karow v. Continental Ins. Co. 67 Wis. 56, 46 Am. Rep. 17.....	69
Kay v. Pennsylvania R. Co. 65 Pa. 299, 3 Am. Rep. 628.....	558
Kearney v. London, B. & S. C. R. Co. L. R. 5 Q. B. 411, L. R. 6 Q. B. 759.....	576
Kee v. State, 28 Ark. 160.....	467
Keeble v. Keeble, 85 Ala. 552.....	794
Keedy v. Long, 71 Md. 385, 5 L. R. A. 759.....	790
Keel v. Larkin, 72 Ala. 493.....	226
Keith v. Clarke, 4 Lea. 718.....	712
Kellogg v. Richards, 14 Wend. 116.....	172
Kelly v. Southern Minn. R. Co. 28 Minn. 96.....	860
Kempland v. Macaulay, 4 T. R. 436.....	258
Kennedy v. Kennedy, 87 Ill. 250.....	608
Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.....	518
Kentucky Club v. Louisville, 92 Ky. 309.....	158
Kenyon, <i>Re</i> , 17 R. I. 149.....	778
Kenyon v. Knights Templar & M. A. Aid Asso. 122 N. Y. 247.....	410
Kerlin v. West, 4 N. J. Eq. 449.....	605
Kernochan v. New York Bowery F. Ins. Co. 17 N. Y. 428.....	372
Kerwhacker v. Cleveland, C. & C. R. Co. 3 Ohio St. 172, 62 Am. Dec. 246.....	304
Kettle River R. Co. v. Eastern R. Co. 41 Minn. 461, 6 L. R. A. 111.....	401
Keymer, <i>Re</i> , 148 N. Y. 219.....	285
Kidd v. Horry, 28 Fed. Rep. 773.....	679, 680
v. Pearson, 128 U. S. 1, 32 L. ed. 346.....	746
Kitchell v. Minnesota Brush Electric Co. 58 Minn. 418.....	67
Kilbourn v. Sunderland, 130 U. S. 514, 32 L. ed. 1008.....	259
Kimball v. Alcorn, 45 Miss. 149.....	701
Kimberly v. Patchin, 19 N. Y. 390, 75 Am. Dec. 384.....	371
King v. Colchester, 2 T. R. 259.....	318
v. Lord Yarborough, 3 Barn. & C. 91.....	414
v. Wyne, 2 Barn. & Ald. 386.....	183
v. Ware, 53 Iowa, 97.....	

Kinnaird v. Williams, 8 Leigh, 400, 31 Am. Dec. 658.	842	Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763.	53
Kinnyngham v. Dickey, 125 Ind. 180.	742	Livermore v. Waite, 102 Cal. 114, 25 L. R. A. 312.	820
Kinsley v. Chicago, 124 Ill. 359.	526	Liverpool & L. & G. Ins. Co. v. Van Os, 63 Miss. 451, 56 Am. Rep. 810.	223
Kinsman v. Cambridge, 121 Mass. 558.	72	Livingston v. The Jewess, 1 Ben. 21, note.	264
Kirkham v. Russel, 76 Va. 956.	389	Lobdell v. Stowell, 51 N. Y. 70.	702
Kirkwood v. Miller, 73 Am. Dec. 134.	186	Locey Coal Mines v. Chicago, W. & V. Coal Co. 131 Ill. 8, 8 L. R. A. 586.	274
Kitts v. Wilson, 140 Ind. 604.	737	Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716.	114
Klein v. Laudman, 29 Mo. 259.	414	Lockhart v. Horn, 1 Woods, C. C. 628.	73
Kline v. Central P. R. Co. 37 Cal. 400, 99 Am. Dec. 232.	372	t. White, 18 Tex. 102.	414
Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L. R. A. 779.	778	Lohman v. State, 81 Ind. 15.	886
Koelsch v. Philadelphia Co. 152 Pa. 365, 18 L. R. A. 769.	788	Long v. Georgia P. R. Co. 91 Ala. 522.	793
Koenig v. State, 33 Tex. Crim. Rep. 367.	513	Long's Appeal, 67 Pa. 114.	632
Koppikus v. State Capital Comrs. 16 Cal. 248.	737	Longmire v. Holliday, 6 Exch. 461.	222
Koser, <i>Ex parte</i> , 60 Cal. 232.	662	Loomis v. Cline, 4 Barb. 453.	283
Kountze v. Omaha Hotel Co. 107 U. S. 378, 27 L. ed. 609.	268	t. Eaton, 32 Conn. 550.	714
Kuhn v. Warren Sav. Bank, 20 W. N. C. 230.	655	Louisiana v. New Orleans, 102 U. S. 208, 26 L. ed. 182.	77
Kurtz v. St. Paul & D. R. Co. 48 Minn. 599.	742	Louisville & M. R. Co. v. Dancy, 97 Ala. 338.	199
L.			
Lacassagne v. Chapuis, 144 U. S. 119, 36 L. ed. 308.	249	Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624, 50 Am. Rep. 186.	372
Lacaze v. State, 1 Add. Rep. 59.	243, 245, 247	Louisville, N. A. & C. R. Co. v. Phillips, 112 Ind. 59.	857
Laclede Bank v. Schuler, 120 U. S. 514, 30 L. ed. 705.	655	Louisville Underwriters, R. 134 U. S. 488, 33 L. ed. 991.	718
LaGrange Butter Tub Co. v. National Bank of Commerce, 122 Mo. 154.	505	Lovejoy v. Murray, 70 U. S. 3 Wall. 19, 18 L. ed. 134.	648
Lagrange v. County Comrs. v. Rogers, 55 Ind. 297.	742	Lowenstein v. Bew, 68 Miss. 265.	223
Lake Roland Elev. R. Co. v. Baltimore, 77 Md. 381, 20 L. R. A. 126.	899	Lowery v. Howard, 103 Ind. 440.	742
Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 50, 30 L. R. A. 33.	322	Lucille, The, v. Respass ("The Lucille"), 86 U. S. 19 Wall. 73, 22 L. ed. 64.	259
Lanark v. Dougherty, 153 Ill. 163.	324	Lynch v. Metropolitan Elev. R. Co. 90 N. Y. 77, 43 Am. Rep. 141.	705
Lane v. Atlantic Works, 111 Mass. 136.	587	Lyons v. McLaughlin, 32 Vt. 423.	111
Langdon v. People, 133 Ill. 382.	165	Lyons v. Cook, 9 Ill. App. 543.	331
Langmaid v. Higgins, 129 Mass. 353.	686	Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 143, 22 L. R. A. 802, 506.	506
Langran v. New York Gaslight Co. 71 N. Y. 29.	787	M.	
Lanning v. Carpenter, 20 N. Y. 447.	192	McAunich v. Mississippi & M. R. R. Co. 20 Iowa, 338.	189
Lauder v. Chicago, 111 Ill. 291, 53 Am. Rep. 625.	527	McCallion v. Hibernia Sav. & L. Soc. 98 Cal. 442.	252
Lavalle v. St. Paul, M. & M. R. Co. 40 Minn. 249.	555	McCarthy v. Marsh, 5 N. Y. 265.	108
Law's Estate, 144 Pa. 499, 14 L. R. A. 103.	854	Macaulay v. Diemal Swamp Land Co. 2 Rob. (V. L.) 507.	180
Lawlor v. People, 74 Ill. 230.	468	McClure v. La Plata County Comrs. 19 Colo. 122.	848
Lawrence v. Fox, 20 N. Y. 238.	656	McClure v. Hayward, 43 U. S. 2 How. 608, 11.	723
Lawson v. Lawson, 1 P. Wms. 441.	444	t. Tode, 1 Kan. 148.	256
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385.	679	McCracken County v. Mercantile Trust Co. 84 Ky. 344.	72
Leach v. McFadden, 110 Mo. 584.	813	McCullough v. Moss, 5 Denio, 567.	57
t. People, 122 Ill. 420.	681, 683	McDade v. McDade, 29 Ind. 340.	696
LeCaux v. Eden, 2 Dougl. 594.	247, 248	McDermott v. Doyle, 11 Mo. 448.	243
Lee v. Green, 83 Ala. 491.	236	McDonald v. English, 85 Ill. 232.	140
t. Griffin, 1 Best & S. 272.	509, 510	t. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529.	230
Legh v. Hewitt, 4 East, 154.	701	McDonough v. Metropolitan R. Co. 137 Mass. 210.	233
Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9 36 Am. Dec. 111.	711	McElroy v. Mumford, 128 N. Y. 307.	256
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419.	387	McGlennan v. Margowski, 90 Ind. 150.	742
Leon v. Galceran, 78 U. S. 11 Wall. 185, 20 L. ed. 744.	248	McGlynn v. Billings, 16 Vt. 329.	173
Le Sasser v. Kennedy, 123 U. S. 521, 31 L. ed. 252.	453	McGowan v. Chicago & N. W. R. Co. (Wis.) 64 N. W. 891.	587
Lester v. Given, 8 Bush, 357.	655	McGregor v. Baylies, 19 Iowa, 43.	189
Levingson v. Lurgan Union, 2 Ir. C. L. Rep. 202.	229	t. Comstock, 3 N. Y. 408.	67
Levy v. McCuttee, 31 U. S. 8, 6 Pet. 102, 8 L. ed. 384.	107	McIntyre v. Sholtz, 121 Ill. 600.	69
t. People, 80 N. Y. 327.	206	McKain v. Love, 2 Hill, L. 508, 27 Am. Dec. 401.	496
Lewis v. Bruton, 74 Ala. 817, 49 Am. Rep. 816.	793	McKee v. Manice, 11 Cush. 358.	742
t. Cocks, 90 U. S. 23 Wall. 470, 23 L. ed. 71.	67	McKenzie v. State, Dickinson, 80 Ind. 547.	723
t. Lyman, 22 Pick. 437.	701	McKim v. Somers, 1 Penn. & W. 297.	662
t. McElvain, 16 Ohio, 347.	652	McKinney v. Memphis Overton Hotel Co. 12 Heisk. 104.	714
Lexington v. Butler, 81 U. S. 14 Wall. 268, 20 L. ed. 813.	537	t. Robinson, 84 Tex. 489.	854
Lioey v. Lacey, 7 Pa. 251, 47 Am. Dec. 513.	450	t. Springer, 8 Blackf. 506.	72
Lickbarrow v. Mason, 2 T. R. 70.	783	McKoin v. Cooley, 3 Humph. 561.	715
Liebermann v. Milwaukee, 89 Wis. 336.	217	McKoy v. McKowen, 23 Miss. 487, 59 Am. Dec. 264.	391
Life & F. Ins. Co. v. Mechanic F. Ins. Co. 7, Wend. 31.	536	McLean v. Fleming, 93 U. S. 258, 24 L. ed. 833.	140
Lillard v. Porter, 2 Head, 177.	712	t. Swanton, 13 N. Y. 535.	108
Lindemuller v. People, 33 Barb. 548.	682	McLellan v. United States, 1 Gall. 227.	244
Lindo v. Rodney, 2 Dougl. 613.	247	McMahon v. Allen, 22 How. Pr. 193.	257
Link v. Clemens, 7 Blackf. 479.	747	McManus v. Crickett, 1 East, 106.	196-198, 360
Lins v. Lenhardt, 127 Mo. 271.	813	McMerty v. Morrison, 62 Mo. 140.	73
Linsenbiger v. Gourley, 56 Pa. 166, 94 Am. Dec. 51.	447	McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.	367
Linthicum v. Ray, 78 U. S. 9 Wall. 241, 19 L. ed. 657.	698	McNell v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.	451
Lippincott v. Shaw Carriage Co. 25 Fed. Rep. 577.	507	McQueen's Appeal, 104 Pa. 585, 49 Am. Rep. 582.	791
Littell v. Zuntz, 2 Ala. 256, 36 Am. Dec. 415.	340	McReynolds v. Counts, 9 Gratt. 242.	842
Little Miami & C. X. R. Co. v. Dayton, 23 Ohio St. 510.	186		

Maenner v. Carroll, 46 Md. 212.....	575	Missouri P. R. Co. v. Brown (Tex.), 18 S. W. 670	857
Maguire v. Maguire, 7 Dana, 181.....	519	v. Humes, 115 U. S. 512, 29 L. ed. 463.....	558
Mallory v. Hanauer Oil Works, 86 Tenn. 566.....	420	Mitchell v. Bridgewater, 10 Cush. 411.....	175
v. Kirkpatrick (N. J.), 33 Atl. 205.....	548	Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256	510
Maltby v. Chicago & W. M. R. Co. 52 Mich. 110.	171	Mobile & G. R. Co. v. Alabama Midland R. Co.	
Manhattan L. Ins. Co. v. Forty-second Street		87 Ala. 501.....	310, 811
& G. S. F. R. Co. 139 N. Y. 146.....	778	Mobile & M. R. Co. v. McKellar, 59 Ala. 458.....	199
Mann v. People, 15 Hun, 155.....	884	Mobile L. Ins. Co. v. Brame, 98 U. S. 754, 24 L.	
Mapes v. People, 69 Ill. 523.....	664	ed. 580.....	719
Maple v. Beach, 43 Ind. 51.....	737	Moers v. Reading, 21 Pa. 208.....	114
Marbury v. Kentucky Union Land Co. 10 C. C.		Moffat v. Greenwalt, 90 Cal. 368.....	255
A. 303, 62 Fed. Rep. 335, 22 U. S. App.		Moll v. Benckler, 30 Wis. 584.....	697
267.....	419	Monkhouse v. Bedford, 17 Ves. Jr. 380.....	259
r. Madison, 5 U. S. 1 Cranch, 170, 2 L. ed. 71	480	Monmouth County Mut. Ins. Co. v. Hutchinsan,	
Marion v. Heinbach (Minn.) 64 N. W. 346.....	172	21 N. J. Eq. 107.....	606
Marr v. Bank of West Tennessee, 4 Coldw. 471.	597	Montgomery v. Maddox, 60 Ala. 181.....	194
Marsh v. Clark County Supers. 42 Wis. 502.....	218	v. Phillips, (N. J.) 31 Atl. 622.....	508
Marshall County Supers. v. Shenck, 72 U. S. 5		v. Townsend, 80 Ala. 499, 60 Am. Rep. 112	194
Wall, 772, 18 L. ed. 556.....	537	v. Townsend, 84 Ala. 478.....	194, 195
Marx v. Parker, 9 Wash. 473.....	353	v. Wright, 72 Ala. 411, 47 Am. Rep. 422.....	196
Maryville College v. Bartlett, 8 Baxt. 231.....	711	Moore v. Bowman, 47 N. H. 494.....	701
Marzett v. Williams, 1 Barn. & Ad. 415.....	558	v. Johnston, 87 Ala. 220.....	194
Mason v. Haile, 25 U. S. 12 Wheat. 370, 6 L. ed.		v. Luce, 29 Pa. 280, 72 Am. Dec. 629.....	73
680.....	75, 652	v. Roberts, 64 Wis. 538.....	697
r. Sainsbury, 3 Dougl. 61.....	606, 606	v. Sanford, 151 Mass. 286, 7 L. R. A. 151, 306,	307
Mathews v. Howard Ins. Co. 11 N. Y. 14.....	69	Morgan's L. & T. R. & S. S. Co. v. Texas C. R.	
Mathewson v. Phoenix Iron Foundry, 20 Fed.		Co. 137 U. S. 171, 34 L. ed. 625.....	406
Rep. 281.....	107	Morley v. Lake Shore & M. S. R. Co. 146 U. S.	
Maxmillan v. New York, 62 N. Y. 160, 20 Am.		162, 36 L. ed. 925.....	78, 723, 724, 726
Rep. 468.....	230, 233	Morrill v. Morrill, 5 N. H. 134.....	701
Maynard v. Hill, 125 U. S. 205, 31 L. ed. 657.....	519	Morris v. Hall, 41 Ala. 536.....	794
Mayou, <i>Ex parte</i> , 4 De G. J. & S. 664.....	471	v. People, 3 Denio, 381.....	663
Mayvee v. Avery, 18 Johns. 362.....	296	v. Powell, 125 Ind. 281, 9 L. R. A. 328.....	730
Meagher v. Storey County, 5 Nev. 244.....	402	Morris & E. R. Co. v. Central R. Co. 31 N. J. L.	
Megett v. Eau Claire, 81 Wis. 326.....	218	218.....	196
Meharry v. Meharry, 59 Ind. 257.....	67	Morrison v. Broadway & S. A. R. Co. 130 N. Y.	
Meier v. Thieman, 90 Mo. 483.....	613	166.....	338
Meincke v. Falk, 55 Wis. 427, 42 Am. Rep.		Morrow v. Nashville Iron & S. & C. Co. 87 Tenn.	
722.....	509, 510	262, 3 L. R. A. 37.....	430
Meinhard v. Youngblood, 37 S. C. 231.....	681	Morse v. Crawford, 17 Vt. 499, 44 Am. Dec. 349	69
Melick v. Knox, 44 N. Y. 676.....	123	Mortimore v. Mortimore, L. R. 4 App. Cas. 448	158
Melvin v. Martin, 18 R. I. 650.....	159	Mose v. Hastings & St. L. Gas Co. 4 Post. & F.	
Memphis v. Ensley, 6 Baxt. 553, 32 Am. Rep. 532		324.....	788
Memphis & C. R. Co. v. Gaines, 97 U. S. 697, 24 L.		Moseby v. Williamson, 5 Heisk. 286.....	597
ed. 1091.....	600	Moses v. Franklin Bank, 34 Md. 580.....	655
Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep.		Moses Taylor, The, v. Hammons ("The Moses	
683.....	471	Taylor"), 71 U. S. 4 Wall. 411, 8 L. ed.	
Meneely v. Meneely, 62 N. Y. 429, 20 Am. Rep.		307.....	248
489.....	138	Moulton v. Connell-Hall McLester Co. 93 Tenn.	
Merchants' Exch. Nat. Bank v. Commercial		377.....	601
Warehouse Co. 49 N. Y. 635.....	714	v. Robinson, 27 N. H. 550.....	701
Merchants' Nat. Bank v. State Nat. Bank, 77		Mt. Sterling & J. Turnp. Road Co. v. Looney,	
U. S. 10 Wall. 604, 19 L. ed. 1008.....	536, 538	1 Met. (Ky.) 550.....	536
Meriden Britannia Co. v. Parker, 39 Conn. 450,		Mount Zion Baptist Church v. Whitmore, 83	
12 Am. Rep. 401.....	139	Iowa, 147, 13 L. R. A. 198.....	144
Merrick v. Brainard, 38 Barb. 674.....	605	Mowrey v. Central City Railway, 51 N. Y. 666.....	961
Merriman v. Moore, 30 Pa. 78.....	656	Moyer's Appeal, 77 Pa. 498.....	453
Mersey Docks & Harbour Board v. Gibbs, L. R.		Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205	
1 H. L. 63.....	226, 228, 230	132.....	679
Meserve v. Clark, 115 Ill. 580.....	256	Mullan v. Wisconsin Central Co. 46 Minn. 474.....	551
Messmer v. McCray, 113 Mo. 382.....	813	Mullanphy Sav. Bank v. Schott, 135 Ill. 655.....	267
Messonnier v. Kauman, 3 Johns. Ch. 66.....	258, 259	Mulry v. Norton, 100 N. Y. 424, 53 Am. Rep. 206	320
Metcalfe v. Hetherington, 11 Exch. 257.....	227	Munn v. Burch, 25 Ill. 35.....	655
Metropolitan Bd. of Excise v. Barrie, 34 N. Y.		Murray v. Murray, 6 Or. 17.....	414
657.....	809	Mussey v. Eagle Bank, 9 Met. 313.....	538
Metropolitan City R. Co. v. Chicago, 96 Ill. 620.	111	Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591,	
Mettler v. Miller, 129 Ill. 630.....	328	29 L. ed. 997.....	69
Meyers v. Block, 120 U. S. 206, 30 L. ed. 642.....	249		
Michener v. Dale, 23 Pa. 63.....	445		
Mickey v. Burlington Ins. Co. 35 Iowa, 174, 14			
Am. Rep. 494.....	69		
Middlebrook v. Corwin, 15 Wend. 169.....	701		
Middleton v. Fowler, 1 Salk. 232.....	391		
William County v. Bateman, 54 Tex. 153.....	73		
Milburn v. Cedar Rapids, 12 Iowa, 256.....	184		
Milford v. Milford Water Co. 124 Pa. 610, 3 L. R.			
A. 122.....	747		
Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619.....	487		
r. Miller, 3 P. Wms. 365.....	444, 449		
r. Pence, 132 Ill. 149.....	328		
r. Thompson, 34 Mich. 10.....	656		
r. Washburn, 117 Mass. 371.....	697		
Milliken v. Brown, 1 Rawle, 301.....	173		
Ming Yue v. Coos Bay R. & E. R. & Nav. Co. 24			
Or. 362.....	482		
Minkey v. Hopeman, 87 Ill. 450, 29 Am. Rep. 63			
Minneapolis & St. L. R. Co. v. Beckwith, 129 U.			
S. 23, 32 L. ed. 585.....	132, 556		
Minnick Case, 6 C. C. A. 387, 37 Fed. Rep. 362, 13			
U. S. App. 530.....	325		
Minton v. Steele, 125 Mo. 181.....	320		
Mississippi v. Johnson, 71 U. S. 4 Wall. 498, 18 L.			
ed. 440.....	480		
Mississippi & M. R. Co. v. Ward, 67 U. S. 2 Black,			
485, 17 L. ed. 311.....	698		
Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 969.....	692		
31 L. R. A.			
		N.	
		Nance v. Gregory, 6 Lea. 348, 40 Am. Rep. 41.....	714
		Nashville Gaslight Co. v. Nashville, 8 Lea. 406	900
		Nason v. Directors of the Poor, 126 Pa. 445.....	853
		National Bank v. Sprague, 20 N. J. Eq. 13.....	471
		v. Sprague, 21 N. J. Eq. 530.....	471
		National Bank of Commerce v. Atkinson, 55	
		Fed. Rep. 465.....	536
		National Bank of the Republic v. Millard, 77 U.	
		S. 10 Wall. 152, 19 L. ed. 897.....	655
		v. Young, 41 N. J. Eq. 531.....	587
		National Furnace Co. v. Keystone Mfg. Co. 110	
		Ill. 427.....	588
		National Ins. Co. v. Webster, 83 Ill. 470.....	69
		National Sav. Bank v. Ward, 100 U. S. 195, 25 L.	
		ed. 621.....	862
		Naught v. Oneal, 1 Ill. 29, Appendix, Beecher's	
		Breese, 36.....	72
		Naylor v. Cox, 114 Mo. 232.....	320
		Nealis v. Dick, 72 Ind. 374.....	742
		Nebraska v. Iowa, 143 U. S. 359, 36 L. ed. 186.....	317
		Needham v. Allison, 24 N. H. 355.....	701
		Nelson v. Suffolk Ins. Co. 8 Cush. 477, 54 Am.	
		Dec. 778.....	69
		v. United States, Pet. C. C. 235.....	244
		Neuendorff v. Duryea, 69 N. Y. 557.....	692

Newby v. Oregon Cent. R. Co. 1 Deady, 810....	140
Newell v. Hemingway, 16 Cox. C. C. 604.....	514
New England, The, 8 Sumn. 495.....	254
New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 6 How. 344, 12 L. ed. 465	248
New Jersey Zinc Co. v. New Jersey Franklinite Co., 18 N. J. Eq. 322.....	711
Newman, <i>Ex parte</i> , 9 Cal. 502.....	692
New Orleans, The, 17 Blatchf. 216.....	244
New Orleans v. United States, 35 U. S. 10 Pet. 682, 9 L. ed. 575.....	317
New Orleans, J. & G. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356.....	391
New Providence v. McEnchion, 38 N. J. L. 339	853
Newton v. Mahoning County Comrs. 100 U. S. 599, 35 L. ed. 711.....	822
Newton Mig. Co. v. White, 42 Ga. 148.....	711
New York, R. 135 N. Y. 233.....	185
New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.....	782
New York C. & H. R. Co. v. Re, v. Metropolitan Gaslight Co. 63 N. Y. 326.....	310
New York, H. & N. R. Co. v. Boston, H. & E. R. Co. 36 Conn. 196.....	311
New York Protestant E. Public Schools, <i>Re</i> , 75 N. Y. 324.....	218
Niagara Falls Suspension Bridge Co. v. Bachman, 68 N. Y. 281.....	697
Niboyet v. Niboyet, L. R. 4 Prob. Div. 11.....	519
Nichols v. Walter, 37 Minn. 264.....	555
Nickels v. Griffin, 1 Wash. Terr. 374.....	252
Niehau v. Shepherd, 26 Ohio St. 40.....	318
Niles Waterworks v. Niles, 59 Mich. 812.....	746, 797
Nims v. Mount Hermon Boy's School, 160 Mass. 177, 22 L. R. A. 364.....	461
Noel v. Drake, 28 Kan. 265, 42 Am. Rep. 162.....	564
v. Ewing, 9 Ind. 37.....	519
Nokomis v. Harkey, 31 Ill. App. 107.....	628
Norcross v. Griffiths, 65 Wis. 599, 56 Am. Rep. 642.....	697
Norfolk v. Chamberlain, 89 Va. 196.....	387, 388
Norfolk City v. Ellis, 26 Gratt. 224.....	387, 389
North Chicago Street R. Co. v. Williams, 140 Ill. 275.....	333
Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755.....	324
Northern Railroad v. Concord & C. Railroad, 27 N. H. 183.....	311
Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.....	830
Norton v. Shelby County, 118 U. S. 425, 30 L. ed. 178.....	661
Norwich F. Ins. Co. v. Boomer, 52 Ill. 442, 4 Am. Rep. 618.....	605
Norwich Gaslight Co. v. Norwich City Gas Co. 25 Conn. 38.....	59
Novion v. Hallett, 16 Johns. 327.....	247

O.

O'Bear Jewelry Co. v. Volfer (Ala.) 28 L. R. A. 707.....	508
O'Connor v. Bucklin, 50 N. H. 589.....	164
Odd Fellows Mut. Aid. Assn. v. James, 63 Cal. 508, 40 Am. Rep. 107.....	854
Ogden v. Saunders, 25 U. S. 12 Wheat. 213, 6 L. ed. 606.....	76, 77, 723
Ohio & M. R. Co. v. Stratton, 78 Ill. 188.....	333
Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co. 11 Humph. 1, 53 Am. Dec. 742.....	600
Oil City Gas Co. v. Robinson, 99 Pa. 1.....	787
Old Colony R. Co. v. Framingham Water Co. 153 Mass. 561, 13 L. R. A. 332.....	185
Oliver v. Fowler, 22 S. C. 540.....	681
Olmstead v. Bach, 78 Md. 132, 22 L. R. A. 74.....	790
v. Camp, 36 Conn. 632, 89 Am. Dec. 221.....	306
Omaha F. Ins. Co. v. Maxwell, S. & R. Co. 38 Neb. 364.....	750
Omro Supers. v. Kalme, 39 Wis. 468.....	846
O'Neal v. Washington County School Comrs. 27 Md. 240.....	656
O'Neil v. American F. Ins. Co. 166 Pa. 72, 26 L. R. A. 715.....	116
Opinion of the Justices, 150 Mass. 592, 8 L. R. A. 467.....	461
Ordway v. Central Nat. Bank, 47 Md. 239, 28 Am. Rep. 455.....	711
Oregon, The, 158 U. S. 186, 39 L. ed. 943.....	720
O'Reilly v. Kingston, 114 N. Y. 439.....	218
Otis, <i>Re</i> , 101 N. Y. 585.....	603
Otis v. The Rio Grande, 1 Woods, C. C. 566.....	254
Ottoman Calvey Co. v. Dane, 95 Ill. 203.....	138, 139
Oury v. Goodwin (Ariz.), 26 Pac. 376.....	306
Overman Silver Min. Co. v. Corcoran, 15 Nev. 147.....	305

Owen v. Gibson, 74 Ga. 485.....	776
v. Sioux City, 91 Iowa, 190.....	189
Owens v. Owens, 100 N. C. 240.....	70

P.	
Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810.....	43
Page v. Allen, 58 Pa. 358, 98 Am. Dec. 272.....	730
Palmer v. Manhattan R. Co. 133 N. Y. 261, 16 L. R. A. 136.....	391
Palmyra, The, 25 U. S. 12 Wheat. 1, 6 L. ed. 531.....	244, 246
Parish v. Stone, 14 Pick. 198, 25 Am. Dec. 378.....	448
Parker v. State, Powell, 133 Ind. 178, 18 L. R. A. 567.....	729
v. Sterling, 10 Ohio, 357.....	652
Parnaby v. Lancaster Canal Co. 11 Ad. & El. 223.....	228
Parsons v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517.....	509
v. Winchell, 5 Cush. 592, 52 Am. Dec. 745.....	197
Paschall v. Hinderer, 28 Ohio St. 568.....	714
Pasewalk v. Bollman, 29 Neb. 522.....	765
Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78.....	391
Paston v. Adams, 49 Cal. 87.....	222
Pate v. Wright, 30 Ind. 476, 95 Am. Dec. 705.....	747
Pattee v. Adams, 37 Kan. 133.....	672
Patterson v. Marine Nat. Bank, 130 Pa. 419.....	553
v. Matthews, 3 Bibb, 80.....	38
v. Seaton, 70 Iowa, 689.....	471
Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443.....	687, 688
v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 357.....	43
Paulling v. Barron, 32 Ala. 9.....	81
Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637.....	387
Paxton & H. Irrig. Canal & L. Co. v. Farmers' & M. Irrig. & L. Co. 45 Neb. 884, 29 L. R. A. 853.....	53, 54
Pearce v. Germanic Ins. Co. ("The Lady Pike"), 96 U. S. 461, 24 L. ed. 672.....	244
v. Foote, 113 Ill. 228.....	534
v. Madison & I. R. Co. 62 U. S. 21 How. 441, 16 L. ed. 184.....	501
Pearson v. Allen, 151 Mass. 79.....	608
v. State, 66 Miss. 510, 4 L. R. A. 835.....	223
Peck v. Belknap, 130 N. Y. 384.....	401
v. Goodberlett, 109 N. Y. 180.....	550
v. James, 3 Head, 76.....	848
Peer v. Cookerow, 14 N. J. Eq. 361.....	259
Peik v. Chicago & N. W. R. Co. 94 U. S. 164, 24 L. ed. 97.....	51
Penfield v. Thayer, 2 E. D. Smith, 305.....	450
Penhallow v. Doane, 3 U. S. 3 Dall. 54, 1 L. ed. 507.....	247, 259
Penn v. Calhoun, 121 U. S. 251, 30 L. ed. 915.....	408
Pennie v. San Francisco City & County Super. Ct. 89 Cal. 31.....	252
Penniman's Case, 108 U. S. 714, 28 L. ed. 602.....	75
Pennoyer v. Neff, 96 U. S. 73, 24 L. ed. 573.....	519
Pennsylvania Coal Co. v. Kelly, 156 Ill. 9.....	334
Pennsylvania R. Co. v. Keokuk & H. Bridge Co. 131 U. S. 371, 33 L. ed. 157.....	501
People v. Andrews, 115 N. Y. 427, 6 L. R. A. 128.....	512
v. Arensberg, 105 N. Y. 123, 59 Am. Rep. 483.....	691
v. Arguello, 37 Cal. 524.....	797
v. Bangs, 24 Ill. 184.....	662
v. Bellett, 99 Mich. 151, 22 L. R. A. 698.....	691
v. Bradley, 33 N. Y. S. R. 562.....	513
v. Buckland, 13 Wend. 543.....	236
v. Budd, 117 N. Y. 1, 5 L. R. A. 559.....	831
v. Burr, 15 Cal. 358.....	114
v. Canal Board, 55 N. Y. 395.....	476
v. Chicago, 51 Ill. 17, 2 Am. Rep. 278.....	73
v. Dohring, 59 N. Y. 374, 17 Am. Rep. 549.....	469
v. Ewer, 141 N. Y. 129, 25 L. R. A. 794.....	691
v. Farrington, 119 Ind. 164, 4 L. R. A. 535.....	471
v. Fields, 58 N. Y. 514.....	476
v. Gillson, 109 N. Y. 589.....	694, 695
v. Home Ins. Co. 92 N. Y. 328.....	42
v. Ingersoll, 58 N. Y. 14, 17 Am. Rep. 178.....	476, 477, 478
v. Irvin, 21 Wend. 128.....	109
v. Luhrs, 7 Misc. 503.....	513
v. Marx, 99 N. Y. 377, 52 Am. Rep. 34.....	691, 692
v. Miner, 2 Lans. 396.....	477
v. Moses, 140 N. Y. 214.....	692, 694
v. Murray, 73 N. Y. 535.....	140
v. New York, 3 Johns. Cas. 79.....	371
v. North River Sugar Ref. Co. 121 N. Y. 582, 9 L. R. A. 33.....	420
v. Pacheco, 29 Cal. 213.....	482
v. Rozelle, 73 Cal. 84.....	295

People v. St. Louis, 10 Ill. 351	111	Pratt v. Albright, 9 Fed. Rep. 634	249
v. Sinell, 84 N. Y. S. 898	513	v. Castle, 91 Mich. 484	173
v. Soule, 75 Mich. 250, 2 L. R. A. 494	513	v. Gilbert, 8 Utah, 54	255
v. Stokes, 71 Cal. 283	415	v. Weymouth, 147 Mass. 245	176
v. The Governor, 29 Mich. 320, 18 Am. Rep. 89	490	Pray v. Wasdel, 146 Mass. 824	256
v. Tilton, 37 Cal. 614	352	Prehn v. Royal Bank, L. R. 5 Exch. 92	553
v. Underhill, 144 N. Y. 324	697	Prentice v. Dehon, 10 Allen, 353	73
v. Un Donz, 106 Cal. 63	698	v. Weston, 111 N. Y. 490	691
v. Weber, 81 Ill. 253	294	Preston v. Boston, 12 Pick. 14	331
People, <i>ex rel.</i> Atty. Gen., v. Maynard, 15 Mich. 463	662	v. Smith, 156 Ill. 359	534
Carter, v. Rice, 135 N. Y. 473, 16 L. R. A. 896	192	Prince Albert v. Strange, 2 De G. & S. 652, 1 Macn. & G. 25	293
Cummings, v. Head, 25 Ill. 325	729, 730	Prince of Wales Asso. Co. v. Palmer, 25 Beav. 605	286
Kemp, v. D'Oench, 111 N. Y. 359	355	Pritz, <i>Ex parte</i> , 9 Iowa, 30	69
Killeen, v. Angle, 109 N. Y. 564	400, 402	Proctor v. Stone, 158 Mass. 504	175
McCauley, v. Brooks, 16 Cal. 11	797	Providence Washington Ins. Co. v. Wager, 37 Fed. Rep. 599	25
Nash, v. Faulkner, 107 N. Y. 477	846	Prudential Assur. Co. v. Knott, L. R. 10 Ch. 142	235
Nechamcus, v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718	691	Pullman v. New York, 49 Barb. 57	746
Peabody, v. Chicago Gas Trust Co. 130 Ill. 268, 8 L. R. A. 487	419	Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L. R. A. 215	332
Williams, v. Dayton, 55 N. Y. 367	514	Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 39 L. ed. 499	53
Williams, v. Kingman, 24 N. Y. 559	697	Purcell v. Allemon, 22 Gratt. 742	655
Woodruff, v. Thompson, 155 Ill. 451	729	Purdy v. Hall, 134 Ill. 286	332
People's Pass. R. Co. v. Green, 56 Md. 84	353		
Peoria P. & J. R. Co. v. Peoria & S. R. Co. 66 Ill. 174	310	Q.	
Pepke v. Cronan, 155 U. S. 100, 39 L. ed. 84	679	Queen v. Williams, L. R. 9 App. Cas. 418	230
Percival v. Hickey, 18 Johns. 257, 9 Am. Dec. 210	248	Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 86, 36 L. ed. 693	603
Perkins v. Headley, 49 Mo. App. 562	173		
Perrott v. Shearer, 17 Mich. 48	605	R.	
Perry v. Carr, 44 N. H. 118	700	Ragland v. McFall, 137 Ill. 81	266, 273
v. Cheboygan, 55 Mich. 250	173	Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636	51
v. New Orleans, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 740	194	Raleigh & G. R. Co. v. Davis, 2 Dev. & B. L. 451	309
Petersburg v. Whitnack, 48 Ill. App. 663	528	Rankin's Appeal (Pa.), 2 L. R. A. 429	130
Peterson v. Brabrock Tailoring Co. 150 Ill. 290	505	Ransom v. Hays, 39 Mo. 445	714
Pettibone v. Hamilton, 40 Wis. 402	697	Rathborn v. Bradford, 1 Ala. 312	653
Phelps v. McNeeley, 96 Mo. 554, 27 Am. Rep. 378	471	Ray v. Stobbs, 28 Mo. 35	340
v. Racey, 60 N. Y. 10, 19 Am. Rep. 140	691	Raymond v. Sellick, 10 Conn. 484	445
v. The City of Panama, 1 Wash. Terr. 615	254	v. Thomas, 24 Ind. 478	676
Philadelphia v. Flanigen, 47 Pa. 21	746	Rea v. The Eclipse ("The Eclipse"), 135 U. S. 569, 34 L. ed. 309, 4 Dak. 218	242, 245, 250, 252, 254, 261
Philadelphia & R. R. Co. v. Hummell, 44 Pa. 375, 64 Am. Dec. 457	860	Read v. Dingess, 8 C. C. A. 388	387
v. Troutman, 11 W. N. C. 458	860	Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014	51, 54
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308	42	Redpath v. Rich, 3 Sandf. 79	104, 108
Phillips v. Watson, 68 Iowa 28	304	Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663	451
Phelps v. McFarlane, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 743	510	Reg. v. Lumley, L. R. 1 C. C. 196	414
Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L. R. A. 661	688	v. McNeill, L. Craw. & D. 80	467
Pickle v. Muse, 88 Tenn. 380, 7 L. R. A. 98	513	v. White, 2 Car. & K. 404	833
Piedmont Club v. Com. 57 Va. 541	219	Regent's Canal Ironworks Co., R. L. R. 3 Ch. Div. 411	406
Pier v. Fond du Lac, 38 Wis. 470	173	Reichwald v. Commercial Hotel Co. 106 Ill. 439	266, 273, 274
Pierce v. Pierce, 25 Barb. 253	220	Renier v. Dwelling House Ins. Co. 74 Wis. 94	116
v. Schutt, 20 Wis. 424	747	Respublica v. Cobbett, 3 U. S. 3 Dall. 467, 1 L. ed. 685	24
Pine Civil Twp. v. Huber Mfg. Co. 83 Ind. 121	387	Rex v. Harborne, 2 Ad. & El. 540	414
Pine Island Bd. of Edu. v. Jewell, 44 Minn. 427	159	v. O'Bonnell, 7 Car. & P. 138	166
Pittsburg, C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031	310	Reynburn v. Mitchell, 106 Mo. 385	471
Pinkham v. Blair, 67 N. H. 226	655	Reynolds v. Howe, 51 Conn. 619	712
Pittsburgh Junction R. Co.'s Appeal, 122 Pa. 511	726	v. Stevenson, 4 Ind. 612	747
Planters' Bank v. Merritt, 7 Heisk. 177	506	v. Stevens, 98 U. S. 145, 25 L. ed. 244	253
v. Sharp, 47 U. S. 6 How. 301, 12 L. ed. 447	858	Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54	471

Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79.	526	Sawin v. Mount Vernon Bank, 2 R. I. 382.	342
Rouch v. Brannon, 57 Miss. 490.	471	Sawyer, <i>Re</i> , 124 U. S. 200, 31 L. ed. 402, 285, 482.	483
Robb v. La Grange, 158 Ill. 21.	111	<i>Ex parte</i> , 88 U. S. 21 Wall. 235, 22 L. ed.	244
Roberts v. Corbin, 25 Iowa 315.	656	617.	244
<i>c. Ogle</i> , 30 Ill. 459, 83 Am. Dec. 201.	133	<i>v. Oakman</i> , 11 Blatchf. 65, Fed. Cas. No.	244
Robertson v. Fleming, 4 Mass. H. L. Cas. 167.	863	12, 408.	244
Robinson v. Harrison, 2 Tenn. Ch. 11.	842	<i>v. Twiss</i> , 26 N. H. 345.	700
<i>c. Holt</i> , 39 N. H. 557, 75 Am. Dec. 233.	701	Saylor v. Bushong, 100 Pa. 23.	655
<i>c. Schenck</i> , 102 Ind. 307.	738	<i>v. Daniels</i> , 37 Ill. 331, 87 Am. Dec. 250.	287
Robison v. Miner, 68 Mich. 557.	105	Schaffner v. Ehrman, 139 Ill. 109, 15 L. R. A. 134.	553
Robson v. Hamilton [1891] 2 Ch. 559.	448	Schatz v. Pfeil, 56 Wis. 429.	607
Rockport v. Walden, 54 N. H. 167, 30 Am. Rep.	73	Schedel's Estate, <i>Re</i> , 69 Cal. 241.	252
131.	730	Schenck v. Conover, 13 N. J. Eq. 31.	259
Rodd v. Hearst "The Lottawanna", 88 U. S.	862	Scherer v. Hopkins, 42 N. Y. S. R. 189.	256
21 Wall. 558, 22 L. ed. 654.	868	Schimmele v. Chicago, M. & St. P. R. Co. 34	556
Roddy v. Missouri P. R. Co. 104 Mo. 234, 12 L. R.	862	Minn. 218.	556
A. 746.	868	Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep.	471
Rodgers v. Parker, 9 Gray. 445.	401	530.	471
Rogers v. Buffalo, 123 N. Y. 173, 9 L. R. A. 579.	139	Schmisseur v. Beatrice, 147 Ill. 310.	414
<i>c. Rogers</i> , 53 Conn. 121, 55 Am. Rep. 78.	136	Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164.	534
<i>c. Talmor</i> , 97 Mass. 291.	328	Schoonmaker v. Gilmore, 102 U. S. 118, 26 L.	248
Rohn v. Harris, 130 Ill. 525.	553	ed. 95.	274
Rolla v. Steward, 14 C. B. 565.	283	Schroeder v. Walsh, 120 Ill. 403.	266
Roll v. Raguett, 4 Ohio, 400, 22 Am. Dec. 759.	471	Schubert v. J. R. Clark Co. 49 Minn. 335, 15 L.	221
Roop v. Herron, 15 Neb. 73.	553	R. A. 518.	285
Rose v. Douglass Twp. 32 Kan. 451.	711	Schuyler v. Curtis, 40 N. Y. S. R. 289.	285
<i>c. Roseburg & M. Turpp</i> , Co. 3 Watts. 46.	504	Schuyler's Case, 34 N. Y. 30.	778
Roseboom v. Whitaker, 132 Ill. 81.	63, 66	Schwuchow v. Chicago, 68 Ill. 444.	526
Ross v. Banta, 140 Ind. 120.	325	Scofield v. State Nat. Bank, 9 Neb. 316, 31 Am.	706
<i>c. Case</i> , 112 U. S. 382, 28 L. ed. 780.	215	Rep. 412.	672
<i>c. Lister</i> , 14 Tex. 469.	247	Scott v. Grover, 56 Vt. 495, 48 Am. Rep. 814.	555
<i>c. Rittenhouse</i> , 2 U. S. 2 Dall. 100, 1 L.	836	<i>v. Minneapolis</i> , St. P. & S. Ste. M. R. Co.	318
ed. 331.	144	42 Minn. 179.	555
Rothrock v. Perkinson, 61 Ind. 39.	509	Scrutton v. Brown, 4 Barn. & C. 485.	509
Rothmann v. Harding, 22 Neb. 375.	301, 302	Scudder v. Trenton Delaware Falls Co. 1 N. J.	306
Roundeau v. Wyatt, 2 H. Ill. 63.	506	Eq. 985, 23 Am. Dec. 759.	306
Rounds v. Delaware, L. & W. R. Co. 64 N. Y.	301, 302	Seaman v. Higgins, 2 N. J. Eq. 214, 34 Am. Dec.	300
129, 21 Am. Rep. 507.	506	300.	399
Rouse v. Merchants' Nat. Bank, 46 Ohio St. 463,	701	Sears v. Russell, 8 Gray. 86.	79
5 L. R. A. 378.	72	Seckler v. Delfs, 25 Kan. 159.	237
Ryder v. Hathaway, 21 Pick. 298.	691	Second Nat. Bank v. Wheeler, 75 Mich. 546.	546
<i>c. Wilson</i> , 41 N. Y. L. J. 9.	236	Seibert v. United States, 122 U. S. 284, 30 L. ed.	78
Ryers, <i>Re</i> , 72 N. Y. L. J. 28 Am. Rep. 88.	472	1161.	723
Rudolph v. Brewer, 56 Ala. 180.	192	Selm v. State, 55 Md. 566, 30 Am. Rep. 419.	513
Ruffin, <i>Ex parte</i> , 4 Ves. Jr. 119.	711	Seldon v. Hickock, 2 Cain. 156.	702
Rumsey v. People, 19 S. Y. 41.	498	Sessions v. Moseley, 4 Cush. 87.	448
Russell v. McLehann, 14 Pick. 69.	498	Sewall v. Fitch, 8 Cow. 215.	509
Russell v. Fubryn, 34 N. H. 218.	498	Seymour v. Jeffersonville, M. & I. R. Co. 126	185
Rutherford v. Hill (Or.) 17 L. R. A. 549.	498	Ind. 466.	249
		<i>v. Phillips & C. Constr. Co.</i> 7 Bias. 460.	471
		Shackelford v. Shackelford, 32 Gratt. 503.	783
		<i>v. Ward</i> , 3 Ala. 37, 36 Am. Rep. 435.	519
		Shafer v. Bushnell, 24 Wis. 372.	813
		Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep.	310
		270.	314
		Sharon's R. Co.'s Appeal, 122 Pa. 545.	304
		Sharp v. Johnson, 22 Ark. 79.	788
		Shaver v. Starrett, 4 Ohio St. 496.	339
		Shaw v. Merchants' Nat. Bank, 101 U. S. 557, 25	69
		L. ed. 892.	798
		<i>v. Potter</i> , 50 Mo. 281.	798
		<i>v. Robberds</i> , 6 Ad. & El. 75.	256
		<i>v. Statler</i> , 74 Cal. 258.	550
		<i>v. Tobias</i> , 3 N. Y. 188.	664
		Sheehan v. Flynn (Minn.) 26 L. R. A. 632.	70
		Sheehan's Case, 122 Mass. 445, 23 Am. Rep. 374.	410
		Shellenberger v. Ransom, 41 Neb. 631, 25 L. R.	482
		A. 565.	691
		Shepard v. Manhattan R. Co. 131 N. Y. 215.	256
		Sheridan v. Colvin, 78 Ill. 247.	679
		Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819.	778
		Sherman v. Bellows, 24 Or. 553.	691
		Shovel v. State, 10 Ark. 259.	256
		Shreffler v. Nadelhoffer, 133 Ill. 555.	471
		Siebold, <i>Ex parte</i> , 100 U. S. 371, 25 L. ed. 717.	679
		Sigler v. Knox County Bank, 8 Ohio St. 511.	471
		Silk v. Prime, 2 White & T. Lead. Cas. Eq. pt.	472
		1, p. 353.	173
		Simmons v. Almy, 103 Mass. 35.	832
		<i>v. Chicago & T. R. Co.</i> 110 Ill. 340.	421
		Simpson v. Lord Howden, 8 Myl. & C. 99.	247
		<i>v. Nadau</i> , N. C. Conf. Rep. 115, 2 Am.	830
		Dec. 634.	528
		Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496.	256
		Sipe v. Murphy, 49 Ohio St. 536, 17 L. R. A. 184.	774
		Skellinger v. Yandes, 12 Wend. 308.	780
		Skipwith v. Strother, 3 Rand. (Va.) 214.	449
		Slauson v. Racine, 13 Wis. 398.	711
		Slaymaker v. Bank of Gettysburg, 10 Pa. 373.	247
		Slee v. Bloom, 5 Johns. Ch. 366.	788
		Smart v. Wolff, 3 T. R. 336.	713
		Smith v. Boston Gaslight Co. 129 Mass. 818.	797
		<i>v. Chicago, M. & St. P. R. Co. (Iowa)</i> 53 N.	50
		W. 128.	713
		<i>v. Clay</i> , 3 Bro. Ch. 640.	797
		<i>v. Dedham</i> , 144 Mass. 177.	

Smith v. East End Street R. Co. 87 Tenn. 636.....	607	State v. McLaughlin, 15 Kan. 228.....	478
v. Hess, 91 Ind. 424.....	742	v. Medbery, 7 Ohio St. 523.....	797
v. Janesville, 28 Wis. 291.....	114	v. Mercer, 28 Iowa, 405.....	513
v. Lynch, 29 Ohio St. 261.....	663	v. Miller, 26 Iowa, 26.....	136
v. Morse, 20 La. Ann. 220.....	533	v. Mines, 38 W. Va. 125.....	183
v. Nashville & D. R. Co. 91 Tenn. 221.....	713	v. Moore, 74 Mo. 413, 41 Am. Rep. 322.....	845, 853
v. Rochester, 38 Hun. 612.....	411	v. Mosley, 31 Kan. 355.....	296
v. St. Lawrence County Supers. 148 N. Y. 187.....	507	v. Neils, 108 N. C. 787, 12 L. R. A. 412.....	513
v. St. Louis Mut. L. Ins. Co. 2 Tenn. Ch. 737.....	497	v. Nevlin, 19 Nev. 162.....	845
v. St. Louis Mut. L. Ins. Co. 6 Lea, 569.....	599	v. Nichols, 78 Iowa, 745.....	136
v. Silver Valley Min. Co. 64 Md. 85, 54 Am. Rep. 783.....	487	v. O'Brien, 47 Ohio St. 494.....	609
v. Skeary, 47 Conn. 47.....	506	v. O'Neill, 24 Wis. 149.....	114
v. Stafford, Hob. 218a.....	814	v. Rollins, 8 N. H. 550.....	107
v. State, 21 Ark. 204.....	140	v. Salline County Ct. 51 Mo. 350.....	478, 479, 482
v. Surman, 9 Barn. & C. 574.....	509	v. Sarratt, 14 Rich. L. 29.....	681
Smith's "The Challenger," 2 Wash. Terr. 447.....	257	v. Smith, 16 Lea, 697.....	844
Smith's Estate, Re. 51 Minn. 316.....	427	v. Sullivan, 9 Mont. 170.....	296
Surr v. State, 105 Ind. 125.....	664	v. Walsen, 17 Colo. 170.....	649
Snellgrove v. Bailly, 3 Atk. 214.....	449, 450	v. Ware, 13 Or. 983.....	477
Snider's Son's Co. v. Troy, 91 Ala. 224, 11 L. R. A. 515.....	488	v. White, 10 Wash. 611.....	296
Snow v. Holmes, 64 Cal. 232.....	252	v. Wilson, 28 Minn. 52.....	634
Snowball, <i>Ex parte</i> , L. R. 7 Ch. 584.....	471	v. Young, 46 N. H. 206, 38 Am. Dec. 212.....	834
Snyder v. Willey, 38 Mich. 433.....	233	State, <i>ex rel.</i> Atherton, v. Sherwood, 15 Minn. 221 (Gil. 172), 2 Am. Rep. 116.....	855, 370, 371
Society for Savings v. Coite, 73 U. S. 6 Wall. 594, 18 L. ed. 897.....	42	Atty. Gen. v. Cunningham, 63 Wis. 90, 17 L. R. A. 145.....	729
South & North Ala. R. Co. v. Donovan, 84 Ala. 141.....	859	Atty. Gen. v. Cunningham, 61 Wis. 440, 15 L. R. A. 561.....	729
Southern Exp. v. Fitzner, 59 Miss. 759, 34 Am. Rep. 494.....	391	Atty. Gen. v. Johnson, 30 Fla. 433, 18 L. R. A. 410.....	852, 370, 371
South Nashville Street R. Co. v. Morrow, 87 Tenn. 406, 2 L. R. A. 853.....	600	Bacon, v. Baltimore & P. R. Co. 59 Md. 482.....	860
Southwestern Tele. & Teleph. Co. v. Robinson, 1 C. C. A. 684, 50 Fed. Rep. 813, 16 L. R. A. 545, 2 U. S. App. 205.....	576	Bell v. St. Louis Club, 26 L. R. A. 573, 125 Mo. 308.....	513, 514
Southworth v. Smith, 27 Conn. 355, 71 Am. Dec. 72.....	701	Blasbee, v. Board of State Canvassers, 17 Fla. 29.....	370
Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68.....	164	Central Type Foundry, v. Moore, 72 Mo. 235.....	339, 341
Spears v. Burton, 31 Miss. 547.....	414	Columbia Club, v. McMaster, 35 S. C. 1.....	513
Specht v. Com. 8 Pa. 312, 49 Am. Dec. 518.....	691	Elliott, v. Bemenderfer, 96 Ind. 374.....	352
Speir v. Utrecht, 121 N. Y. 429.....	698	Everding, v. Simon, 20 Or. 365.....	352
Spencer v. Merchaut, 125 U. S. 345, 31 L. ed. 763.....	387	George, v. Aiken, 42 S. C. 222, 26 L. R. A. 345.....	738
Springer v. Walters, 139 Ill. 419.....	140	German Sav. & L. Soc. v. Sears (Or.) 13 Pac. 482.....	723, 724
Sprugfield v. Connecticut River R. Co. 4 Cush. 71.....	185	Jones, v. Oates, 86 Wis. 634.....	356, 371
v. Sale, 127 Ill. 359.....	218	Law, v. Saxon, 25 Fla. 792.....	370
Staigt v. State, 39 Ohio St. 496.....	702	Loring, v. Benedict, 15 Minn. 196 (Gil. 152).....	352
Stall v. Wilbur, 77 N. Y. 158.....	666	McLoruan, v. Ryno, 49 N. J. L. 603.....	338
Star v. Pease, 8 Conn. 543.....	519	Mead, v. Dunn, Minor (Ala.) 46, 12 Am. Dec. 25.....	371
State v. Adams, 71 Mo. 620.....	792	Meckling, v. Jaynes, 19 Neb. 161.....	370
v. Addington, 77 Mo. 117.....	819	Memphis, v. Butler, 86 Tenn. 614.....	710
v. Alling, 12 Ohio, 16.....	663	Morrison, v. Morris, 103 Ind. 161.....	742
v. Anderson, 5 Kan. 115.....	482	Newark, v. Essex Club, 53 N. J. L. 99.....	513
v. Blake, 2 Ohio St. 147.....	65	Richards, v. Hammer, 42 N. J. L. 435.....	190
v. Bloom, 17 Wis. 521.....	664	Snyder, v. Newman, 91 Mo. 445.....	356
v. Brooks, 39 La. Ann. 817.....	664	Stevenson, v. Tufty, 20 Nev. 427.....	403
v. Butler, 15 Lea. 104.....	711	State Bank v. Coquillard, 6 Ind. 232.....	747
v. Carroll, 38 Conn. 499, 9 Am. Rep. 409.....	664	State Board of Comrs. v. Boice, 140 Ind. 506.....	738
v. Chicago, M. & St. P. R. Co. (Iowa) 55 N. W. 331.....	51	State Mut. F. Ins. Co. v. Updegraff, 21 Pa. 518.....	605
v. Chicago, M. & St. P. R. Co. 38 Minn. 298.....	116	State Tax on Railway Gross Receipts, 82 U. S. 15 Wall. 234, 21 L. ed. 164.....	42
v. Choate, 11 Ohio, 511.....	563	Steele v. Sanchez, 72 Iowa, 65.....	318
v. Clarke, 38 N. H. 324, 68 Am. Dec. 723.....	837	Steele v. Hoagland, 39 Ill. 234.....	273
v. Clarke, 73 N. C. 255.....	853	Stein v. Swensen, 44 Minn. 218.....	714
v. Croft, 24 Ark. 550.....	846	Steinbach v. Relief F. Ins. Co. 77 N. Y. 498, 38 Am. Rep. 655.....	791
v. Cunningham, 81 Wis. 440, 15 L. R. A. 561.....	478, 479, 481	Stephens & C. Transp. Co. v. Western U. Tele. Co. 8 Ben. 502, Fed. Cas. No. 13, 371.....	576
v. Curators State University, 57 Mo. 178.....	478	Stephenson v. King, 81 Ky. 425, 50 Am. Rep. 172.....	449
v. Dayton & S. E. R. Co. 36 Ohio St. 434.....	477, 478	v. Sloan, 65 Miss. 407.....	223
v. Dollaselline, 1 McCord, L. 43.....	371	Sterl v. Sterl, 2 Ill. App. 223.....	162
v. Douglas County Road Co. 10 Or. 201.....	481	Stevens v. Loranport, 76 Ind. 498.....	67
v. Easton Social. L. & M. Club, 73 Md. 97, 10 L. R. A. 64.....	513	Stewart v. Polk County Supers. 30 Iowa, 9, 1 Am. Rep. 238.....	132, 184
v. Fuller, 34 N. J. L. 227.....	385	v. Stewart, 78 Me. 548, 57 Am. Rep. 822.....	606
v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863.....	132	Stewart's Estate, 147 Pa. 383.....	158
v. Granville, 45 Ohio St. 264.....	667	Stipp v. Brown, 2 Ind. 647.....	72
v. Guenther, 87 Wis. 675.....	220	Stokes v. Mackay, 140 N. Y. 640.....	778
v. Harper, 6 Ohio St. 607, 67 Am. Dec. 363.....	845, 853	Stone v. Chisolm, 113 U. S. 302, 28 L. ed. 991, 600, 601 v. Mississippi, 101 U. S. 717, 25 L. ed. 1079.....	809, 871
v. Hatcher, 11 Rich. L. 525.....	681	v. Small, 54 Vt. 498.....	371
v. Hibernian Sav. & L. Asso. 8 Or. 396.....	481	Stoner v. Pennsylvania Co. 98 Ind. 384, 49 Am. Rep. 784.....	393
v. Horacek, 41 Kan. 87, 3 L. R. A. 687.....	513	Stoughton v. Leigh, 1 Taunt. 402.....	701
v. Houston, 78 Ala. 576, 56 Am. Rep. 59.....	844, 854	Stover v. Mitchell, 45 Ill. 213.....	331
v. Hudson, 29 N. J. L. 104.....	218	Strang, <i>Ex parte</i> , 21 Ohio St. 610.....	664, 667, 668
v. Jersey City, 38 N. J. L. 410.....	218	Stratton v. Allen, 16 N. J. Eq. 229.....	506
v. Jones, 29 S. C. 201.....	497	Strong v. Daniel, 5 Ind. 348.....	403
v. King, 37 Iowa, 462.....	190	Strout v. Pennell, 74 Me. 262.....	846
v. Leatherman, 38 Ark. 81.....	191	Stuart v. Palmer, 74 N. Y. 191, 30 Am. Rep. 289.....	386, 388
v. Littell, 45 La. Ann. 655.....	295	Studtill v. State, 7 Ga. 2.....	296
v. Lockyer, 95 N. C. 683, 50 Am. Rep. 257.....	513	Sturge, <i>Re</i> , and Great Western R. Co. L. R. 19 Ch. Div. 444.....	159
v. McBride, 4 Mo. 306, 29 Am. Dec. 636.....	820	Sturges v. Crowninshield, 17 U. S. 4 Wheat. 122, 4 L. ed. 529.....	75, 723
v. McCauley, 15 Cal. 429.....	797		
v. McFetridge, 84 Wis. 473, 20 L. R. A. 233.....	854		

Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718...	408	Todd v. Rowley, 8 Allen, 51.....	176
Superior v. Norton, 12 C. C. A. 460, 63 Fed. Rep. 357, 24 U. S. App. 59.....	746	Toland v. Sprague, 37 U. S. 12 Pet. 330, 9 L. ed. 1063.....	661
Sutton v. Hayden, 62 Mo. 101.....	813	Torrence v. Shedd, 156 Ill. 194.....	533
Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. Rep. 496.....	268	Tourne v. Lee, 8 Mart. N. S. 543, 20 Am. Dec. 290.....	133
Swain v. Russell, 10 Ind. 438.....	896	Towers v. Osborne, 1 Strange, 506.....	508
Swan, <i>Ex parte</i> , 7 C. B. N. S. 447.....	724	Town v. Bank of River Basin, 2 Dougl. (Mich.) 530.....	505
Swan v. North British Australasian Co. 2 Hurlst. & C. 181.....	785	Townley v. Chicago, M. & St. P. R. Co. 53 Wis. 636.....	861
Swanson v. Griffin, 68 Miss. 319.....	282	Treadwell v. Salisbury Mfg. Co. 7 Gray, 368, 66 Am. Dec. 490.....	419, 710
Swanston v. James, 63 Ill. 165.....	331	Treasurer v. Commercial Coal Min. Co. 23 Cal. 390.....	562
Swift v. Smith, 65 Md. 423, 57 Am. Rep. 366.....	712	Treat v. Jones, 28 Conn. 334.....	293
v. Staten Island Rapid Transit R. Co. 123 N. Y. 645.....	890	Troy v. Cape Fear & Y. V. R. Co. 99 N. C. 298.....	860
Swinburne, <i>Re</i> , 16 R. I. 208.....	159	Troy & R. R. Co. v. Boston, H. T. & W. R. Co. 86 N. Y. 123.....	410
Sydney, <i>The</i> , 47 Fed. Rep. 290.....	244	Tuck v. Priestler, L. R. 19 Q. B. Div. 629.....	285
T.		Tucker v. Ferguson, 89 U. S. 22 Wall. 527, 22 L. ed. 805.....	831
Tackaberry v. Tackaberry, 101 Mich. 102.....	161	Turner v. Conkey, 132 Ind. 243, 17 L. R. A. 509.....	742
Taggard v. Innes, 12 U. C. P. 77.....	69	Twining v. Elgin, 38 Ill. App. 361.....	527
Talbot v. Hudson, 16 Gray, 417.....	304, 306	Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329.....	298
Talmage v. Peil, 7 N. Y. 328.....	419	U.	
Tanner v. Louisville & N. R. Co. 60 Ala. 621.....	372	Ugla v. West End Street R. Co. 160 Mass. 351.....	576
Tate v. Hilbert, 2 Ves. Jr. 111.....	444	Ungley v. Ungley, L. R. 4 Ch. Div. 73.....	571, 572, 576
Taylor v. Beech, 1 Ves. Sr. 287.....	814	Union, <i>The</i> , 4 Blatchf. 90.....	246
v. Branham, 35 Fla. 297.....	487	Union Bank v. State, 9 Verg. 490.....	600
v. Carpenter, 11 Paige, 297, 42 Am. Dec. 114.....	139	Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 34 L. ed. 341.....	603
v. Delaware & H. Canal Co. 113 Pa. 162, 57 Am. Rep. 446.....	860	v. Oceana County Sav. Bank, 80 Ill. 212, 22 Am. Rep. 185.....	655
v. Shrine, 35 Treadway, Const. 696.....	663	Union P. R. Co. v. Artist, 9 C. C. A. 14, 60 Fed. Rep. 365, 23 L. R. A. 581.....	232, 233
v. Sullivan, 45 Minn. 309, 11 L. R. A. 272.....	362	v. Dodge County Comrs. 98 U. S. 541, 25 L. ed. 196.....	331
v. The Royal Saxon, 1 Wall. Jr. 311.....	247	Union School Twp. v. First Nat. Bank, 102 Ind. 464.....	747
Taylor Dist. Twp. v. Morton, 37 Iowa, 550.....	853	United Electric R. Co. v. Shelton, 89 Tenn. 423.....	572, 592
Tazewell v. Saunders, 13 Gratt. 354.....	714	United Exp. Co. v. Ellyson, 28 Iowa, 370.....	149
Teal v. Walker, 111 U. S. 242, 28 L. ed. 415.....	723	United States v. Adams, 74 U. S. 7 Wall. 463, 19 L. ed. 249.....	173
Teats v. Flanders, 118 Mo. 669.....	813	v. Ames, 98 U. S. 85, 25 L. ed. 295.....	244
Teft v. Teft, 3 Mich. 67.....	521	v. Beebe, 127 U. S. 338, 32 L. ed. 121.....	192
Templeton v. Kraner, 24 Ohio St. 554.....	661	v. Biens (N. M.) 42 Pac. 70.....	453
Tennessee Club v. Dwyer, 11 Lea, 462, 47 Am. Rep. 296.....	513	v. Bissell, 8 Mont. 20.....	253
Tenney v. Foote, 4 Ill. App. 594.....	534	v. Briggs, 46 U. S. 5 How. 209, 12 L. ed. 119.....	398
v. Foote, 96 Ill. 99.....	534	v. Chase, 135 U. S. 255, 34 L. ed. 117.....	398
Terre Haute & I. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168.....	393	v. Childs, 79 U. S. 12 Wall. 232, 20 L. ed. 360.....	173
Terre Haute & S. E. R. Co. v. Rodel, 87 Ind. 128, 46 Am. Rep. 164.....	194	v. Dashiell, 71 U. S. 4 Wall. 182, 18 L. ed. 319.....	845
Territory v. Guthrie, 2 Idaho, 996.....	296	v. Hall, 181 U. S. 51, 33 L. ed. 67.....	396
v. McAndrews, 3 Mont. 158.....	297	v. Haynes, 2 McLean, 155.....	254
Territory, Woods, v. Oklahoma, 2 Okla. 158.....	797	v. Haytian Republic, <i>The</i> ("The Haytian Republic," 154 U. S. 118, 38 L. ed. 930.....	246
Terry v. Anderson, 96 U. S. 623, 24 L. ed. 565.....	76, 723	v. Insley, 130 U. S. 293, 32 L. ed. 968.....	192
Texarkana Gas & E. L. Co. v. Orr, 59 Ark. 215.....	571	v. Keebler, 76 U. S. 9 Wall. 39, 19 L. ed. 574.....	845
Texas & P. R. Co. v. Minnick, 10 C. C. A. 1, 61 Fed. Rep. 635.....	323	v. Kacher, 134 U. S. 625, 33 L. ed. 1081.....	398
v. Richards, 68 Tex. 375.....	279, 281	v. Morgan, 52 U. S. 11 How. 154, 13 L. ed. 643.....	845
Texas Exp. Co. v. Texas & P. R. Co. 6 Fed. Rep. 497.....	54	v. Olney, 1 Abb. (C. S.) 275.....	836
Thales, <i>The</i> , 3 Ben. 327, Fed. Cas. No. 13, 855.....	246	v. Perrin, 131 U. S. 56, 33 L. ed. 89.....	398
Thatcher v. Humble, 67 Ind. 444.....	67	v. Prescott, 44 U. S. 3 How. 599, 11 L. ed. 739.....	845
v. Morris, 11 N. Y. 487.....	839	v. Preston, 23 U. S. 8 Pet. 57, 7 L. ed. 601.....	259
Thomas v. Lewis, 89 Va. 1, 18 L. R. A. 170.....	461	v. Quincy, 71 U. S. 4 Wall. 535, 18 L. ed. 463.....	652, 733
v. Poole, 7 Gray, 83.....	698	v. Reilly, 131 U. S. 58, 33 L. ed. 75.....	398
v. Richmond, 79 U. S. 12 Wall. 349, 20 L. ed. 453.....	471	v. Thomas, 82 U. S. 15 Wall. 337, 21 L. ed. 89.....	846, 852
v. Western U. Teleg. Co. 100 Mass. 166.....	569, 576	v. Throckmorton, 98 U. S. 70, 25 L. ed. 96.....	482
v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 650.....	420	v. Watts, 1 N. M. 553.....	845
v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.....	222, 587	United States, <i>ex rel</i> , Riggs v. Johnson County Supers. 73 U. S. 6 Wall. 187, 18 L. ed. 774.....	338
Thompson v. Hopper, 6 El. & Bl. 191.....	792	United States Bank v. Stearns, 15 Wend. 314.....	487
v. Howard, 31 Mich. 309.....	792	United States Distilling Co. v. Chicago, 112 Ill. 19.....	523, 528
v. Read, 41 Iowa, 43.....	73	University v. Tucker, 31 W. Va. 621.....	130
v. Stacy, 10 Verg. 493.....	843	V.	
v. Township 16, 30 Ill. 99.....	853	Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416.....	745, 797
Thomson v. Holt, 62 Ala. 497.....	371	Van Alstyne v. Cook, 25 N. Y. 499.....	504
Thomson-Houston Electric Light Co. v. Henderson Electric & G. L. Co. (N. C.) 21 S. E. 561.....	506	Van Beil v. Prescott, 62 N. Y. 630.....	139
Thorpe v. Brumfitt, L. R. 8 Ch. App. 650.....	636	Vander's Estate, <i>Re</i> , 121 Pa. 201, 12 L. R. A. 227.....	843
Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682.....	533	Vandor v. Roach, 73 Cal. 614.....	451
Thruswell v. Handyside, L. R. 20 Q. B. Div. 359.....	587	Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Rep. 346.....	672
Tillinghast v. Merrill, 77 Hun. 481.....	854		
v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621.....	449		
Tilton v. Coffield, 93 U. S. 163, 23 L. ed. 853.....	423		
Timberlake v. Parish, 5 Dana, 352.....	843		
Timm v. Harrison, 109 Ill. 593.....	526		
Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.....	175		
Tippling v. Clarke, 2 Harv. 383.....	298		
Titus v. Cairo & F. R. Co. 37 N. J. L. 98.....	536		
Tobey v. Robinson, 99 Ill. 222.....	565		
Tod v. Kentucky Union Land Co. 57 Fed. Rep. 47.....	537		

Vanzant v. Waddell, 2 Yerg. 200.....	652	Westerlo v. DeWitt, 36 N. Y. 340, 98 Am. Dec. 517.....	450
Vaughan v. State, 56 Ark. 373.....	460	Western Nat. Bank v. Armstrongs, 152 U. S. 846, 38 L. ed. 470.....	587
Vickery v. Hendricks County Comrs. 134 Ind. 554.....	737	Western R. Co. v. Alabama G. R. Co. (at present term).....	194
Vincent v. Vincent, 1 Heisk. 333.....	842	Western U. Teleg. Co. v. Eyser, 91 U. S. 496, 23 L. ed. 377.....	571
Virgin, The, v. Vyfhins, 83 U. S. 8 Pet. 538, 8 L. ed. 1036.....	244	v. Eyser, 2 Colo. 163.....	576
Virgo, The, 13 Blatchf. 225, Fed. Cas. No. 16, 976.....	246	v. Philadelphia, 21 Am. & Eng. Corp. Cas. 40 and note (Pa.) 12 Atl. 144.....	809
Vischer v. Yates, 11 Johns. 25.....	738	West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252.....	713
Voglesong v. State, 9 Ind. 112.....	691	West Wisconsin R. Co. v. Trempealeau County Supers, 93 U. S. 595, 23 L. ed. 814.....	831
Voight v. Wright, 141 U. S. 63, 36 L. ed. 638.....	826	Whaley v. Norton, 1 Vern. 483.....	421
Von Phul v. Hammer, 29 Iowa, 222.....	189	Wharton v. Barker, 4 Kay & J. 483.....	159
Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750.....	139	Wheaton v. Peters, 38 U. S. 8 Pet. 659, 8 L. ed. 1080.....	447
Vrooman v. Lawyer, 13 Johns. 389.....	672	Wheeler v. Jackson, 137 U. S. 245, 34 L. ed. 659.....	219
W.			
Wabash R. Co. v. Brown, 152 Ill. 484.....	338	v. Northern Colorado Irrig. Co. 10 Colo. 582.....	880
Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244.....	51	Wheelock v. Moulton, 15 Vt. 519.....	712
Waddle v. Terry, 4 Coldw. 51.....	844	White v. Multnomah County Comrs. 13 Or. 317, 57 Am. Rep. 20.....	476
Wade v. Wortsman, 29 Fed. Rep. 754.....	249	v. Schuyler, 1 Abb. Pr. N. S. 300.....	562
Wagener v. Booker, 81 S. C. 375.....	683	v. Washington, 5 Gratt. 645.....	774
Wahle v. Reinbach, 76 Ill. 322.....	111	Whiteball v. Crawford, 67 Ind. 84.....	67
Wait v. Nashua Armory Asso. 66 N. H. 561, 14 L. R. A. 366.....	586	Whitehurst v. Dey, 90 N. C. 542.....	73
Walcott v. Swampscott, 1 Allen, 101.....	175	Whitfield v. Longest, 6 Ired. L. 271.....	183
Walker v. Gregory, 36 Ala. 184.....	794	Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 167, 3 Am. Rep. 30.....	185
v. Herron, 22 Tex. 55.....	672	Whitney v. State, 10 Ind. 404.....	898
v. Matland, 5 Barn. & Ald. 171.....	69	Whitton v. Smith, Freem. Ch. (Miss.) 231.....	471
v. Miller, 59 Fed. Rep. 671.....	508	Whitwell v. Warner, 20 Vt. 426.....	505
Wallace v. San José, 29 Cal. 181.....	746	Whyte v. Nashville, 2 Swan, 364.....	843
Walla Walla, The, 44 Fed. Rep. 4.....	245	Wiggins v. Chicago, 68 Ill. 572.....	528
Walsh v. Chesapeake & O. Canal Co. 59 Md. 427.....	790	Wiggins Ferry Co. v. East St. Louis, 102 Ill. 560.....	525-527
v. Sexton, 55 Barb. 251.....	450	Wilder v. Campbell (Idaho) 48 Pac. 677.....	726
v. State, Soules (Ind.) 41 N. E. 65.....	737	Wilkinson v. Bauerle, 41 N. J. Eq. 640.....	508, 509
Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544.....	387	Willan v. Willan, 16 Ves. 31.....	259
Walworth County Bank v. Farmers' Loan & T. Co. 14 Wis. 325.....	586	Willeford v. Watson, 12 Heisk. 476.....	849
Wanata, The, v. Avery ("The Wanata"), 95 U. S. 8, 600, 24 L. ed. 461.....	244, 254	William H. Webb, The, v. Barling ("The Webb"), 81 U. S. 14 Wall. 406, 20 L. ed. 774.....	244, 246
Wappello County Comrs. v. Sinnaman, 1 G. Greene, 413.....	173	Williams v. Guile, 117 N. Y. 343, 6 L. R. A. 366.....	447
Ward v. Maryland, 79 U. S. 12 Wall. 418, 20 L. ed. 449.....	381	v. Hays, 143 N. Y. 442, 23 L. R. A. 153.....	69
v. School Dist. No. 15, 10 Neb. 293.....	863	v. Mills County, 71 Iowa, 367.....	140
v. Turner, 1 White & T. Lead. Cas. in Eq. 1217.....	447	v. Pearson, 38 Ala. 299.....	130
v. Turner, 2 Vee. Sr. 431.....	444, 447, 449	v. Planters' Ins. Co. 57 Miss. 759, 34 Am. Rep. 494.....	391, 705
Warner v. Meyers, 4 Or. 72.....	355, 370	v. Prince of Wales Life etc. Assur. Co. 23 Beav. 338.....	286
v. Mower, 11 Vt. 380.....	505	v. Weaver, 100 U. S. 547, 25 L. ed. 708.....	438
v. Smith, 8 Conn. 14.....	691	Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222.....	130
Warren v. First Nat. Bank, 149 Ill. 9, 25 L. R. A. 746.....	266, 274	v. Louisville Industrial School, 95 Ky. 251, 23 L. R. A. 200.....	231
Warwick v. State, 25 Ohio St. 21.....	696	Williamsport v. Kent, 14 Ind. 306.....	730
Washburn v. Great Western Ins. Co. 114 Mass. 175.....	791	Willis v. Bremner, 60 Wis. 622.....	471
v. Green ("Richardson v. Green"), 133 U. S. 30, 33 L. ed. 516.....	268	Willis v. Manufacturers' Nat. Gas Co. 130 Pa. 222, 5 L. R. A. 603.....	676
Washington & I. R. Co. v. Cœur d'Alene R. & Nav. Co. (No. 1), 180 U. S. 77, 40 L. ed. 346.....	731	Wilson v. Bell ("The Lottawanna"), 87 U. S. 20 Wall. 201, 22 L. ed. 259.....	258
Waters v. Howard, 8 Gill, 262.....	814	v. People, Pueblo & A. V. R. Co. 19 Colo. 199, 22 L. R. A. 451.....	846, 850
v. Merchants' Louisville Ins. Co. 36 U. S. 11 Pts. 213, 9 L. ed. 691.....	69	v. Shiveley, 11 Or. 215.....	318
Waterson v. Devoe, 18 Kan. 233.....	78	v. Wichita County, 67 Tex. 647.....	853
Watkins v. Glenn, 55 Kan. 417, 31 L. R. A. 82.....	75, 82, 726	Windham v. Childress, 7 Ala. 367.....	794
v. Zwietusch, 47 Wis. 513.....	217	Wing v. Gray, 36 Vt. 261.....	701
Watson v. Penn. 108 Ind. 21.....	676	v. Rogers, 138 N. Y. 361.....	255, 256
Watts v. Parker, 27 Ill. 224.....	328	Winslow v. Wallace, 116 Ind. 324.....	471
Waugh v. Waugh, 84 Pa. 360, 24 Am. Rep. 191.....	130	Winterbottom v. Wright, 10 Mees. & W. 109, 221, 863.....	863
Way v. Foy, 18 Ves. Jr. 452.....	259	Winterson v. Hitchings, 18 Misc. 201.....	342
Weander v. Johnson, 42 Neb. 117.....	750, 751	Wires v. Farr, 25 Vt. 41.....	73
Weaver v. San Francisco City & County (Cal.) 43 Pac. 972.....	796	Wisconsin C. R. Co. v. Ashland County, 81 Wis. 1217.....	217
Weber v. Morris & E. R. Co. 35 N. J. L. 409, 10 Am. Rep. 253.....	605, 606	Wishard v. Lenthart (No. 17,385).....	731, 737
Webster v. Webster, 4 DeG. M. & G. 437.....	814	Wolfe v. Erie Teleg. & Teleph. Co. 38 Fed. Rep. 322.....	576
v. Webster, 1 Smales & G. 439.....	814	Wollaston v. Tribe, L. R. 9 Eq. 44.....	714
Webster Case, 5 Cush. 320, 52 Am. Dec. 711.....	298	Wood v. Brush, 140 U. S. 237, 35 L. ed. 509.....	679
Weeks v. Milwaukee, 10 Wis. 242.....	218	v. Duncan, 9 Port. (Ala.) 227.....	733
Weller v. McCormick, 47 N. J. L. 397, 54 Am. Rep. 175.....	194, 195	v. Keith, 60 Ark. 425.....	660
Wellington v. Downer Kerosene Oil Co. 104 Mass. 64.....	221	v. Wood, 1 Met. (Ky.) 515.....	844
Wells v. Bailey, 55 Conn. 232.....	318	Woodman v. Fulton, 47 Miss. 682.....	73
Wells v. Tucker, 3 Blinn. 366.....	448, 450	Woodruff v. Parham, 75 U. S. 8 Wall. 123, 19 L. ed. 382.....	381
Wendover v. Baker, 121 Mo. 273.....	813	v. Wentworth, 133 Mass. 309.....	564
Wenona Coal Co. v. Holmquist, 152 Ill. 581.....	332	Woodson v. Barrett, 2 Hen. & M. 80, 3 Am. Dec. 612.....	774
Wentworth v. Alexander, 66 Ind. 39.....	742	Woodward v. Blanchard, 16 Ill. 433.....	328
Wescott v. Waller, 47 Ala. 492.....	173	Woolcott v. Mead, 12 Met. 517.....	256
West v. Bundy, 78 Mo. 407.....	813	Woolfolk v. State, 81 Ga. 551.....	164, 166
v. Camden, 126 U. S. 507, 34 L. ed. 254.....	564	Woolsey v. Dodge, 6 McLean, 142.....	403
Weston v. Syracuse, 17 N. Y. 110.....	797	v. Judd, 4 Duer, 379.....	293
31 L. R. A.			

Worthen v. Griffith, 59 Ark. 502.....	505	Yeaton v. United States, 9 U. S. 5 Cranch, 281, 3	259
Wright v. Boston & A. R. Co. 142 Mass. 295.....	856	L. ed. 101.....	259
r. Tinsley, 30 Mo. 399.....	813	York County v. Watson, 15 S. C. 1, 40 Am. Rep.	846, 854
r. Wilcox, 19 Wend. 343, 22 Am. Dec. 507.....	300	675.....	267
Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84	106	Young v. Chapp, 147 Ill. 178.....	267
Wynehamer v. People, 13 N. Y. 378.....	690		
Y.			
Yancy v. Yancy, 5 Helsk. 353, 13 Am. Rep. 5.....	73	Zepher, The, v. Brown, 2 Wash. Terr. 44.....	252, 254
Yates v. Whyte, 4 Bing. N. C. 272.....	605, 606	Zettel v. West Bend, 79 Wis. 515.....	697
		Zieman v. Kneckbefer Elevator Mfg. Co. 90 Wis.	58
		503.....	

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.

Statutes.

Westm. II. Respondent superior.....	232
29 Car. II. chap. 7. Sunday laws.....	691
11 & 12 Wm. III. Inheritance through aliens.....	103

Mexico.

Constitution.

Art. 72, § 22. Lines of communication.....	279
--	-----

Statutes.

Art. 1. Regulation of railroads.....	279
4. Crime defined.....	277
5. Misdemeanor defined.....	277
6. Intentional and negligent crimes.....	277
11. Negligent crimes defined.....	277
20. Rule of decision.....	279
21. Rule for decision in absence of statute.....	279
28. Jurisdiction of civil actions.....	278
52. Drawheads of cars.....	279
72, § 22. Power of Congress over lines of communication.....	277
83. Authority of conductor.....	279
121. Railway signals.....	279
124. Liability for railroad accidents.....	279
184. Liability for negligent accidents.....	279
206. Penalty for violation of railroad law.....	279
301. Civil liability for infraction of penal law.....	277
304. Reparation for injury.....	277
305. Indemnization for injury.....	277
308. New suit for subsequent injuries.....	277
307. Judicial expenses.....	277
304. Enforcement of civil responsibility.....	277
309. Rule for decision.....	278
310. Survivorship of action.....	278
311. Right to demand support of one guilty of homicide.....	278
312. Amount of payment to be fixed by agreement.....	278
318. Persons injured by death of another.....	278
321. Damages for deformity.....	278
322. Damages for permanent inability to labor.....	278
323. Damages for loss of member.....	278
324. Reckoning loss of wages.....	278
325. Cases within rule.....	278
326. Proof necessary to maintain action.....	278
327. Proof to establish liability.....	278
330. Responsibility of master for act of servant.....	278
331. Liability of railroad companies.....	278
333. Limitation of actions.....	278
364. Effect of amnesty on civil responsibility.....	278
365. Effect of pardon on civil responsibility.....	278
366. Interruption of statute of limitations.....	278
372. Criminal liability immaterial.....	278
1059, § 8. Limitation of action for personal injuries.....	279

United States.

Constitution.

Art. 1, § 2. Number of representatives.....	733
8, cl. 3. Regulation of commerce.....	821, 824
10. Obligation of contracts.....	82, 722

L. R. A.

Amend. 14, § 1. Due process of law.....	84, 385, 555
Equal protection of law.....	43, 682
Protection of rights.....	51

Ordinances.

1787, July 13. Northwestern territory.....	732
--	-----

Statutes.

1875, Feb. 18. Exemption of national bank from suit.....	719
1890, Oct. 1. Tariff.....	114

Statutes at Large.

Vol. 18, p. 816, chap. 80. Exemption of national bank from suit.....	719
26, p. 45. District of Washington.....	718
612. Tariff.....	114

Revised Statutes.

P. 49 (ed. 1899). Missouri enabling act.....	821
§ 563, subd. 8. Remedy at law in maritime cases.....	248
641. Appeals in admiralty cases.....	257
651. Certification of question to supreme court.....	398
652. Certification of question to supreme court.....	398
697. Certification of question to supreme court.....	398
917. Regulation of admiralty practice.....	253
1012. Appeals in prize cases.....	258
1910. Jurisdiction of territorial courts.....	245
1911. Jurisdiction of territorial courts.....	252
5139. National bank stock.....	449

Alabama.

Constitution.

Art. 14, § 7. Compensation for property taken for improvements.....	194
---	-----

Code.

§ 1742. Gambling contracts.....	793
1749. Sunday contracts.....	793
1756. Requisites of negotiable paper.....	236

Arkansas.

Sandels and Hill's Code.

§ 680. Judge or jury as witness.....	468
Chap. 47. Corporation law.....	536
§§ 1330-35. Business corporations.....	537
§ 1804. Executing corporate note without authority.....	537
2905. Judge or juror as witness.....	468

California.

Constitution.

Art. 11, § 18. Municipal indebtedness.....	796
--	-----

Statutes.

1883, p. 255. Fresno charter; indebtedness.....	796
---	-----

Civil Code.

§ 43. Disposing of dangerous article.....	221
1559. Contract for benefit of third person.....	863
1708. Disposing of dangerous article.....	221

<i>Code of Civil Procedure.</i>	
§ 1903. Innocence presumed.....	414
<i>Penal Code.</i>	
§ 470. Forgery.....	894

Colorado.

<i>Statutes.</i>	
1887, p. 304. Distribution of water.....	829
<i>Code, 1887.</i>	
§ 199. Special findings by jury.....	568

Connecticut.

<i>Statutes.</i>	
1776, Nov. 7. Right to life, liberty, and happiness.....	59
1893, p. 271. Peddlers.....	56
<i>Code, 1650.</i>	
P. 1. Guaranty of rights.....	59

Florida.

<i>Constitution, 1885.</i>	
Art. 6, § 2. Returns of elections.....	370
8, § 6. Election of county officers.....	369
16, § 14. Term of county office.....	369

Illinois.

<i>Constitution, 1870.</i>	
Art. 1, § 2. Right to have rights determined.....	72
4, § 22. Special laws.....	72
9, § 1. Power to tax peddlers.....	525
9. Uniformity of taxation.....	526
10. Uniformity of taxation.....	526

Statutes.

1819, March. Repealing territorial laws.....	72
P. 141, § 8. Limitation of actions.....	72
361. Limitation of actions.....	72
1861, Feb. 17. Rights of aliens.....	106
1872, Apr. 4. Limitation of actions.....	71
1879. Interest on bid in case of redemption.....	76
1887, June 16. Rights of aliens.....	106
1887, June 16. Licensing itinerant merchants.....	525
1896, June 17. Limitation of actions.....	71

Private Laws.

1867, vol. 3, p. 329. Normal school district.....	71
---	----

Gross' Statutes, 1869.

§ 7. Rights of aliens.....	106
----------------------------	-----

Revised Statutes.

Chap. 28, § 1. Common law.....	105
32, § 25. Suit to wind up insolvent corporation.....	273
39, § 1. Statute of descent.....	100
131, § 3. Repeal of repealing act.....	107
P. 232. Licensing itinerant merchants.....	525

Starr & Curtis' Annotated Statutes.

Vol. 1, p. 791. Gambling contracts.....	593
---	-----

Criminal Code.

§ 121. Corruption of water.....	111
130. Gambling contracts.....	593

Indiana.*Constitution.*

Art. 4, § 1. Legislative power.....	729
2. Number of legislators.....	735
3. Term of legislators.....	732
4. Enumeration of inhabitants.....	729
5. Apportionment of senators and representatives.....	730
6. Formation of senatorial or representative district.....	732
7. Qualifications of legislators.....	735
8, § 15. Lotteries.....	836
12. Municipal indebtedness.....	745
15, § 3. Term of office.....	732

31 L. R. A.

Statutes.

1889, March 9. Custody of children.....	741
1891, March 9. Custody of children.....	741
1893, March 3. Custody of children.....	741
1895, March 5. Apportionment act.....	738

Revised Statutes, 1881.

§ 615. Review of judgment.....	67
§§ 2076-2078. Lotteries.....	836
§ 5208. Tenancy from year to year.....	678

Revised Statutes, 1894.

§ 627. Review of judgment.....	67
§§ 2170-2172. Lotteries.....	836
§ 3780. Legislative authority in city of Indianapolis.....	744
3789. Appropriations.....	744
§§ 3812-3819. Board of public works of Indianapolis.....	744
§ 3821. Estimates of money requirements.....	744
3822. City contracts.....	745
3823. Liability of officer for unauthorized warrant.....	745
3825. Duty of comptroller.....	745
3830. Ordinance authorizing action of board of public works.....	744
3833. Source of payment for municipal contract.....	745
4377. Power of municipality to borrow money.....	746

Iowa.*Constitution.*

Art. 1, § 22. Rights of foreigners.....	183
3, § 30. Local and special laws.....	190

Statutes.

1878, § 3. Supervision of railroads.....	50
20 Gen. Assem. chap. 24, § 1. Connection of railroad tracks.....	50
21 Gen. Assem. chap. 65. Incorporation law.....	136
22 Gen. Assem. chap. 85. Right of alien to hold real estate.....	183
23 Gen. Assem. March 3, 1890. Extending municipal boundaries.....	186

Revised Statutes, 1860.

§§ 2368-2369. Right of alien to inherit land....	183
--	-----

Code.

§ 464. Power to lay out streets.....	185
470. Power to acquire land for streets.....	185
1244. Damages for street opening.....	184
1270. Taking private property for streets.....	185
1282. Transfer switches.....	50
3348. Two warrants to test city's rights over territory.....	189

McClain's Code.

§ 1763. Incorporation law.....	188
1776. Injunction against use of corporate name.....	140
2742. Limitation of actions.....	141

Kansas.*Statutes.*

1861, June 4. Redemption law.....	84
1893, chap. 109. Redemption from judicial sale.....	75

General Statutes, 1889.

Chap. 37, § 80. Demands against decedent's estates.....	539
§ 3886. Short form of mortgage.....	79
4349. Receiver in foreclosure case.....	79

Code of Civil Procedure.

§ 254. Receiver in foreclosure case.....	79
--	----

Kentucky.*Constitution.*

§ 174. Uniform taxation.....	41
181. Licenses.....	42

General Statutes.

§ 4003. Tax on corporate stock.....	42
4223. Tax on foreign loan association.....	41

Civil Code of Practice.

§ 273. Practice in granting injunctions.....	39
§ 276. Granting of injunctions.....	40
§ 678. Performance by deputies.....	39

Maine.*Private and Special Laws.*

1887, chap. 195. Charter of Waterville.....	117
---	-----

Revised Statutes.

Chap. 3, § 34. Right of mayor to vote.....	117
60, § 2. Divorce for desertion.....	608

Maryland.*Statutes.*

1878, chap. 247. Coroners.....	546
1884, chap. 263. Execution of wills of person- ality.....	456

Code of Public Local Laws.

Art. 4, § 149. Coroners.....	546
------------------------------	-----

Code.

Art. 67, § 3. Limitation of action for negli- gent killing of person.....	574
75, § 36. Abatement of action for mis- nomer.....	574

Baltimore City Code, 1892.

Art. 23, §§ 1-7. Post-mortem examinations....	546
42, § 2. Death certificate.....	546

Massachusetts.*Statutes.*

1796, chap. 81. Highway surveyors.....	178
1796, chap. 58, § 1. Making highways.....	178
1818, chap. 121, § 1. Making highways.....	178
1871, chap. 158. Road commissioner.....	175
chap. 298, § 2. Highway taxes.....	178
1873, chap. 51, § 1. Road commissioner.....	175
1877, chap. 58. Highway taxes.....	178
1883, chap. 221. Record of designation of elec- tric poles.....	460
1887, chap. 382. Permission to erect electric poles in streets.....	459
385. Right of town to furnish light plant.....	459
1891, chap. 370, § 13. Purchase by town of light plant.....	459
1893, chap. 423, § 23. Powers of road commis- sioner.....	175
chap. 454. Purchase by town of light plant.....	459

Revised Statutes.

Chap. 24, §§ 10, 44, 47, 64. Making highways....	178
25, § 6. Injuries caused by repairing highways.....	178
§ 9, 15. Making highways.....	178

Public Statutes.

Chap. 27, § 75. Powers of road commissioner..	175
49, §§ 9, 75. Making highways.....	178
50, §§ 1, 3, 4. Making sewers.....	178
52, § 3. Making and repairing highways.....	175
13. Making highways.....	178
15. Injuries caused by repairing highways.....	178
31. Highway taxes.....	178
108, § 23. Sale of electric plant to town.....	460
109, § 3. Record of designation of loca- tion of electric poles.....	460

Michigan.*Constitution.*

Art. 6, § 26. Unreasonable searches.....	165
--	-----

Statutes.

1853, p. 180. Board of water commissioners....	464
1857, p. 106, subd. 60. Detroit charter; power to establish jails, etc.....	463
1861, March 15. Detroit House of Correction..	464
1873, vol. 3, p. 135. Board of water commis- sioners.....	464
1889, No. 225, § 3. Unlawful trust.....	419
31 L. R. A.	

Howell's Statutes.

Chap. 344. Power of convicts.....	463
§ 6231. Divorce.....	162
Vol. 3, § 9230. Seizure of indecent books.....	108
9354 j. Unlawful trust.....	419
9365. Search warrants.....	163
9472. Recognizance from witnesses.....	166
9475. Recognizance from witnesses.....	166
9598. Disinterment of bodies.....	166
9615. Search warrants.....	166
9619. Disposition of property seized in criminal cases.....	165

Minnesota.*Constitution.*

Art. 1, § 2. Due process of law.....	555
7. Due process of law.....	555
8. Right to obtain practice.....	555

Statutes.

1875, chap. 98. Ejectment for land taken by eminent domain.....	554
1887, chap. 191. Libel.....	556

General Statutes, 1894.

§§ 2657-2662. Ejectment for land taken by em- inent domain.....	554
--	-----

Missouri.*Constitution, 1865.*

Art. 4, § 25.....	806
8, § 2.....	806

Constitution, 1874.

Art. 2, § 1. Source of political power.....	819
2. Alteration of Constitution.....	819
4, § 56. Seat of government.....	820
12, § 20. Street railway franchises.....	809
15, § 1. Amendment of Constitution.....	819
2. Manner of amending Constitution.....	819
3. Vote on question of amendment.....	819

Statutes.

1855, Nov. 23. Corporations.....	804
1857, March 2. Laclede Gaslight Co.....	862
March 3. Laclede Gaslight Co.....	862
1868, March 23. Bonds for railroad stock sub- scriptions.....	78
March 26. Laclede Gaslight Co.....	862
1889, May 18. Tax on foreign corporation.....	43

Revised Statutes, 1855.

Chap. 34, § 9. Continuation of statute.....	804
---	-----

Revised Statutes, 1889.

§ 2721. Telegraph wires in streets.....	809
5186. Contract in consideration of marriage.....	813
6159. Mechanics' liens.....	338
6161. Enforcement of mechanics' lien.....	337
6163. Service of notice.....	337
6287. Execution of judgment filed in circuit court.....	340
§§ 6705-6729. Mechanics' liens.....	338

Wagner's Statutes.

Vol. 2, p. 1032. Injunction.....	478
----------------------------------	-----

Montana.*Constitution.*

Art. 3 § 11. Impairing obligation of contract.....	722
15. Private roads.....	308
15, § 5. Public control of railways.....	307
7. Equal rights on railroads.....	307
9. Right of eminent domain.....	309

Statutes.

1887, § 176. Criminal practice act, aiding com- mission of offense.....	226
177. Accessory before the fact.....	226
1895, July 1. Redemption from mortgage sale.....	721

Code of Civil Procedure, 1895.

§ 601. Requirements for exercise of power of eminent domain.....	305
1235. Final judgment on appeal.....	726

Compiled Statutes, 1887.

Chap. 2, § 12, p. 502. Aiding commission of crime.....	295
§ 596. Rights of way.....	312
600, p. 116. Crossing rights of way.....	312
607, p. 218. Ascertaining damages for railway crossings.....	313
680, p. 809, div. 5. Construction of side tracks.....	307
688. Railroad companies.....	312
1495. Right to take property for public use.....	308

Nebraska.*Statutes.*

1893, chap. 11. Transfer switches.....	50
24. Railroad freight rates.....	53

Compiled Statutes.

Chap. 16, § 113. Transfer switches.....	50
---	----

New York.*Constitution.*

Art. 1, § 6. Due process of law.....	690
5, § 3. Appointment to office.....	400
9. Civil service examinations.....	400

Statutes.

1788, chap. 42. Sunday laws.....	691
1801, chap. 34. Sunday laws.....	691
1811. Insolvent laws.....	75
1847, chap. 349. Sunday laws.....	691
450. Damage for loss of life.....	719
1849, chap. 256. Damage for loss of life.....	719
1869. Atlantic avenue in new lots.....	386
1870, chap. 78. Damage for loss of life.....	719
1881, chap. 202. Deception in sale of dairy products.....	691
1583, chap. 354. Civil service.....	400
358. Sunday laws.....	691
1884, chap. 272. Manufacture of cigars in tenements.....	691
1885, chap. 183. Regulation of sale of dairy products.....	691
1887, chap. 691. Premium for purchasing goods.....	691
1892, chap. 401, § 31. Sales of intoxicating liquor.....	512
1894, chap. 681. Civil service.....	400
1895, chap. 823. Barbering on Sunday.....	690

Greenleaf's Laws.

Vol. 2, p. 89. Sunday laws.....	691
---------------------------------	-----

Andrew's Laws.

P. 467. Sunday laws.....	691
--------------------------	-----

Revised Laws.

Vol. 1, p. 192. Sunday laws.....	691
----------------------------------	-----

Revised Statutes.

Vol. 2, p. 675, § 70. Sunday laws.....	691
--	-----

Penal Code.

§ 263. Sunday labor.....	694
267. Sunday sales.....	694

North Dakota.*Compiled Statutes.*

§ 5099. Judgment in replevin.....	251
-----------------------------------	-----

Code of Civil Procedure.

§ 416. Supersedeas on appeal.....	250
422. Cost bond.....	252

Ohio.*Constitution.*

Art. 2, § 1. Legislative power.....	663
13, § 6. Organization of cities.....	663

Statutes.

1890, Apr. 2 (Laws, vol. 87, p. 149). Liability of railroad companies for defective appliances.....	651
1891, March 5 (88 Laws, 77). City commissioner of Akron.....	667

1893, Apr. 20. Akron charter.....	661
Vol. 66, p. 200. Board of health.....	663

Revised Statutes.

§ 1622, ¶ 24. Authority to establish board of health.....	663
7305. Review of acquittal in criminal case.....	661
7306. Review of acquittal in criminal case.....	661
7307. Review of acquittal in criminal case.....	661
7308. Review of acquittal in criminal case.....	661

Oregon.*Constitution.*

Art. 2, § 2. Qualification of electors.....	353
6, § 6. County officers.....	353
7. County officers.....	353
8. Qualification for county office.....	353
7, § 17. State law officers.....	481
8, § 8. Continuing laws in force.....	354

Statutes.

1855, p. 453. Superintendent of schools.....	354
1891, p. 188. Duty of attorney general.....	481

Special Laws.

1893, p. 62. Making women eligible to educational offices.....	354
--	-----

Hill's Code.

§ 785, subd. 5. Sales of personal property to be in writing.....	509
2586. Term of office.....	351
2587. Qualification of officer.....	351

Pennsylvania.*Statutes.*

1889. Receiving of deposits by insolvent bankers.....	126
---	-----

Rhode Island.*Public Statutes.*

Chap. 172, § 6. Rights of aliens.....	159
---------------------------------------	-----

South Carolina.*Constitution, 1868.*

Art. 1, § 38. Excessive fines.....	678
------------------------------------	-----

Statutes.

1895, Jan. 2. Dispensary act.....	683
-----------------------------------	-----

South Dakota.*Constitution.*

Art. 17, § 7. Power of corporation to hold real estate.....	502
---	-----

Compiled Statutes.

§ 572. Power of county to sue.....	492
2612. Duty to maintain poor person.....	492
2917. Power of corporation to deal in stock.....	500
2928. Liability of directors for impairing capital of corporation.....	500
4654. Power of debtor to prefer creditors.....	503
4660. Effect of failure of preference in general assignment.....	507
4661. When corporation is insolvent.....	503

Tennessee.*Constitution, 1870.*

Art. 4, § 1. Elective franchise.....	838
--------------------------------------	-----

Statutes.

1885, Extra Sess. chap. 16. Investment of school funds.....	845
1890, Extra Sess. chap. 26, p. 67. Elective franchise.....	838
1891, March 30, chap. 222. Elective franchise.....	838
1891, Extra Sess. chap. 23. Elective franchise.....	838

Milliken & Vertrees' Code.

§ 712. County trustee's bond.....	845
716. County trustee's oath.....	845
1167. School funds.....	845
1712. Forfeiture of corporate franchises.....	711

3247. Allotment of dower	841		
4168. Dissolution of corporation by nonuse.	599		
5037. Creditor's bill	596		
5038. Receiver in creditor's suit	599		
Texas.			
<i>Constitution.</i>			
Art. 10, § 4. Rolling stock, personal property	213		
<i>Statutes.</i>			
1892, p. 31, § 35. Certification of question to supreme court	304		
<i>Revised Statutes.</i>			
Art. 2287. Delivery of possession of property levied on	213		
Virginia.			
<i>Constitution.</i>			
Art. 4, § 2, cl. 1. Uniform taxation	381		
5, § 15. Titles of acts	824		
10, § 1. Uniform taxation	385		
<i>Statutes.</i>			
1871. Funding act	76		
1882. Cash payment of taxes	76		
1888, March 1. Charter of Alexandria	384		
1889-90, p. 200. Taxation	379		
217, § 32. Peddler's license	380		
33. License tax	381		
1896, Feb. 29. Betting	824		
March 5. Trial by justice of peace	824		
<i>Code.</i>			
§ 3956. Certainty of charge in warrant	824		
4106. Trial by justice of peace	824		
4107. Appeal from conviction by justice	827		
<i>Hening's Statutes.</i>			
Vol. 9, pp. 262, 420. County commissioners	133		
10, pp. 114, 351. County commissioners	133		
11, p. 366. County commissioners	136		
Washington.			
<i>Constitution.</i>			
Art. 11, § 5. Accountability of public officers	852		
<i>Hill's Annotated Code.</i>			
Vol. 1, § 211. Duty of county treasurer	852		
1678. Liability of vessel for personal injuries	718		
2, § 138. Action for wrongful death	718		
149. Action for injury to child	718		
148. Abatement of action for personal injuries	718		
West Virginia.			
<i>Constitution.</i>			
Art. 3, § 10. Due process of law	132		
8, § 24. County court commissioners	138		
31 L. R. A.			
<i>Statutes.</i>			
1872-73, p. 175, chap. 77. Hogs running at large	131		
<i>Code, 1891.</i>			
PP. 41, 42. County court commissioners	133		
P. 244. County court commissioners	133		
568, chap. 60, § 3a. Hogs running at large	131		
Wisconsin.			
<i>Constitution.</i>			
Art. 3, § 2. Disqualification of convict to vote	520		
6. Effect of bet on right to vote	520		
4, § 1. Legislative power	113		
24. Legislature shall not grant divorce	518		
<i>Statutes.</i>			
1839, p. 140. Power to grant divorce	518		
1889, chap. 152, § 143. Charter of superior assessments for street improvements	214		
375, § 1. Insulation of electric wires	587		
1891, chap. 124, § 112. Directions for assessments	217		
117. Charter of superior; assessments for street improvements	214		
118. Payments out of general fund	217		
120. Levy of city taxes	217		
125. Payments out of general fund	217		
126. Appeal exclusive remedy	219		
127. Assessment to be complete before contract let	219		
131. Improvement bonds	218		
132. Improvement bonds	218		
136. Special assessments for improvements	218		
137. Action to avoid special assessment	218		
Chap. 195. Insurance policies	112		
<i>Revised Statutes.</i>			
§ 12, subd. 4. Effect of bet on right to vote	520		
1943. Valued insurance policies	115		
1947. Insurance agencies	115		
2204. Implied covenants	697		
2365. Effect of conviction on marriage	517		
2918, subs. 7. Costs	219		
2921. Costs	219		
4219. Time for bringing action	115		
4222. Time for bringing action	115		
4720. Taking case to supreme court on exceptions	515		
4995. Effect of conviction of office holder	520		

LAWYERS' REPORTS,

ANNOTATED.

KENTUCKY COURT OF APPEALS.

I. N. PAYTON, *Appt.*,
v.
Lewis] McQUOWN, Admr., etc., of W. A.
Botts, Deceased.
(.....Ky.....)

1. There is no abuse of discretion in refusing to set aside a submission which is claimed to have been made under the mistaken belief that no answer had been filed, where, although the answer was not filed on the day it was due, it had been on file for several months, which fact by the exercise of ordinary diligence could have been discovered by counsel before entering the order of submission.

2. No injunction against a default judgment is justified by the facts that defendant submitted the facts constituting his defense to an attorney, with the request to prepare an answer, and then went to his home in another county relying on the attorney's promise to do so, but that for some reason unknown to defendant the answer was not filed.

3. The power given by statute to a clerk of court to issue injunction orders cannot be exercised by his deputy under a statute providing that any duty enjoined upon a ministerial officer and any act permitted to be done by him may be performed by his lawful deputy.

(June 21, 1895.)

NOTE.—*Negligence as a cause for, and as a bar to, injunctions against judgments.*

I. *As a cause for injunctions against judgments.*

II. *As a bar to injunctions against judgments.*

- a. *In attending court.*
- b. *In employing an attorney.*
- c. *Of attorney.*
- d. *In ascertaining a defense.*
- e. *In regard to evidence.*
- f. *In asserting a defense.*
- g. *Delay in seeking.*

I. *As a cause for injunctions against judgments.*

The case of *PAYTON v. McQUOWN* holds that it is not a cause for an injunction against a common-law judgment, that the complainant had requested an attorney to whom he had submitted the facts constituting his defense, to prepare an answer for him; that he had relied upon this attorney's promise to do so, and, supposing the answer would be filed and the case continued, paid no more attention to the case; and that the attorney had failed to file an answer,—as the negligence of the attorney is the negligence of the complainant. This is in accord with the general doctrine.

An injunction will not be granted against a judgment on the ground that the negligence of a party, attorney, or agent prevented a defense of the action at law.

As, where counsel advised that defense would not be necessary. *Bateman v. Willoe*, 1 Sch. & Lef. 301; *Fentress v. Robins*, N. C. Term Rep. 177, 7 Am. Dec. 704.

Or where counsel did not understand that he was employed, and did not plead. *Shields v. McClung*, 6 W. Va. 79.

Or where no showing is made that complainant relied on the attorney. *Bardonski v. Bardonski*, 144 Ill. 284.

Or where the attorney turned the case over to another attorney who was ignorant of the defense. *Chester v. Apperson*, 4 Helsk. 639.

Or where the attorney did not examine the writ, and was mistaken as to the court, and made no defense. *Ayres v. Morehead*, 77 Va. 586.

31 L. R. A.

Or on the ground that he made no defense, where the defense would not have been available. *Ballow v. Wichita County*, 74 Tex. 339.

Or where the attorney was grossly negligent, but there was no charge of fraud. *Hiles v. Mosher*, 44 Wis. 601; *Wynn v. Wilson*, Hempst. 696.

Or because the attorney failed to plead in a case where the judgment was not shown to be unjust. *Hartford F. Ins. Co. v. Meyer*, 30 Neb. 185.

And an injunction will not be granted on the ground of negligence of the attorney, where the defense was not made known to the attorney. *Ballow v. Wichita County*, *supra*.

Or where he neglected to defend, even though he is insolvent. *Rogers v. Parker*, 1 Hughes, C. C. 148.

And it was denied on account of negligence in defending, as the remedy is by writ of error *coram nobis*. *Shepard v. Akers*, 8 Tenn. Ch. 215.

Or by action against counsel. *Ibid.*; *Ames v. Snider*, 55 Ill. 496; *Barhorst v. Armstrong*, 42 Fed. Rep. 2.

Or on the ground that other counsel could have been employed. *Crim v. Handley*, 94 U. S. 652, 24 L. ed. 216.

The failure of a husband to defend for a wife as instructed will not authorize an injunction where there is no fraud. *Neville v. Pope*, 95 N. C. 346.

Neither will the negligence of a county clerk to disclose service of process against a county. *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 593.

Neither will the negligence of a city attorney in not ascertaining the cause of action against a city. *Darling v. Baltimore*, 51 Md. 1.

Neither will negligence of the attorney in making a defense and the absence of complainant. *Odell v. Mundy*, 59 Ga. 641.

The absence of complainant and his engagements in business are not cause for enjoining a judgment. *Cammann v. Traphagan*, 1 N. J. Eq. 28.

And that attendance on court was prevented by press of public business will not justify an injunction, where no diligence is shown. *Smith v. Lowry*, 1 Johns. Ch. 320.

And absence from court a whole term by defendant in a civil case, at the instance of attorney for

APPEAL by complainant from a judgment of the Circuit Court for Barren County in favor of defendant in a proceeding brought to enjoin the enforcement of an execution upon a judgment which had been entered against complainant. *Affirmed.*

The facts are stated in the opinion.

Mr. S. M. Payton for appellant.

Mr. Lewis McQuown, appellee, *in propria persona*:

A new trial ought not to be awarded on account of the neglect of the agent or attorney of the party applying for it; for such neglect is equivalent to the neglect of the party himself, and he may have a remedy over against his agent or attorney.

Patterson v. Matthews, 3 Bibb, 80.

The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment.

1 High, Inj. 3d ed. § 210.

Where fraud is relied on as the foundation for an injunction, the allegations must be of specific and definite acts.

1 High, Inj. 3d ed. § 21.

A deputy clerk has no power to make such an order. The power to be exercised is quasi judicial and cannot be delegated.

19 Am. & Eng. Enc. Law, p. 461; *Com. v. Jones*, 10 Bush, 749.

The power is delegated alone to the clerk. The confidence is reposed alone in him, and the mere appointment, by him, of a deputy does not clothe such person with this power.

Hartman v. Hartman, 15 Ky. L. Rep. 368.

It does not appear from the petition that the judge of the court was absent from the county when the injunction was granted.

Jacobs v. Louisville & N. R. Co. 10 Bush, 263.

Eastin, J., delivered the opinion of the court:

This equitable action was brought by appellant in the Barren circuit court against appellee and the sheriff of Hart county, Ky., for the purpose of enjoining the levy and collection of an execution then in the hands of said sheriff, and which had been issued on a common-law judgment rendered by the said Barren circuit court in favor of appellee against appellant. It is, in substance, alleged by appellant in his petition that he was employed by one Mary E. Burks, administratrix of John Burks, deceased, to aid her in collecting the assets and paying the debts of the estate of intestate, and that, while so engaged, he accepted an order given on himself by the said administratrix to appellee, with the understanding that he was to pay it out of funds that he might collect for the estate of said intestate, and not other-

plaintiff, who was employed by the defendant in a criminal case, and who advised him to remain absent, is not sufficient ground to enjoin execution of the judgment rendered in the civil suit; neither is the fact that complainant had employed counsel, and received a message from him that he was sick and all his cases were to be continued. *Sasser v. Olliff*, 91 Ga. 84.

And reliance on a codefendant's promises to defend will not authorize an injunction, where such codefendant was an attorney, but no retainer was paid, and he made a defense for both, and nearly two years afterwards such suit was dismissed as to the attorney, and judgment taken against the complainant. *Bardonski v. Bardonski*, 144 Ill. 284.

Employing an attorney and simply asking him to look after all business, without referring to any particular case, will not entitle to an injunction against a judgment where such attorney failed to defend. *Watts v. Gayle*, 20 Ala. 817.

But in *Mayo v. Bentley*, 4 Call (Va.) 528, it was held that the negligence of the clerk of court in failing to set aside a judgment as directed would authorize an injunction against the same.

II. As a bar to injunctions against judgments. a. In attending court.

Complainant's absence from court through negligence will prevent an injunction against the judgment.

As to absence caused by accident or mistake, see note on *Injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress*, to *Merriman v. Walton* (Cal.) 30 L. R. A. 786.

So, not appearing at the return term, or at the next term at which judgment was taken in the fall of 1861, when six months had elapsed from time of service and no counsel was employed, was such negligence as will prevent an injunction, although there was some excitement in the country on account of the war. *George v. Tutt*, 36 Mo. 141.

And negligence of complainant in not attending 31 L. R. A.

the trial to testify or cross-examine the witnesses will prevent him from obtaining an injunction against the judgment where he had the opportunity to defend. *Ames v. Snider*, 55 Ill. 498.

And absence from the state at the time of trial, when complainant knew that he had been sued, and made no preparation for trial, and gave no personal attention to the case, will prevent an injunction. *Burnley v. Rice*, 21 Tex. 171.

Negligence of defendants in failing to attend court, and in simply telegraphing that they will be unable to procure the attendance of their witnesses, and will not be there, will prevent an injunction against the judgment, or an execution. *Roots v. Cohen* (Miss.) 12 So. 593.

And negligence in failing to make preparations for trial will prevent an injunction, where complainant was unable to be present in court. *McCullum v. Prewitt*, 37 Ala. 573, 1 Ala. Sel. Cas. 498.

So, failure to ascertain when a case stands for trial is such negligence that a judgment rendered thereon will not be enjoined. *Combs v. Choven*, 89 Ga. 779.

And forgetfulness of a party as to a suit pending will prevent an injunction against the judgment. *Cullum v. Casey*, 1 Ala. 351.

And negligence in not attending court will prevent an injunction against the judgment, although the judge had said at the prior term that he would not try that cause. *White v. Cahal*, 2 Swan, 550.

A judgment in ejectment in which no defense was made, was not enjoined where complainant presumed that the suit was abandoned, and did not attend court because she did not hear anything from her attorney, who had told her to go home and rest contented, although she afterwards sent the copy of the summons served on her to him and thought that he would inform her if her presence was needed. *Hoey v. Jackson*, 31 Fla. 541.

Where a suit was pending and defendants were already in default when a discharge in bankruptcy was obtained by the defendant and this was not set

wise, and that the execution sought to be enjoined was issued on a judgment rendered in an action at law brought by appellee against him on this accepted order. It is further alleged that he had not, at the time said suit was brought, nor at any time after the acceptance of the order, any money or assets belonging to the estate of said Burks in his hands, with which to pay said order or any part thereof; that upon being served with process in the action he went to Glasgow, and laid these facts, together with the fact that he was in no way individually liable on said claim, before a practicing attorney of that bar, whom he requested to prepare and file an answer for him in the action, and who promised and agreed to do so; that, supposing that this would be done, and supposing that the action would thereupon stand continued for that term, he then returned to his home in Hart county, Ky., but that, for some reason unknown to him, the said attorney failed to file the answer or make defense for him, and the appellee wrongfully and fraudulently took the judgment against him on which the execution sought to be enjoined was issued. The petition further charges that Lewis McQuown, who, as administrator of W. H. Botts, deceased, is appellee herein, and who recovered said judgment against appellant, is also the attorney for the estate of said John Burks, deceased,

and, as such, has directed parties indebted to said estate not to pay their indebtedness to appellant, but to pay to another; and that, in consequence thereof, appellant will never be able to collect anything more belonging to said estate, or to pay the demand of appellee; and concluded with the usual averments that, unless an injunction be issued, his individual property will be levied on and sold, and he will be subjected to great, irreparable loss and injury. On the day on which this petition was filed, to wit, August 24, 1893, and without notice to appellee, an order of injunction was entered, and an injunction as prayed for was issued, restraining the sheriff from levying said execution on the property of appellant, and from taking any further steps thereunder, until the further order of the court, which was in due time executed upon said sheriff. At the succeeding term of the court—not, however, on the third day of the term, which commenced on the third Monday in November, but on the 18th day of December, 1893—appellee filed an answer controverting all the allegations of the petition, and pleading affirmatively the facts attending the giving of the order on appellant by Mr. Burks, and its acceptance by appellant. That order, with the acceptance thereon, is made a part of the answer, and shows on its face that it was drawn on appellant and accepted by him individ-

up as a defense, an injunction was refused against the judgment, although the defendants being in default supposed the judgment had been entered before the discharge as they could have compelled the plaintiff to take his judgment in due course, and have no right to complain of the result of their own negligence. *Bellamy v. Woodson*, 4 Ga. 173, 48 Am. Dec. 221. But see next case.

But in *Carrington v. Holabird*, 17 Conn. 580, where a party supposed a judgment was taken against him, and failed to make any defense, but obtained his discharge in bankruptcy thereafter, when in fact a judgment was obtained out of the usual course at the ensuing term after discharge in bankruptcy, an injunction was granted.

And the failure of complainant or his counsel to be present at the trial at law, solely because a witness was absent, is not such negligence as will preclude an injunction against the judgment, where in the equity case the defendants do not object to the jurisdiction, and admit the equity of complainant. *Vanlew v. Bohannon*, 4 Rand. (Va.) 587.

As to absence from court, see *Cammann v. Traphagan*, *Smith v. Lowry*, and *Sasser v. Olliff*, *supra*, I.; and *Cabell v. Roberts*, *infra*, II., b.

As to absence from court, see also note on *Injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress*, to *Merriman v. Walton* (Cal.), 30 L. R. A. 736.

b. In employing an attorney.

The inexcusable negligence of complainant in employing an attorney to attend to the case will prevent an injunction against the judgment.

So, negligence in not employing counsel will prevent an injunction against a judgment. *Landrum v. Farmer*, 7 Bush, 46; *Waldrom v. Waldrom*, 76 Ala. 286; *Kelleher v. Boden*, 55 Mich. 296; *Dwight v. Richards*, 4 La. Ann. 240; *Duncan v. Gibson*, 45 Mo. 352; *Watts v. Gayle*, 20 Ala. 817.

Where a member of a partnership asked attorneys to defend a case, but gave no facts or names of witnesses to establish the defense, and such partner,

died, and the other suffered judgment by default, there was such negligence as prevents an injunction. *Walker v. Kretsinger*, 48 Ill. 502.

And writing to a lawyer to defend, where the party is himself absent from court, will not excuse negligence in not making a defense. *Cabell v. Roberts*, 6 Rand. (Va.) 580.

So, negligence of a defendant in preparing for his trial, or in employing counsel, or in summoning witnesses, will prevent an injunction, although he may have had a good excuse for not being present himself at the time of the judgment. *McColum v. Prewitt*, 37 Ala. 573, 1 Ala. Sel. Cas. 498.

The negligence of a messenger from defendant in not delivering a copy of the summons until the time for answer expired, to an attorney for the defendant with instructions to appear and plead payment, where default was taken a year afterward, will prevent relief by injunction against a judgment. *Sullivan v. Shell*, 36 S. C. 578.

And an injunction was not granted against a decree where defendant was negligent, and merely wrote to a lawyer to defend him, without giving any information, and the deposition of the lawyer was not taken, and the letter was not produced. *Hill v. Bowyer*, 18 Gratt. 364.

The negligence of defendant in not furnishing his attorney with full information of a suit that he believed was pending, where the attorney could not find the case, and the clerk informed him that no such case was pending, and the complainant had information between terms of the court sufficient to cause a full investigation, will prevent an injunction against the same, although he was prevented from attending court by the danger incidental to reorganizing courts after the war. *Prater v. Robinson*, 11 Helak. 391.

And negligence of complainant in examining the summons and complaint, and his failure to show the same to his attorney, will prevent an injunction against the judgment, where there is no charge of fraud on the part of the prevailing party. *Slappey v. Hodge Bros.*, 99 Ala. 300.

ually, and without qualification as to the manner in which or the fund from which it was to be paid. No motion was made to dissolve the injunction; no reply was filed or offered to be filed to this answer; no proof was taken by either party; but, at the next term of the court, to wit, on March 12, 1894, it appears, singularly enough, in view of the state of the record, that the action was submitted for judgment, on motion of appellant. On the next day, March 13, 1894, appellant moved to set aside the order of submission, and in support of that motion filed the separate affidavits of the two attorneys who were representing him in the case. On the 17th day of March the court below overruled this motion to set aside the submission, dismissed appellant's petition, and dissolved the injunction, with damages at the rate of 10 per cent on the amount of the execution enjoined and costs, and from that judgment this appeal is prosecuted.

The principal question to be considered is whether or not the motion to set aside the order of submission was properly overruled. The statements of the affidavits of counsel, filed in support of this motion, practically amount to but little more than the statement of each of these gentlemen that he did not

know that an answer had been filed at the time the order of submission was entered. It is true that one of these affiants says "that if he was present in court on the day said answer was offered and filed, that he did not hear said motion, and said answer was not in the papers of said suit when the November term ended;" but he does not say how he knows this, or that he ever inquired for or looked at the papers of the case to see whether or not an answer had been filed. The other affiant says that he was detained from court by sickness during several days of the November term, but that, "in a few days after said last term," he looked through the papers in the suit, and that there was then no answer among them. This must have been in December, and he does not pretend ever to have made any further investigation, though nothing further was done in the case until the 12th day of March following, when the case was submitted for judgment, either on his motion or the motion of his partner. Both affiants lay much stress on the fact that appellee's answer was due on the third day of the November term, and that no order was made extending the time for filing same. But it is not pretended that any agreement was made that none should be filed at a later

For negligence in employing an attorney, see *George v. Tutt, supra*, II. a.

For cases in regard to employment of attorney, see note on *Injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress*, to *Merriman v. Walton* (Cal.) 80 L. R. A. 786.

c. Of attorney.

The negligence of an attorney is considered the negligence of his client, and where the defense was not made on account of the negligence of the attorney for complainant, and a good excuse is not shown, the complainant will not be entitled to an injunction against the judgment.

That a judgment is against good conscience will not authorize an injunction, where, through fault of complainant or his attorney, defense was not interposed in proper time. *Shricker v. Field*, 9 Iowa, 366.

So, where an attorney who was irresponsible had neglected and failed to make a defense that could have been made at law, proceedings on the judgment were not enjoined. *Kern v. Strausberger*, 71 Ill. 413.

And an injunction was not granted against a judgment against W. as a member of the firm of B. & Co. where his lawyer made no defense, and was negligent in not ascertaining what members of the firm were parties defendant, though he had been notified that such a suit was pending, and the client W. had a good defense, and lived in the county, where it did not appear that he had furnished his counsel with a copy of the summons, and he would have had to verify his plea. *Wallace v. Richmond*, 26 Gratt. 67.

And the negligence of complainant's counsel in filing a frivolous demurrer, and absenting himself from trial, will prevent an injunction against the judgment. *Borland v. Thornton*, 12 Cal. 440.

So, negligence of complainant's attorney in not prosecuting a suit of replevin will prevent an injunction against the judgment, where complainant was himself guilty of negligence, and did not attend court or have any witness there, and there was no fraud on the part of the opposite party. *Albro v. Dayton*, 28 Ill. 325.

11 L. R. A.

And negligence, in not obtaining a continuance, by an attorney who was sick, will prevent an injunction. *Pharr v. Reynolds*, 8 Ala. 521.

Or negligence in not informing his client that he could not attend to the case. *Clark v. Ewing*, 93 Ill. 572; *Griffith v. Thompson*, 4 Gratt. 147.

Where complainant's counsel was furnished with a copy of the writ, but took no trouble to inquire in what court the suit was brought, and did not read the writ, but carelessly placed it with papers belonging to another court, and never thought of it until after judgment, an injunction was not granted. *Ayres v. Morehead*, 77 Va. 568.

And where complainant's attorney by oversight "failed to enter an appearance," and for more than a year after judgment had been rendered the complainant and his attorney neglected to make any inquiry about the action, an injunction was refused. *Amherst College v. Allen* (Mass.) 42 N. E. 570.

Negligence in not procuring a bill of exceptions, or in employing an attorney who could be relied upon, where complainant was unavoidably detained from court, will prevent an injunction against proceedings on a judgment. *Ballance v. Loomiss*, 22 Ill. 82.

So, the negligence of an attorney in not perfecting the record for the appellate court, or in not taking an appeal in the proper time or manner, will prevent an injunction against the judgment. *Galbraith v. Barnard*, 21 Or. 67; *Ballance v. Loomiss, supra*; *Augusta Mut. L. Assn. v. McAndrew*, 68 Ga. 490; *Miller v. Berneckes*, 48 Mo. 194; *Smith v. Fouché*, 55 Ga. 120; *Holman v. G. A. Stowers Furniture Co.* (Tex.) 30 S. W. 1120; *Ruppertsberger v. Clark*, 53 Md. 402; *Musgrove v. Chambers*, 12 Tex. 32; *Bowman v. Field*, 11 Mo. App. 594; *Watt v. Cobb*, 22 Ala. 530; *Robbins v. Mount*, 8 Ga. 74; *Palmer v. Gardiner*, 77 Ill. 143; *Dibble v. Truluck*, 12 Fla. 185. See also note to *Little Rock & Ft. S. R. Co. v. Wells* (Ark.) 30 L. R. A. 560, *Injunctions against judgments for matters arising subsequent to their rendition*.

In *Morgan's Appeal*, 110 Pa. 271, it was said that negligence in appealing cannot be cured by enjoining the judgment.

Or negligence in not asserting the remedy of mo-

day in the term, nor does it appear that appellant or his counsel were in any way led to believe that none would be filed; but, on the contrary, it does appear that this answer was filed, without objection, in open court, on the 13th day of December, at that same term of court. One of appellant's counsel says in his affidavit that he is informed that his client is at that time at home with a sick wife, and this may account in some measure for the fact that, although counsel discovered on March 13 that the answer had been filed, and the motion to set aside the order of submission was not considered until March 17, yet no reply controverting the allegations of the answer was tendered or filed, and no proof offered to sustain the averments of the petition. But, however this may be, we are unable to find anything in either of these affidavits sufficient to explain or overcome the fact that this answer was allowed to remain in the record uncontroverted from December 13, 1893, or to rebut the conclusion that, by the exercise of ordinary diligence, counsel could and would have discovered this fact before they voluntarily entered the order of submission on March 12, 1894. Upon these considerations alone, it seems to us that the chancellor might, as he did, in the exercise

of a reasonable discretion, have refused to set aside the order of submission.

But, in support of the action of the court below in overruling this motion and dismissing the petition, another very potent consideration is found in the fact that the grounds, as set forth in the petition on which this injunction was asked, are insufficient to justify it. We are aware that this could, and perhaps should, properly have been taken advantage of by a motion to dissolve the injunction, and that no such motion was made; but still it is not to be entirely excluded on this motion, made after the entire case had been submitted for judgment. This injunction was asked, as above stated, against a common-law judgment, on the ground that appellant had requested an attorney, to whom he had submitted the facts constituting his defense, to prepare an answer for him; that he had relied upon this attorney's promise to do so, and had gone to his home in another county, supposing that his answer would be filed, and the case be continued, but that, for some reason unknown to him, the attorney had failed to file the answer. This, in our opinion, is wholly insufficient to entitle appellant to relief by injunction against a judgment by default rendered against him under

tion for a new trial. *French v. Garner*, 7 Port. (Ala.) 549; *Phelps v. Peabody*, 7 Cal. 50.

Or in not asserting the remedy of motion to set aside the judgment. *Gulf, C. & S. F. R. Co. v. Henderson*, 88 Tex. 70; *Smith v. Powell*, 50 Ill. 21.

Or in not prosecuting a writ of error. *Rogers v. Kingsbury*, 22 Ga. 80.

d. In ascertaining a defense.

The negligence of complainant or his attorney in failing to use reasonable diligence to ascertain his defense will prevent an injunction against the judgment.

So, negligence in ascertaining defense will prevent an injunction against the judgment. *Governor v. Barrow*, 13 Ala. 540; *Goldsmith v. Stetson*, 39 Ala. 183; *Stetson v. Goldsmith*, 31 Ala. 649; *Wixom v. Davis*, Walk. Ch. (Mich.) 15; *Garrett v. Lynch*, 45 Ala. 204; *Williams v. Lockwood*, Clarke, Ch. 172; *Headley v. Bell*, 84 Ala. 346; *Taliaferro v. Branch Bank*, 23 Ala. 755; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Perrine v. Carlisle*, 19 Ala. 686; *Lee v. Insurance Bank*, 2 Ala. 21; *Hinrichsen v. Van Winkle*, 27 Ill. 334; *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) 991; *Smith v. Powell*, 50 Ill. 21; *Dilly v. Barnard*, 8 Gill & J. 170; *Cheyney v. Wright*, 7 Phila. 431; *Stinnett v. Branch Bank*, 9 Ala. 120.

And negligence in not discovering mistakes in the statement of a partnership account, which showed the judgment to be unjust, where complainant had free access to the books, will prevent an injunction against proceedings on a judgment, as such a case presents gross negligence. *Palmer v. Bethard*, 66 Ill. 529.

That the complainant did not have time to examine books when they were produced at the trial of the action at law will not entitle to an injunction, as he should have applied to the court for further time for this purpose, which would doubtless have been granted if the facts and circumstances had warranted it. *Hines v. Beers*, 76 Ga. 9.

A party who neglects to examine the note upon which he is sued, and to avail himself of all proper credits when he had the opportunity to do so, cannot have the judgment enjoined. *Jarboe v. Kepler*, 4 Ind. 177.

31 L. R. A.

So, an injunction will not be granted against a judgment, where the complainant has been guilty of negligence in not knowing on what note he had been sued, and does not tell what pleas he made. *Head v. Pitzer*, 1 Mo. 548.

And the failure to use diligence to ascertain the consideration of the note sued upon will prevent an injunction against proceedings on a judgment, where there is no reason or excuse given for not ascertaining the same in time. *Miller v. Gaskins*, *Smedes & M. Ch.* 524.

And a surety will not be entitled to an injunction against a judgment on a note, where one of the names has been erased with a pen, and he claims that he would not have signed the note without such other party on it, and that he was ignorant of the erasure, although the note was presented at the trial, as his negligence will bar an injunction. *Shelmire v. Thompson*, 2 Blackf. 270.

Gross negligence in not searching the records to ascertain a defense will prevent equitable relief. *Vaughn v. Johnson*, 9 N. J. Eq. 173.

A defendant who claimed that he was not the party named in the process, but swore to an affidavit of defense without knowing what it contained, was guilty of negligence and is not entitled to an injunction. *Burke v. Gibson*, 6 Kulp, 310.

Where complainant was guilty of negligence and made no effort to prepare for the trial, an injunction will not be granted. *Kriechbaum v. Bridges*, 1 Iowa, 14.

And a judgment will not be enjoined on the ground of ignorance of a defense, where the same was mixed with negligence. *Lebanon Mut. Ins. Co. v. Erb*, 16 W. N. C. 113.

And the failure of a defendant to remember a fact which would have been a complete defense on a motion for summary judgment will not be ground for enjoining the judgment, as this is not fraud of the opposite party or such mistake as will be relieved against. *Bailey v. Anderson*, 6 Humph. 149.

Delay in filing a bill of interpleader setting up that, owing to the absence of one of the defendants, who left for a foreign country after service of process, it was not discovered until after judgment that the plaintiff at law was not the party entitled to the judgment, is fatal to an application for an

such circumstances. Aside from the personal negligence thus confessed, on part of appellant himself, in going off to another county, and never looking after his case, in which, as we understand, the default judgment was not rendered till the second term after process was served, is the fact that the gross and unexplained negligence which he thus charges upon his attorney, instead of excusing, is, under the law, to be treated as his own negligence. This doctrine was laid down in one of the early decisions of this court, and, so far as we are aware, has not been materially modified or departed from. In *Patterson v. Matthews*, 3 Bibb, 80, this court said: "It is a settled rule that a new trial ought not to be awarded on account of the neglect of the agent or attorney of the party applying for it; for such neglect is equivalent to the neglect of the party himself, and he may have a remedy over against his agent or attorney." And, in considering this exact question, Mr. High lays down the rule in this language, to wit: "The negligence or improper conduct of an attorney employed to defend a suit at law, or his failure or neglect to defend the action, will not justify an injunction against the judgment." High, *Inj.* 3d ed. § 210. This being the

law, the question of the validity or invalidity of the defense which might have been made to the action becomes wholly immaterial, and it is therefore unnecessary to consider the question how far appellant could have availed himself of the defense that it was understood that he was not to be individually bound on this accepted order, but was only to pay it out of funds collected for John Burks' estate, when, by the terms of the writing itself, the obligation was personal and unqualified. No matter what his defense may have been, having failed, either by his personal negligence or that of his attorney, to answer or make defense, he was not entitled to the relief sought in this action; and, although no motion was made to dissolve the injunction on this ground, yet it was a proper matter to be considered by the court below in disposing of the case as it did.

There is still another question, pertaining more directly to the validity of this order of injunction, and which might properly have been raised on a motion to dissolve, but which might also properly have been considered by the court on the hearing; and that is the fact that this injunction was granted by the deputy clerk of the Barren

injunction. *Larabrie v. Brown*, 1 DeG. & J. 204, 26 L. J. Ch. 416.

In *Center Twp. v. Marion County Comrs.* 110 Ind. 580, it was said that equity will not relieve a party from a judgment at law for failure to interpose a defense, or for mistakes that could have been discovered by the use of ordinary diligence.

But in *Wilday v. McConnell*, 63 Ill. 278, where the claim in judgment had been paid, and the receipt had been forgotten at the time the default was entered, and when the motion was made to set it aside its existence had not occurred to the defendant, and the evidence was conclusive that he was not apprised of the receipt until after final judgment, an injunction was granted, as the party could not be said to be guilty of negligence.

e. In regard to evidence.

Diligence is required by attorneys and their clients in regard to evidence; and so negligence in not procuring evidence or witnesses at the trial will prevent an injunction against the judgment.

The fact that complainant was unable to find any witness by whom a defense could be proved does not show such diligence as will entitle to an injunction. *Wells v. Wall*, 1 Or. 295.

And negligence in obtaining the presence of witnesses or advising counsel will prevent an injunction against a judgment,—especially where other preparations are not made for the trial. *Hoopes v. Kuhn*, 4 Call (Va.) 274; *Robb v. Halsey*, 11 Smedes & M. 140; *Mook v. Cundiff*, 6 Port. (Ala.) 24.

So, negligence in not obtaining evidence that might have been had will prevent an injunction against proceedings on a judgment. *Fisher v. Greene*, 5 Colo. 541; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Kersey v. Rash*, 3 Del. Ch. 321.

And negligence in failing to obtain witnesses, and in not making the defense that the claims had been satisfied and merged before judgment, will bar complainant from enjoining the judgment. *State Bank v. Stanton*, 7 Ill. 352.

On a judgment recovered for such sum as referees should say was due, the negligent failure of the defendant to produce vouchers and credits before them prevents him from thereafter obtaining an

injunction against the judgment entered upon the report. *Webster v. Hardisty*, 28 Md. 562.

And negligence in not obtaining a continuance in order to procure evidence will prevent an injunction against the judgment. *Ratliff v. Stretch*, 130 Ind. 282; *Naylor v. Phillips*, 2 Stew. & P. (Ala.) 58; *Canada v. Barksdale*, 84 Va. 742.

The negligence of complainant in not resisting the use of incompetent evidence will prevent an injunction against the judgment. *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55.

And the failure to prove that the plaintiff is not the owner of a judgment filed against an estate, and that the claim is unfounded, will prevent enjoining the same, where such fact could have been proved if the complainant had not been negligent, and no fraud or accident is shown. *Stilwell v. Carpenter*, 59 N. Y. 414, Reversing 1 Thomp. & C. 615.

And negligence in preparing for trial will prevent enjoining a judgment, although money had been sent to complainant's attorney to take depositions, where the money was not received, and the attorneys, believing the case to be abandoned, made no preparation, and the case was tried in complainant's absence, and he resided only 150 miles from court. *Meliendy v. Austin*, 69 Ill. 15.

The failure of complainant to consult with his witnesses and ascertain what facts could be proved is gross negligence, and will prevent an injunction against proceedings on the judgment. *Tallman v. Becker*, 85 Ill. 183.

As to negligence in regard to evidence, see *Ames v. Snider*, *supra*, II. a; *Albro v. Dayton*, *supra*, II. c; *Walker v. Kretzinger*, *infra*, II. f.

An injunction will not be granted against a judgment on the ground of newly discovered evidence, where complainant was negligent. *Burnley v. Rice*, 21 Tex. 171; *Holmes v. Stateler*, 57 Ill. 209; *Cadwalader v. Atchison*, 1 Mo. 659; *Kirby v. Pascault*, 53 Md. 581; *Cantey v. Blair*, 1 Rich. Eq. 41; *Cunningham v. Buchanan*, 10 Grant, Ch. (U. C.) 523; *DeLima v. Glaseell*, 4 Hen. & M. 369; *Faulkner v. Harwood*, 6 Rand. (Va.) 125; *Fuller v. Little*, 69 Ill. 229; *Glover v. Hedges*, 1 N. J. Eq. 113; *Greenfield v. Frierson*, 7 Helsk. 633; *Hill v. Harris*, 42 Ga. 412;

circuit court. The order is signed, "Jas. B. Martin, C. B. C. O., by J. H. Bohannon, D. C." Has a deputy clerk power to grant such an order? The clerk certainly has this power, under certain circumstances, as it is provided in § 273, Civ. Code Prac., that "the injunction may be granted at the commencement of the action, or at any time before judgment, by the court, or by any circuit judge; or by the clerk of the court, or by the county judge, if the judge of the court be absent from the county, or by two justices of the peace, if the judge, and the clerk of the court, and the county judge, be absent from the county." And, if the exercise of this power to grant injunctions were merely ministerial in its character, it would be conceded that the power thus conferred on the clerk might be exercised by his deputy. By section 678 of the Civil Code of Practice it is provided that "any duty enjoined by this Code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." But this language, in our opinion, in referring to duties to be performed, and acts permitted to be done, by a ministerial officer, is intended to include only duties and acts which are ministerial only in character and

such as are to be performed and done by the officer in his ministerial capacity. When, however, a ministerial officer or one whose general duties are of that character, is clothed, in special cases, as may be done, with the power to perform acts in their nature judicial, or quasi judicial, we do not think it was the purpose or intention of the legislature by this section of the Code to authorize the performance of such acts by a deputy. The clerk of a court is, strictly speaking, a ministerial officer; but that this power of granting injunctions conferred upon him by the section referred to is, in its nature, not purely ministerial, but is judicial or quasi judicial, seems to us manifest; and that it cannot be delegated, either by him or any of the other officers upon whom it is conferred, either to a special or a regular deputy, seems equally manifest. It is not analogous to the power conferred upon him to issue attachments, which may be done by a deputy. There he is required to see that an affidavit in a special form prescribed by law is filed; but here, where an immediate order of injunction is asked for, without notice, as was done in the case before us, it is expressly provided, by section 276 of the Code, that it shall not be granted unless the court or officer

Hevener v. McClung, 22 W. Va. 51; Lebanon Mut. Ins. Co. v. Erb, 16 W. N. C. 113; Levan v. Patton, 2 Heisk. 108; Ludington v. Handley, 7 W. Va. 390; Munn v. Worrall, 16 Barb. 221; Peace v. Nalling, 1 Dev. Eq. 239; Taylor v. Sheppard, 1 Youngs & C. Exch. 271; Semple v. McGatagan, 10 Smedes & M. 98; Smith v. McLain, 11 W. Va. 654; Titcomb v. Potter, 11 Me. 218; Turley v. Taylor, 6 Baxt. 376; Green v. Robinson, 5 How. (Miss.) 80; Harnsbarger v. Kinney, 13 Gratt. 511; Bloss v. Huil, 27 W. Va. 508; Bishop v. Duncan, 3 Dana, 15; Leggett v. Morris, 6 Smedes & M. 723; Floyd v. Jayne, 6 Johns. Ch. 479; Slack v. Wood, 9 Gratt. 40; Akers v. Akers, 83 Va. 633; Forsythe v. McCleight, 10 Rich. Eq. 308; Branch Bank v. Tillman, 10 Ala. 149; Baeye v. Beard, 12 B. Mon. 561; Wilson v. Bastable, 1 Cranoh. C. C. 304.

For the particular facts in the above cases, see note on *Injunctions against judgments for matters arising subsequent to their rendition*, to Little Rock & Ft. S. R. Co. v. Wells (Ark.) 80 L. R. A. 560.

1. In asserting a defense.

The negligence of complainant or his counsel in failing to assert a legal defense that might have been made by the exercise of reasonable diligence, and that should have been made, will prevent an injunction against the judgment. Hettzell v. Bents, 8 Phila. 261; Cairo & St. L. R. Co. v. Holbrook, 92 Ill. 297; Broda v. Greenwald, 66 Ala. 588; Champlon v. Woods, 79 Cal. 17; Conway v. Ellison, 14 Ark. 360; Cunningham v. Caldwell, Hardin (Ky.) 123; Elston v. Blanchard, 3 Ill. 420; Kersey v. Rash, 8 Del. Ch. 321; Newman v. Morris, 52 Miss. 402; Odell v. Mundy, 59 Ga. 641; Ross v. Holloway, 60 Miss. 553; Miller v. Morse, 23 Mich. 365; Hendrickson v. Hincley, 58 U. S. 17; How. 443, 15 L. ed. 123; Barber v. Rukeyser, 39 Wis. 590; Hill v. Harris, 51 Ga. 628; Hambrick v. Crawford, 85 Ga. 333; Kriechbaum v. Bridges, 1 Iowa. 14; Green v. Robinson, 5 How. (Miss.) 80; Little v. Price, 1 Md. Ch. 182; Reeves v. Cooper, 12 N. J. Eq. 223; Crawford v. Wingfield, 25 Tex. 414; Walker v. Shreve, 87 Ill. 474; Tutt v. Ferguson, 13 Kan. 45; Barker v. Elkins, 1 Johns. Ch. 466; Woodward v. Dromgoole, 71 Ga. 523.

And complainant must show that he is without fault or negligence, to obtain an injunction against a judgment. Wood v. Lenox, 5 Tex. Civ. App. 318; 31 L. R. A.

Buntain v. Blackburn, 37 Ill. 406; Barker v. Elkins; 1 Johns. Ch. 466; Whitaker v. Wickersham, 5 Del. Ch. 187; Gulf. C. & S. F. R. Co. v. Henderson, 83 Tex. 70; Meek v. Howard, 10 Smedes & M. 502; Glover v. Hedges, 1 N. J. Eq. 118; Foster v. Mansfield, C. & L. M. R. Co. 146 U. S. 88, 36 L. ed. 890; Cole v. Hundley, 8 Smedes & M. 473; Horn v. Queen, 4 Neb. 108; Gott v. Carr, 6 Gill & J. 309.

So, a garnishee negligent in making his defense will not be entitled to an injunction against the judgment. Paynter v. Evans, 7 B. Mon. 420; Carroll v. Parker, 1 Baxt. 299; Yarborough v. Thompson, 8 Smedes & M. 291, 41 Am. Dec. 623; Sanders v. Fisher, 11 Ala. 812; Houston v. Wolcott, 7 Iowa, 173; Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 390; Hair v. Lowe, 19 Ala. 224; Richmond Enquirer Co. v. Robinson, 24 Gratt. 548; Danaber v. Prentiss, 22 Wis. 311; Alleman v. Kight, 19 W. Va. 301; Braden v. Reitzenberger, 18 W. Va. 238; Nevins v. McKee, 61 Tex. 412; Field v. McKinney, 60 Miss. 763; Anderson v. Oldham, 82 Tex. 228; Haseltine v. Brickey, 16 Gratt. 116.

That a debtor did not suppose plaintiff would press his attachment suit until another case was settled is not ground for enjoining a sale on the judgment in attachment, or an excuse for not making a defense. Lott v. Michel (Miss.) 16 So. 794.

And negligence in failing to make a defense because the defendant believed the plaintiff would allow him credits will prevent an injunction. Coleman v. Goyne, 37 Tex. 552; Reeves v. Hogan, Cooke (Tenn.) 175, 5 Am. Dec. 684; Garlick v. Reece, 8 La. 101.

So, where complainant carelessly put the summons and complaint in his pocket and never read it, and he and his attorney, believing the suit was for only a certain amount, made no defense, and the attorney consented to judgment for such amount, and it was taken for a much larger amount, their negligence will prevent an injunction against the judgment. Slappey v. Hodge Bros. 99 Ala. 300.

And negligence in failing to make a defense through pressure of business will prevent an injunction, although the defendant claimed to have relied on an understanding that the case was to be dismissed, where the complaint does not show with

to whom the application is made shall be satisfied, by the affidavit of the applicant or by other evidence, that irreparable injury will result to the applicant if the injunction be not immediately granted. This requirement clearly demands investigation and consideration judicial in its character. He is to consider and determine, as a quasi judicial officer, at least, the sufficiency of the application in law and in fact, under the evidence presented, before granting the order. In defining judicial power, this court has said: "We regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial." *Com. v. Jones*, 10 Bush, 749. All the elements entering into this definition of judicial powers seem to us to exist in this power of granting injunctions. But the language of the section conferring this power, as well as the fact that it is conferred on no others except those whose function and duties are strictly judicial, seems to us conclusive that this power is intrusted

to the clerk personally, that it is in its nature judicial, and is one that cannot be delegated. By the language of the provision itself the power is given to the clerk, and not to his deputy. It certainly involves the exercise of discretion and judgment, and, under the general rule governing such powers, the person to whom they are delegated and in whom the trust is reposed cannot delegate or intrust their exercise to the judgment and discretion of another. In a certain contingency the clerk may grant an injunction, and, if the judge, the clerk, and the county judge be absent from the county, then two justices of the peace may grant the injunction. If it had been contemplated that the deputy clerk, in any state of case, should have this power, the law would have conferred it in the event of the absence of the clerk from the county,—as it must be presumed that the clerk would leave a deputy in charge of his office,—and would have said that, if the judge and the county judge and the clerk, and all his deputies, are absent from the county, then the two justices may act. We cannot believe that it was ever intended to intrust so important a function, involving as it necessarily does the exercise

whom the contract for dismissal was made. *Gamble v. Campbell*, 6 Fla. 347.

So, allowing a judgment to be taken by default, intending to reserve the right of appeal, which was not done, will prevent enjoining proceedings on the judgment. *Bostwick v. Perkins*, 1 Ga. 136.

And negligence in not making a defense to an action at law because another defendant advised complainant not to attend to it will prevent an injunction against the judgment. *Young v. Morgan*, 13 Neb. 48; *Hayden v. Moore*, 4 Bush, 107.

And the statement of a third party that he had arranged the matter with the plaintiff is not an excuse for failing to make a defense. *Walker v. Shreve*, 87 Ill. 474.

The negligence of one partner in not making a defense for the firm, at the instance of the other partner, who spoke to an attorney, but gave him no names of witnesses, prevents an injunction against a judgment on a firm debt. *Walker v. Kretzinger*, 48 Ill. 502.

The negligence of a complainant in not making a defense is not excused by the promise of the sheriff to inform him, after service of process, whether or not he or another party of similar name was the party intended to be served. *Higgins v. Bullock*, 73 Ill. 205.

And an injunction will not be granted against a judgment where a new trial has been refused at law on account of negligence of the defendant in not defending, and sufficient excuse is not shown. *Dodge v. Strong*, 2 Johns. Ch. 228.

And negligence in the assertion of a homestead right by which it is made ineffectual will preclude an injunction against a sale on execution, where there was no fraud on the part of the other side, and the whole trouble was caused by complainant's own laches. *Platt v. Sheffield*, 63 Ga. 627.

Where a tort in forcibly taking a note from complainant and procuring a judgment thereon against a third party was alleged, but complainant waited without reasonable excuse until the judgment was rendered on the note and until the tort was barred at law, an injunction was refused against proceedings on the judgment. *Hays v. Urquhart*, 63 Ga. 323.

So, where a judgment was obtained on a note, and it was claimed the consideration was a defec-

tive engine, and the judgment was rendered nearly two years after the note was given, and it did not appear but that complainant was well acquainted with the insufficiency of the engine, his negligence in failing to make a defense prevented an injunction. *Parker v. Morton*, 5 Blackf. 1.

And negligence of a party, not excused, in failing to ascertain the amount of a judgment rendered against him, within the time allowed for appeal or error, will prevent an injunction. *Anderson v. Oldham*, 82 Tex. 228.

g. Delay in making.

Where the wife of G recovered judgment against B, who filed motions to retax costs and to revive two judgments against G, and five years afterward B commenced an action, and asked for an injunction against the judgment until such motions, still pending, were heard and determined, the lack of diligence in securing the determination of the motions prevented an injunction. *Boley v. Griswold*, 2 Mont. 447.

After an administrator has by mistake allowed a claim where the allowance has the effect of a judgment he must act with promptness in seeking to enjoin the same, and cannot be relieved for mistake of law. *Eccles v. Daniels*, 16 Tex. 136.

And negligence for three years in not ascertaining or making a defense where a judgment was taken, will prevent an injunction against the judgment. *Noble v. Butler*, 25 Kan. 645; *Lawson v. Bettison*, 12 Ark. 410.

And an injunction against a judgment that is erroneous will be refused on account of complainant's gross negligence. *Muscatine v. Mississippi & M. R. Co.* 1 Dill. 536.

Failure to make a defense at law, as distinguished from negligence in respect to defenses generally, will be treated in a subsequent note on *Jurisdiction of equity in general to grant injunctions against judgments*, to *Jarrett v. Goodnow*, post, —.

See further, as to negligence, note on *Injunctions against judgments by confession*, to *John V. Farwell Co. v. Hilbert* (Wis.) 30 L. R. A. 242, and note on *Enjoining judgments against or in favor of sureties*, to *Michener v. Springfield Engine & Thresher Co.* (Ind.) post, 59.

I. T.

of judicial discretion, to every deputy clerk in this commonwealth, many of whom are wholly without experience, and who, under the laws of this state, may even be under the age of twenty-one years; and we think, therefore, that the injunction issued in this action was invalid, and should have been dissolved, for the additional reason that it was issued by a deputy clerk. We are of the opinion that the court below properly dissolved appellant's injunction and dismissed his petition with damages and costs, and that judgment is affirmed.

SOUTHERN BUILDING & LOAN ASSOCIATION, of Knoxville, Tenn., *Appl.*,
v.

L. C. NORMAN, Auditor of Public Accounts,

(.....Ky.....)

1. **The requirement of Stat. § 4228.** that every foreign building and loan association doing business within the state shall pay into the treasury annually 2 per cent of its annual gross receipts, does not violate Const. § 174, requiring all nonexempt property, whether owned by natural persons or corporations, to be uniformly taxed in proportion to its value, but providing that nothing shall prevent a taxation based on "franchises."
2. **The obligation of previous contracts of subscription** to a foreign building and loan association doing business within the state is not impaired by Stat. § 4228, imposing an annual tax of 2 per cent of the annual gross receipts of all such associations.
3. **The freedom of commerce between states** is not interfered with by Stat. § 4228, requiring every foreign building and loan association to pay into the treasury annually 2 per cent of its annual gross receipts.
4. **The equal protection of the laws is not denied** to foreign building and loan associations doing business within the state, by Stat. § 4228, requiring such associations to pay into the treasury annually 2 per cent of their annual gross receipts.

(November 20, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Franklin County in favor of defendant in a mandamus proceeding to compel the issuance of a warrant for the repayment of taxes claimed to have been unlawfully exacted from petitioner. *Affirmed.*

The facts are stated in the opinion.

Mr. W. G. Bullitt, with *Messrs. Knott & Edelen*, for appellant:

The sections in question violate § 174 of the Constitution of Kentucky, which was supposed to guarantee absolute equality of taxation.

This exaction was not in the nature of a license to do business in the commonwealth. A license is a permission to do business in the future, while a tax is an exaction on present values or past business.

Bouvier, Law Dict.; 18 Am. & Eng. Enc. Law; 25 Am. & Eng. Enc. Law.

NOTE.—For exclusion or recognition of foreign corporations, see note to *Cone Export & C. Co. v. Poole* (S. C.) 24 L. R. A. 289.
31 L. R. A.

The acts in question operate as to existing subscriptions, to impair the contract of subscription.

De Vignier v. New Orleans, 16 Fed. Rep. 11.

The sections in question operate to impair that freedom of commercial intercourse between the states which is attempted to be conserved by the Constitution of the United States.

Wellton v. Missouri, 91 U. S. 280, 23 L. ed. 849; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 464, 26 L. ed. 1068; *Com. v. Smith*, 92 Ky. 38; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Fecheimer v. Louisville*, 84 Ky. 306; *Fire Assn. of Pennsylvania v. New York*, 119 U. S. 110, 30 L. ed. 343.

The state having permitted the appellant to come into the state and transact business, it is a denial of the equal protection of the laws to exact from it 2 per cent of its business under the guise of taxation.

Santa Clara County v. Southern P. R. Co. 118 U. S. 396, 30 L. ed. 118.

Mr. W. J. Hendrick for appellee.

Haselrigg, J., delivered the opinion of the court:

This appeal involves the constitutionality of the statute requiring every foreign building and loan association doing business in the state to pay into the treasury annually \$2 on every \$100 of its annual gross receipts. Ky. Stat. § 4228. The law is assailed as being, (1) in violation of section 174 of the state Constitution; (2) as impairing the obligation of contracts in existence when the law became operative; (3) as an unwarrantable interference with the freedom of commerce between the states; and (4) as denying to the association the equal protection of the laws. It is apparent that a brief inquiry into the nature of the business done by the association is pertinent to a proper understanding of each of these contentions, and especially in so far as the business is supposed to be affected with an interstate character. We say "brief inquiry," because the general characteristics of these associations are alike, and in recent years have become well known. The appellant's principal office is at Knoxville, Tenn. Its course of business is this: Each subscribing member contracts to contribute each month a stated sum, which the company agrees to invest on bond and mortgage; collecting the interest monthly, and reinvesting at frequent intervals the entire moneys received from all sources for the benefit of the stockholders, share and share alike. These contributions are made at the rate of 60 cents per month on each share of stock subscribed, until the time when such instalments and their accumulations should amount to the sum of \$100 for each share. This period is approximately seven years. Prior to the 11th of November, 1892, when the law in question became operative, none of the stock had matured, though the appellant had been doing business in the state and had made numerous contracts. From the date named until June 1, 1893, the gross receipts of the association

were \$98,057.60, but how much of this was old and how much was new business does not appear.

1. Is the statute in conflict with section 174 of the state Constitution? The section reads as follows: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution: and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the general assembly from providing for taxation based on income, licenses, or franchises." In this connection it is pertinent to read a portion of section 181 of the same instrument: "The general assembly may, by general laws only, provide for the payment of license fees on franchisees, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax." It is said that the imposition of the levy of 2 per cent on the gross receipts of the association is not in the nature of a license tax, because, as those terms imply, such a tax is enforced to obtain a license to do business in the future, and cannot, in the nature of things, be an exaction on past business. A license, it is said, is a permission, and the payment of a license tax proper is required as a condition precedent to doing a business otherwise prohibited. It is not an income tax, because the company has no property out of which an income may arise; and it is not a franchise tax, it is said, because the state has granted no franchise, that being a grant of another sovereignty. The conclusion is reached, therefore, that the statute imposes a tax on the business of the association. As this business in this state consists solely in selling shares of stock to Kentucky members, it is manifest the company can have no gross receipts, except from payments made by its Kentucky subscribers. These subscribers, under section 4093, Ky. Stat. are required to pay taxes on their shares of building and loan association stock as on other individual personal property. Therefore, say counsel, undisguised double taxation, and hence taxation not in proportion to its value, is imposed, not, as sometimes unavoidably happens, on the same property in the hands of different owners, but double taxation of the same property in the hands of the same owners, because the association is a purely mutual one, and the assets belong exclusively to the shareholders. The fallacy of the argument, it seems to us, lies in the assumption that this statute imposes a tax on property at all. Certainly it is not an *ad valorem* tax. The associations of the kind described generally have no tangible property within the state, and we do not regard the purpose of the statute to be to force an artificial *situs* on the obligations due the association from its members for stock, dues, etc. Indeed, those contracts cannot be said to have any certain value. The members own the contracts of subscription, it is true, but upon notice these may retire from membership, and withdraw the value of their payments, subject to conditions not necessary to notice. The business nevertheless is a valuable one,

1 L. R. A.

and it is for the privilege of doing this business that the tax is imposed. It is not a tax on the corporate franchise, for the conclusive reason that the state does not grant this, but it is a tax on the franchise of doing business in this state, and in this sense a franchise tax. It is true, the amount of the gross receipts of the company are taken as the measurement of the tax, but this is only the adoption of a fair and just standard. Such taxes may be measured by dividends, by the amount of the capital stock, by the extent of the business transacted, by the net earnings, by the gross receipts, etc. In the earlier cases a tax upon the gross receipts of a railroad was held not to be a direct tax on the property, but a tax upon the franchise of the corporation, measured by the extent of its business. *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 21 L. ed. 164. But subsequently the same court, in *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888, and *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 336, 30 L. ed. 1800, 1 Inters. Com. Rep. 308, modified or rather denied the right of the state to thus tax an interstate agency under such a guise. With this feature of the taxing power, however, we have nothing to do here. To the extent that such a claim is urged by counsel, we shall notice it presently. Regarded as a tax for the privilege of doing business in the state, we see at once that the plea of want of uniformity and failure to tax in proportion to value becomes unavailing; so, also, the contention that there is double taxation. If the tax is found to be in effect a franchise tax, the complaint cannot be made that the property of the corporation is otherwise taxed, or is nontaxable. *Society for Savings v. Cotte*, 73 U. S. 6 Wall. 594, 18 L. ed. 897; *People v. Home Ins. Co.* 92 N. Y. 328. In our opinion, however, there is in fact no unequal or double taxation imposed. So far as borrowing members are concerned, they do not list their shares for taxation, and, while the subscribers for paid stock pay on their shares as on other individual property, the company pays no annual tax on these shares. After paying on its gross receipts for any given year, it never again pays on the receipts of that year. It never receives them again. The one payment exhausts the force of the statute for all time.

2. Counsel say that, viewed from the standpoint of the company, the subscriptions may be regarded as choses in action, and having no *situs* in this state, except the artificial one created by this statute, the contracts of subscription made before the law was passed are impaired to the extent of the tax imposed. In *De Vignier v. New Orleans*, 16 Fed. Rep. 11—, the case relied on by counsel,—it was held that "in the absence of any provisions of the statute which had entered into and formed part of the contract, giving the right to impose a tax, bonds or other obligations of a city, which belong to nonresidents, cannot be taxed without impairing the force of the obligation itself." But we have seen that there is no purpose here to tax the property of the corporation, or impart to its property a forced location, contrary to the settled rules which govern that class of property. The

principle announced in the case is not applicable.

3 and 4. Finally it is said that the freedom of commerce between the states is interfered with, and the equal protection of the laws denied the corporation. The statute, whatever may be said of the nature of the tax it imposes, in express terms, affects only business done within the state. The business—traffic or commerce, if you please so to term it—of the corporation is purely internal or domestic. Having under consideration the validity of a tax imposed on a Nebraska express company by a Missouri statute (Act May 16, 1889) similar to the one now in question, the supreme court, by Justice Lamar, after quoting the statute, said: "It is manifest that these provisions of the statute, so far from imposing a tax upon the receipts derived from the transportation of goods between other states and the state of Missouri, expressly limit the tax to receipts for the sums earned and charged for the business done within the state. This positive and oft-repeated limitation to business done within the state, that is, business begun and ended within the state, evidently intended to exclude, and the language employed certainly does exclude, the idea that the tax is to be imposed upon the interstate business of the company. 'Business done within the state' cannot be made to mean business done between that state and other states." *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 8 Inters. Com. Rep. 810. This case is decisive also of other contentions made by the appellant here. The tax under consideration was one on the gross receipts of a foreign corporation, and it was contended that the act violated "the requirements of uniformity and equality of taxation prescribed by the Constitution of Missouri, and thereby denies to the complainant the equal protection of the laws of the state which the 14th Amendment to the Constitution guarantees shall not be abridged by state action." The court said that it had repeatedly "laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms," citing *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, and *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 607, 33 L. ed. 1025, 1032. The perfect application of these principles to the case at hand becomes apparent when we observe the substantially perfect identity between our statute and the Missouri statute. For not only was the complainant a foreign corporation, and the tax one on its gross receipts on business done in the state, but the rate was \$2 on the \$100 of such receipts taken in for one year next preceding a time certain fixed in the statute. The court further proceeds to demonstrate that the manner of taxing the express company, which had no tangible property in the state, of consequence, was necessarily different from that of other corporations, but there was no unjust discrimination on that account. We may ob-

serve here that the burdens imposed on appellant by the statute under consideration are substantially the same as those imposed on other similar corporations, similarly situated. In the case of *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 343, relied on by the appellant, the plaintiff in error was a fire insurance company of Pennsylvania doing business in the state of New York, and the question was what effect the 14th Amendment of the Constitution should be given in the matter of taxing the foreign corporation. The court first decided that "issuing a policy of insurance is not a transaction of commerce." The case of *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, was also distinctly approved, wherein it was said: "Having no absolute right of recognition in other states but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." And a tax of 3 per cent on the premiums received by the complaining company in the state of New York for a given year was upheld because a like tax had been imposed on New York insurance companies doing business in Pennsylvania. The court also approved its former decision in *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972, where it was said: "The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established. As to the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." The right to impose the tax in the case at hand does not depend, it seems to us, on its being paid as a condition precedent to the entrance of the corporation into the state. If the corporation, by the diligence of its agents, entered the state before any law was enacted to exclude it or tax its privileges, it still cannot be said that the state assented to such entrance, or gave it any official recognition whereby it was precluded from imposing a reasonable tax on its right to transact business, and rating it according to the amount of business done after the enactment of the law. It was at least a tax on the privilege of doing business after the enactment of the law, and its collection postponed in order that the sum of it might be fixed with regard to the amount of business done. It might have been fixed without regard to such amount. We do not think that the modification of the charge of \$25 on the agent of the corporation, fixed on all alike, affects the right to impose the tax in question. This was in the nature of a fee for the license not exceeding the cost of its issue, and the regulations with respect thereto.

It may be observed, finally, that while the language of some of the cases cited, and others not referred to, sustains the position that the state may favor its own corporations, or impose a less tax on them than on foreign ones, the assertion of that principle is not necessary here to sustain the statute in question. It does not follow, because different plans of taxation are adopted with respect to the two classes, that there is a discrimination

against either. It is practically impossible to compare a tax rate fixed on property on the ad valorem system with a rate fixed without reference to the value of property, but as a tax on the privilege of doing business. But an examination of our various statutes will, we think, show no discrimination against the nonresident corporation.

The judgment dismissing the petition is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

James HOYT *et al.*, *Appts.*,

v.

J. T. LOVETT COMPANY.

(71 Fed. Rep. 173.)

1. **Prior use of a name by other persons is sufficient to defeat a trade mark**, although it was not a commercial use and was only for a short period, if it was such that the name had already become extensively recognized and well known before it was claimed as a trademark.
2. **The words "Green Mountain" cannot be appropriated** by an individual as a trademark for grape vines and grapes which are the natural product of the Green mountains, to the exclusion of others who deal in similar articles originating in the same locality.
3. **An organic article which by the law of its nature is reproductive and derives its chief value from its innate vital powers independently of the care, management, or ingenuity of man, such as seeds, plants, or vines, cannot be the subject of a trademark** so as to prevent the use of the name of the parent stock by any person cultivating and selling its products.

(December 8, 1896.)

APPPEAL by complainants from a decree of the Circuit Court of the United States for the District of New Jersey in favor of defendant in an action brought to recover damages for infringement of a trademark and to enjoin the further infringement thereof. *Affirmed.*

Before Acheson and Dallas, Circuit Judges, and Wales, District Judge.

The facts are stated in the opinion.

Mr. Rowland Cox, for appellants:

The term "Green Mountain," when applied to grapevines, was an arbitrary or fanciful designation which could be adopted as a trademark.

Williams v. Spence, 25 How. Pr. 366; *Williams v. Adams*, 8 Biss. 452, 7 Rep. 613; *Windsor v. Clyde*, 9 Phila. 518.

A right of property in a trademark does not depend upon priority of use. In this respect trademarks differ essentially from patents.

Menendez v. Holt, 128 U. S. 521, 32 L. ed. 526; *Colman v. Crump*, 70 N. Y. 580.

The material question in the case is whether a person who, by his enterprise, industry, or skill, produces a new vine or plant can select and apply to it an arbitrary name, and be protected in the use of that name as a trademark. Analogous cases say that he can.

Selchow v. Baker, 98 N. Y. 59, 45 Am. Rep. 169; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *Menendez v. Holt*, *supra*; *Congress & E. Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291, 6 Am. Rep. 82; *Cox*, Manual of Trade Mark Cases, 650; *Id.* 429; *Id.* 727.

The circumstances that the defendant uses the designation "Green Mountain," without using the incidental features which complainants have employed in connection with it, is an immaterial circumstance.

Where the trademark consists of a word which is chiefly addressed to the ear, the manner in which it is used is obviously immaterial.

Enoch Morgan's Sons Co. v. Wendover, 48 Fed. Rep. 420, 10 L. R. A. 283; *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589; *Menendez v. Holt*, 128 U. S. 514, 32 L. ed. 526.

The presumptions in favor of a patent or statutory right are of great weight.

American Bor Mach. Co. v. Day, 32 Fed. Rep. 585; *McMillin v. Barclay*, 5 Fish. Pat. Cas. 205; *Coffin v. Ogden*, 85 U. S. 18 Wall. 120, 21 L. ed. 821; *Comstock v. Sandusky Seat Co.* 3 Bann. & Ard. 188, 13 Off. Gaz. 230.

If, in any instance, it appears that the defendant is endeavoring to "steal away another's business and goodwill" (*Celluloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 97), he will be restrained.

Lawrence Mfg. Co. v. Tennessee Mfg. Co. 188 U. S. 537, 34 L. ed. 997; *Le Page Co. v. Russia Cement Co.* 51 Fed. Rep. 941, 17 L. R. A. 354, 5 U. S. App. 112; *Coats v. Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847; *Taendstieksfabriks Aktiebolagat Vulcan v. Myers*, 139 N. Y. 364.

Prior to 1889 the term "Green Mountain," had never been used in commerce. To the extent that it was used it signified just what we claim it signifies to-day, a product of the complainants or their assignor. It had not taken its place in the language as indicating a particular thing. When complainants adopted, applied, and registered it, they did not disturb

NOTE.—The above case presents a novel question in respect to the right to have a trademark in such organic, reproductive articles as grapevines. 31 L. R. A.

As to trademark in geographical names, see *Levy v. Waitt* (C. C. App. 1st C.) 25 L. R. A. 190, and cases there cited.

its original meaning as indicating, (1) a vine of a particular variety, (2) grown by them.

Kohler Mfg. Co. v. Beshore, 58 Fed. Rep. 264, 59 Fed. Rep. 576.

Mr. Augustus T. Gurllis, with **Mr. Henry S. White**, for appellee:

It is not the registration that makes a party owner of a trademark, he must be the owner before he can register.

Brower v. Boulton, 58 Fed. Rep. 389; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 311, 20 L. ed. 581.

The latter case settled the doctrine for this country:

1. That the generic name of an article can never be a trademark;

2. That the name of a district of country where an article originates can never be monopolized by one person as against another who is dealing in similar articles originating in the same district;

3. That trademark rights rest upon priority of use;

4. That a claim to monopoly cannot be sustained upon the theory of trademark or trade-name.

Hostetter v. Fries, 17 Fed. Rep. 620; *Leclanche Battery Co. v. Western Electric Co.* 23 Fed. Rep. 276; *Evans v. Von Laer*, 32 Fed. Rep. 158.

No circular, price list, or advertisement, no matter how frequently repeated, can constitute a trademark.

Candee v. Deere, 54 Ill. 489, 5 Am. Rep. 186. The complainants can have no trademark in the name "Green Mountain."

The public use of the name was established by Mr. Paul, before complainants ever heard of the Green Mountain. That which has once gone into public use cannot thereafter be appropriated by any one.

Egbert v. Lippmann, 104 U. S. 335, 26 L. ed. 755.

No one has a right to appropriate a sign or symbol which from the nature of the fact it is used to signify others may employ with equal truth, and therefore have an equal right to employ for the same purpose.

Delaware & H. Canal Co. v. Clark, 80 U. S. 18 Wall. 311, 20 L. ed. 581; *Humphreys Homeopathic Medicine Co. v. Hilton*, 60 Fed. Rep. 758.

The geographical name merely cannot be a valid trademark.

Wales, District Judge, delivered the opinion of the court:

James Hoyt and Edwin Hoyt sued the J. T. Lovett Company for the infringement of their common-law and registered trademark, under which they claimed the exclusive right to propagate and sell grapevines, grapevine slips, and grapes cultivated and produced by them, and to which they had given the name of "Green Mountain Grape." The circuit court dismissed the complainants' bill, on the ground that "the case seems clearly to fall within the principles stated by Mr. Justice Jackson in *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, and is governed by it." In the case referred to the court says: "The general principles of law applicable to trademarks, and the conditions under which a party may estab-

lish the exclusive right to the use of a name or symbol, are well settled by the decisions of this court, . . . which . . . establish the following general propositions: . . . (8) That the exclusive right to the use of the mark or device claimed as a trademark is founded on priority of appropriation; that is to say, the claimant of the trademark must have been the first to use or employ the same on like articles of production. (4) Such trademark cannot consist of words in common use as designating locality, section, or region of country."

The law being thus settled, we have only to consider its application to the facts of the case now before us.

1. Priority of adoption and use. Each of the parties to the present suit has been for many years extensively engaged in the business of a nurseryman; the complainants at New Canaan, in the state of Connecticut, and the defendant at Little Silver, in the state of New Jersey. The bill alleges that the complainants, in and about the year 1885, discovered the vine to which, after three years of experimental cultivation and propagation, they gave the name of "Green Mountain Grape;" that they selected and used this name as a trademark in advance of all others, and have since continuously used it to denote and indicate their grapevines, and also the grape produced therefrom; that the said trademark was registered in the patent office of the United States on the 27th of August, 1889; and that the defendant has fraudulently used the name. The answer denies all the material matters set out in the bill, excepting the fact of registration, and specially denies that the complainants were the first to select and adopt the name which they claim as a trademark. The record shows that J. M. Paul, who carried on a nursery on a small scale at North Adams, Mass., in the year 1884, and probably earlier, found some grapevines growing wild on or near the side of the Green mountains, in the state of Vermont, on the farm of Mr. Clough, from whom he bought them, and that in the spring of that year he sent one of the vines to Mr. Hathaway, of Easton, N. Y., with a wooden label attached thereto, bearing the words "Green Mountain." Previous to this Mr. Paul, while on a visit to the home of his old-time friend, Mr. Hathaway, had mentioned his discovery of the vines, and the two, after talking over the subject of a suitable name for the new vine, had concluded that "Green Mountain" "would cover the whole." The first vine planted by Mr. Hathaway did not live, and in the spring of 1885 he planted another of the same variety, labeled with the same name, received from Mr. Paul, which survived, and bore fruit in the summer of 1886; and from this last vine he sold eyes on slips to different buyers, among whom was the J. T. Lovett Company, by the name of the "Green Mountain Grape." This witness also states that he had sold and given away some of these vines to his neighbors as the Green Mountain grape, and that the vines are now known in his neighborhood by that name. Mr. Hathaway is distinct in his recollection of the circumstances thus briefly narrated, and he is corroborated as to the fact of prior use by other witnesses. Mr. Edwin Hoyt, one of the complainants, and the only witness produced in

support of the bill, says that Mr. Paul sent them a sample of the Green Mountain grape in the spring of 1885; that they had at first thought of calling it the "New Canaan Grape," and had prepared a device taken from a pictorial Bible, representing the two returning spies bearing on their shoulders a staff from which was suspended a large cluster of grapes, but upon further reflection "we thought the words 'Green Mountain,' the place where the vine originated, would carry with it the idea of hardiness; that perhaps the vine would take better; . . . and we finally adopted the name 'Green Mountain,' with the same picture;" and that this name has been used by them since January, 1889. Mr. Hoyt also states that the vine was discovered by Mr. Paul, who bought it of Clough. In a letter from the complainants to the defendant, dated September 11, 1888, they wrote: "We send you by express a sample of our new grape, the 'Green Mountain.' This grape originated in the Green mountains; hence its name." The complainants published two advertisements, dated, respectively, February, 1890, and August, 1890, in which, after describing the excellent qualities of their new grape, they notified the public that: "Each vine sold will be sealed with our trademark. Our copyright name 'Green Mountain,' gives us the exclusive right for its propagation for sale."

On August 25, 1890, the defendant wrote to the complainants, inquiring: "On what terms will you supply us some seals? A party offered us the wood of a vine of the Green Mountain grape last fall, which he said came into his possession before you had purchased. This was before we knew that you were going to have the grape copyrighted, and we bought the wood, and propagated from it a few vines, perhaps a hundred."

The complainants reply by letter to this inquiry, on August 27, 1890: "You say you got the wood of a party who procured it before we had purchased it. We do not think this can be so, as we have had it nearly five years now, but did not offer it for sale until last spring a year ago. Would you object telling us from what source you received your wood? Mr. Paul told us there were no vines sold which would do us any harm. He is dead now, and there is no finding out to whom he sold vines, or the date he bought the vines from Mr. Clough."

At the time of the sale by Mr. Paul to the complainants,—December 20, 1885,—he entered into a written contract with them, the substance of which was that he would furnish the wood grown from the Green Mountain vine on his place, or under his control, so long as the said Hoyt's Sons shall require it, or until six years shall have expired; and without the latter's consent would not furnish the wood to any other person. It is quite probable that the complainants honestly believed they had acquired the sole right, under this agreement, to propagate and sell the vine, but they acted mistakenly, since the evidence proves that, besides Hathaway, at least two other persons—Mr. Terry and Mr. Francis—had each procured a Green Mountain vine from Mr. Paul, and had successfully cultivated them, before

the complainants had decided to adopt "Green Mountain" as a tradename. The registration of the trademark does not help the complainants. It amounts to nothing more than *prima facie* evidence of ownership, and does not confer a title upon the complainant, if some other person has, by adoption, acquired a prior right to its use. *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. Rep. 826.

In *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 322, 20 L. ed. 588, the court said: "The office of a trademark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article."

The defendant is not charged with an attempt to palm off his goods as the goods of the complainants, nor is there any evidence that the defendant attempted to deceive the public by a counterfeit or any imitation of the latter's device. On this branch of the case the evidence appears to be conclusive that the complainants had been anticipated in the use of the name which they undertook to claim as a trademark. We have not overlooked the contention of counsel that the prior use by Messrs. Hathaway, Terry, and Francis was not a commercial use, and was only for a short period before the registration. This distinction is unimportant in view of the fact that the name had already become extensively recognized and well known before the selection by complainants as descriptive of this particular variety of grape; and the length of time it had been on the market, if anterior, is not material. No usage or custom has been brought to our notice in support of the suggestion that the right of the public to the use of a name, as applied to a particular article, is limited by the number of sales, few or many, which may have been made previous to its adoption by a person who claims it as a trademark. It is not pretended that Mr. Hathaway was under any obligation which should have prevented him from selling the vines when he did; and one lawful prior sale by him, like *Mercutio's wound*, is enough.

2. The right to the use of a geographical name. This conclusion dispenses with anything more than a brief reference to the other defenses. The words "Green Mountain" being used to denote the place of origin of the article to which they were affixed, and the fact that this article is a natural product, bring the present case within the rule laid down in *Delaware & H. Canal Co. v. Clark* and *Columbia Mill Co. v. Alcorn*, already cited. In the first of these cases the attempt was made to secure to the complainant the exclusive use of the name "Lackawanna Coal," as applied, not to any manufacture of theirs, but to that portion of the coal of the Lackawanna valley which they mined and sent to market, differing neither in nature nor quality from all other coal of the same region. The reasons why such use cannot be allowed are thus presented by Mr. Justice Strong, speaking for the court: "No one can claim protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made

by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection. . . . 'He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.' And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. . . . It must then be considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation."

In *Columbia Mill Co. v. Alcorn*, the court repeats and approves the rule thus laid down. Its application here is obvious. All the vines which were sold or given away by Mr. Paul were the products of the original vine taken from the Green mountains, and "hence its name." The vine planted by Mr. Hathaway, and the wood sold by him to the defendant, were reproductions of the parent stock, and both buyer and seller could rightfully use the name by which it had been first called. To have sold it under any other name would have been a deception on dealers in similar articles, who were entitled to know its pedigree and history. The name given to the vine and to the grape is geographical, designating a particular district or country, and cannot be employed by the complainants to the exclusion of others who deal in similar articles originating in the same locality.

3. The remaining objection to the bill is that the protection of a trademark cannot be obtained for an organic article which, by the law of its nature, is reproductive, and derives its chief value from its innate vital powers, independently of the care, management, or ingenuity of man. This question is conceded to be novel and unprecedented. Tested, however, by the general principles regulating sales of personal property, there is no doubt that a sale of seeds, plants, or vines, when detached from the soil in which they grew, carries with it, on delivery, the right of property in the buyer, not only in the article so bought, but also in the natural increase or products of the same when sown or replanted. Neither the common law nor the statutes relating to trademarks extend the protection of tradenames to things which are valued more for their natural powers of reproduction and increase than for any other qualities. The facts in the present case afford an apt illustration of the incongruity of a contrary doctrine. A man buys a grapevine, to which is attached a metallic label stamped with the trademark of the seller. In the absence of a special contract between the parties, what is to prevent the buyer from cultivating the vine, and selling its products, whether of wood or of fruit, under the name of the parent stock? Certainly not a trademark. To repeat the words of Mr. Justice Strong: "No one can obtain protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made by himself."

The Hoyts did not make the Green Mountain vine, nor, strictly speaking, did they produce it. It grew out of the earth, was fashioned by nature, and endowed with powers and qualities which no human ingenuity or skill could create or imitate. If such protection as that now claimed by the complainants was allowed, a breeder of cattle could with equal propriety and reason demand like protection for the natural increase of his herd. In every aspect such claims would seem to be impracticable and inequitable.

There was no error in the decree of the circuit court, and it is therefore *affirmed*.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* BOARD OF TRANSPORTATION, *Ptf. in Err.*,

v.

SIoux CITY, O'NEILL, & WESTERN RAILROAD COMPANY *et al.*

(.....Neb.....)

*1. The construction placed upon provisions of the Federal Constitution by

*Headnotes by RYAN, C.

NOTE.—The decisions of the Supreme Court of the United States which control the constitutional question presented in the above case are so fully set forth in the case itself that no annotation will be attempted.

On the general subject of restriction of business, see note to *State v. Loomis* (Mo.) 21 L. R. A. 760, 31 L. R. A.

the Supreme Court of the United States must be followed by state courts in all matters to which such provisions are applicable.

2. The provisions of chapter 11, Laws 1893, which require railroad companies, as an absolute finality and without the right of judicial investigation by due process of law, to carry freights over longer lines for the same rates as required by any railroad company for hauling the same freight between the same points by a shorter line, no matter how great the disparity in the length of such hauls may be, are in conflict with the provision of the 14th Amendment of the Constitution of the United States, that no state shall "deprive any person of life, liberty, or property without due process of law."

3. It is not within the power of the court to make such an arrangement for the business intercourse of common carriers as, in

the opinion of such court, they ought to make for themselves, for such function is legislative rather than judicial.

4. **The power of the legislature to require railroad lines to build and maintain transfer switches** between themselves, being but an incidental consideration, is not discussed or decided in this case. The main purpose of chapter 11, Laws 1893, being the regulation of business intercourse of connecting railroad companies, said act is held invalid, as not being susceptible of enforcement as an entirety, for the reasons given in the second and third paragraphs of this syllabus.

(January 9, 1906.)

ERROR to the District Court for Holt County to review a judgment in favor of defendants in a mandamus proceeding to compel defendants to construct and maintain a transfer switch to connect their roads according to the provisions of a statute requiring it. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. A. S. Churchill, Attorney General, *George A. Day*, Deputy Attorney General, and *W. A. Dilworth*, for plaintiff in error:

With the proper averments a court of equity would by its decree fix the place, the manner of construction, and adjust the cost of construction, as well as the costs of the suit, where either company unreasonably refused to agree as to the location.

Texas Exp. Co. v. Texas & P. R. Co. 6 Fed. Rep. 437; *McCoy v. Cincinnati, I. St. L. & C. R. Co.* 13 Fed. Rep. 3.

The act is not void for uncertainty. Neither does it deprive it of either its liberty or property without due process of law.

State v. Republican Valley R. Co. 17 Neb. 647, 52 Am. Rep. 424.

That this transfer switch is simply a facility for conducting the business of the railroad, there can be no doubt. If so, then this disposes of all the contention that the law is without due process of law, or that it denies to them the equal protection of the law, or the taking of property without just compensation, or that its effect is to impair the obligations of a contract.

Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. Rep. 854; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 12 L. R. A. 486, 3 Inters. Com. Rep. 584; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *State v. Republican Valley R. Co. supra*; *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 18 L. R. A. 260; *Reagan v. Mercantile Trust Co.* 154 U. S. 418, 38 L. ed. 1030.

Other states have similar laws to this, and, in many cases, more stringent.

San Antonio & A. P. R. Co. v. State, 79 Tex. 264; *State v. Wabash, St. L. & P. R. Co.* 83 Mo. 144; *State v. Kansas City, Ft. S. & G. R. Co.* 32 Fed. Rep. 722; *Smith v. Chicago, M. & St. P. R. Co.* 86 Iowa, 202; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *People v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631; *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274; *Hoyt v. Chicago, B. & Q. R. Co.* 93 Ill. 609; *People v. New York, L. E. & W. R. Co.* 28 Hun, 549; 31 L. R. A.

Abbott v. Johnstown, G. & R. H. R. Co. 80 N. Y. 81, 38 Am. Rep. 572; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73; *Mason v. Missouri P. R. Co.* 25 Mo. App. 480; *Budd v. People*, 143 U. S. 517, 36 L. ed. 247; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757.

The transfer switch is simply an exercise of the police power of the state.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62 Am. Dec. 625; *State v. Chicago, B. & Q. R. Co.* 29 Neb. 412; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 18 L. R. A. 454; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 8 Inters. Com. Rep. 807.

It is the duty of a public servant to give all the assistance possible to promote the good of the general public, and when he assumes the duties of a public servant, he takes upon himself the protection of the public interests in preference to his own, and these railroad companies will not be heard to urge their own individual and selfish interests as against the good of the general public.

Galena & C. U. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574.

On petition for rehearing.

The court erred in holding and deciding that the act entitled "An Act to Regulate Railroads and to Compel Them to Put in Transfer Switches" was in contravention to the 14th Amendment to the Federal Constitution.

As to whether any rate is reasonable or unreasonable is a question of fact to be determined from the evidence produced before the proper tribunal.

Budd v. People, 143 U. S. 517, 36 L. ed. 247; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014.

Where does this court find any evidence in this case to support the presumption of an unreasonable rate?

The increasing or diminishing volume of business, the market price of the articles to be transported, the relation through freight, the articles of freight upon which the railroad must depend as compared with other roads transporting similar commodities through more populous communities, the development of competition, the opening of new lines of communication, the course of business which may concentrate empty cars at either terminus of the line,—all have a bearing upon the making of reasonable rates.

Evans v. Oregon R. & Nav. Co. 1 Inters. Com. Rep. 641; *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754; *Missouri P. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2, 4 Inters. Com. Rep. 428; *Concord & P. Railroad v. Forsaith*, 59 N. H. 123, 47 Am. Rep. 181; *Seefeld v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846; *Buchanan v. Northern P. R. Co.* 3 Inters. Com. Rep. 655.

The reasonable rate must be ascertained from the facts of the particular case.

Coze Bros. & Co. v. Lehigh Valley R. Co. 3 Inters. Com. Rep. 460; *Dow v. Beidelman*, 125 U. S. 690, 31 L. ed. 844.

The board of transportation is clothed with power to determine what is a just and reason-

able charge on all the lines of railroad within the state, and this may be done in advance of the rendition of the service.

State v. Fremont, E. & M. V. R. Co. 22 Neb. 822.

The court erred in holding and deciding that said act was incapable of being enforced, for the reason that there was no tribunal which was authorized to determine and fix the details of the business connections between the various railroads affected by said act.

Ibid.; *State v. Chicago, St. P. M. & O. Railroad*, 19 Neb. 476; *State v. Missouri P. R. Co.* 29 Neb. 550.

The court erred in holding and deciding that the main and sole object of said act was the compelling of the various railroad companies affected thereby to enter into business relations and intercourse with each other, and was not the compelling of said railroads solely to connect their tracks.

Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584.

Messrs. Lloyd W. Bowers, William B. Sterling, Wright, Hubbard, & Bevington, John B. Hawley, and B. T. White, for defendants in error:

As the statute neither itself determines, nor provides any tribunal clothed with authority to determine, such essential preliminaries to the building of the switch track as the place of its beginning or ending, its intermediate route, the method or material of its construction, or its cost, and yet the track is to be built by the joint action of the railroads to be connected, and is neither required nor permitted to be built by any one of them alone, it follows that the act undertakes to oblige the railroads themselves to agree upon all necessary preliminaries to construction such as the above named. It does not, however, declare which railroad shall yield to the others' desires in case of disagreement, and is fatally uncertain and incomplete in failing to do that, or otherwise determine where and how the switch track shall be built.

If the statute is not fatally defective in its own provisions, then it requires one railroad to reach agreement with the other, as to the necessary preliminaries of constructing the track, by yielding to the demands of that other railroad concerning such preliminaries. In that view the act requires one railroad to help build such a track as the other demands; and that is depriving the first railroad of its liberty and property without due process of law, in violation of Amend. 14, § 1, of the United States Constitution, and of art. 1, § 3, of the Nebraska Constitution, beside denying to the first railroad the equal protection of the laws guaranteed by the same section of the Federal Constitution.

By the act a railroad is required to engage in the business of transporting freight beyond its own line of road, and so is forced (whether it chooses or not) into an occupation which it has never bound itself to enter. Such legislation is a deprivation of liberty and property without due process of law, abridges the immunities guaranteed to railroads as to others, and denies them the equal protection of the laws.

Zabriskie v. Hackensack & N. Y. R. Co. 18 31 L. R. A.

N. J. Eq. 178, 90 Am. Dec. 617; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 255; 2 Morawetz, Priv. Corp. 2d ed. §§ 1047, 1059; Hutchinson, Carr. 2d ed. § 145; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 87 Fed. Rep. 567, 2 L. R. A. 239, 2 Inters. Com. Rep. 351; *Aitchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 663, 28 L. ed. 291.

The act compels involuntary contracts of agency between different railroads and their employees, and in so doing opposes the United States Constitution.

The rates fixed by the act for any transportation of freight in the course of which a transfer switch is traversed are unreasonable, and have the effect of taking property without due process of law, in disregard of both the Federal and state Constitutions.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 88 L. ed. 1014; Black, Const. L. pp. 318, 324, 325; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; Tiedeman, Pol. Powers, § 194, p. 598; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

Section 3 of the act, declaring in terms that no extra charge shall be made for the service of delivering or receiving freight on a transfer switch, explicitly requires the taking of property without due process of law.

The right of railroads, under their charters from Congress and the state of Nebraska, to charge reasonable rates, is a contract right, and is subject to regulation only by the legislative power of the state in the proper exercise of the police power, and for the purpose and to the extent of preventing unreasonable charges.

3 Am. & Eng. Enc. Law, article, *Constitutional Law*, p. 741; Black, Const. L. pp. 536, 741; Story, Const. § 1892; Cooley, Const. Lim. 5th ed. p. 712, *577; *Pingry v. Washburn*, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 850, 29 L. ed. 516.

The rates fixed by the statute for the transportation of freight in the course of which a transfer switch is traversed are absolute and are conclusively imposed, whether actually reasonable or not. The rates are established finally, instead of being merely declared presumptively reasonable; and under the terms of the statute judicial inquiry into the actual reasonableness of the rates is immaterial and improper; for this reason, the act takes property without due process of law.

Chicago, M. & St. P. R. Co. v. Minnesota, 184 U. S. 418, 88 L. ed. 970, 3 Inters. Com. Rep. 209.

Ryan, C., filed the following opinion: This action was begun in the district court of Holt county, as shown by the prayer of the application, for a writ of mandamus to compel the defendants to build forthwith a transfer or connecting switch at O'Neill, in said county, whereby the lines of the respondent railroad companies might be connected one with the other, and, upon completion of said transfer switch, to henceforth maintain the same in good condition, and to receive and forward freight in car-load lots, offered by one road to the other, on or over said transfer switch, and to place in force a joint schedule of rates between stations on the

lines of each of said roads, whereby freight in car-load lots might be carried from a station on one road to a station on the other, which said rates should be for the rate for the shortest mileage by any railroad between the point of shipment and the point of destination, or to show cause, by a day fixed, why said order should not be complied with, and, upon final hearing, that said order be made final, and for such other and further order as might be required, and which a full and complete carrying out of the statute set forth in the application aforesaid should demand. It is not necessary to more fully state the nature of this action, further than to say that, by the application, it was shown that the lines of railroad owned and operated by the defendant companies touched each other at O'Neill, and at that point each received and delivered freight; that the board of transportation of the state of Nebraska, before the commencement of this action, had found a necessity for a transfer switch between said lines, and had duly ordered the same to be constructed; and that the respondents, and each of them, had failed and refused to build and maintain such switch. The right to the relief above prayed was based upon the provisions of chapter 11, Laws 1893. It is not possible to determine whether or not the connection by transfer switch could have been compelled under the provisions of section 113, chap. 16, Comp. Stat., for there are contained in the application no averments showing the existence of prerequisites indispensable under this section. A general demurrer to the petition by each defendant was sustained, and from the judgment of dismissal thereupon following plaintiffs have prosecuted error proceedings to this court.

The first and second sections of chapter 11, Laws 1893, contain the provisions concerning which most of the arguments in this case have been made. The enacting clause and these sections are in the following language:

"Be it enacted by the legislature of Nebraska:

"Sec. 1. That all railroads touching the same point in this state, at which point such railroads receive and deliver freight or at some near point, shall build and maintain transfer switches for common use in transferring freight in car-load lots from one such railroad to another, and receive and forward such freight according to the provisions of this act; provided, that the railroads interested may apply to the state board of transportation to be relieved of this duty in any case where its performance is unusually burdensome; and if, upon a personal examination of the locality where the transfer switches are to be put in, and taking testimony of the persons residing in the locality, by the secretaries of such board, they find it unjust and unreasonable to require the building of such transfer switches, then such board may relieve such roads of such duty, and that evidence from any locality along the lines of roads interested shall be considered by said board, and be competent testimony in such case.

"Sec. 2. That whenever a shipper of freight from any point in this state to any other point

"1 L. R. A.

in this state over two or more lines of railroads to reach such point of destination, it shall be the duty of all such railroads as come under the provisions of this act to receive and deliver all such freight in car lots, on board cars upon such transfer switch. The railroad company at point of shipment shall make a through waybill to point of destination, and the rate to be charged for such shipment shall not be the sum of two or more locals, but shall be apportioned between the different roads according to the mileage of each necessarily used in such shipment, and shall be the rate for the shortest mileage distance by any railroad between point of shipment and point of destination."

The mandatory requirement of the first section is that railroad companies, situated as the defendants, shall build and maintain transfer switches for transferring car-load lots from one road to the other, and receive and forward the same according to the provisions of said act. The case has been presented on both sides upon the theory that the clause "according to the provisions of this act" relates to and qualifies each antecedent requirement; that is, of putting in and maintaining the transfer switch, as well as of receiving and forwarding freight. In this, we think, counsel correctly construed these provisions. In view of the fact that at the date of the passage of this act there was already in existence a section of the Compiled Statutes which required the construction of transfer switches, it is very clear that the main purpose of the act under consideration is to be found in its second section. The validity of this act will therefore be considered with reference to its chief object as defined in the said second section, rather than with reference to the duty to construct transfer switches,—a matter of minor importance. In Iowa a transfer-switch law was enacted by the legislature, of which some provisions resemble those found in the above act. It is not necessary that these should be copied or described at length, for the argument of the attorney general was based upon analogies sufficiently indicated by an opinion of the supreme court of that state filed in a cited case, to which we shall now refer. In *Smith v. Chicago, M. & St. P. R. Co.* (Iowa) 53 N. W. 128, thus confidently relied upon by the plaintiffs in error, there were considered but two questions. Of these, the first was whether the state was the proper party plaintiff. The other proposition decided is found correctly stated in the fourth paragraph of the syllabus, thus: "Code, § 1292, provides that a railroad corporation whose road intersects or crosses any other line of railway of the same gauge 'shall' connect its road with such other railway so intersected. Act 1878, § 3, provides that the railroad commissioners shall have general supervision of all railroads in the state, and inquire into any neglect or violation of the laws of the state. Acts 20th Gen. Assem. chap. 24, § 1, provide that corporations having intersecting roads shall, 'whenever ordered by the railroad commissioners,' unite and connect their tracks. Held, that the commissioners should order the connection of such tracks only when

they deem it best, and need not do so regardless of its advisability." In this case the railroad commissioners had, in effect, found that there was no necessity for the connection sought to be required, but ordered it, on the theory that the statute compelled them so to do, whether the connection was necessary or not. How the supreme court of Iowa viewed the construction followed by the railroad commissioners is clearly indicated by the language above quoted. In the case just considered, however, there was involved no such question as that which chiefly concerns us in this case. Since we have had brought to our notice the holding of the supreme court of Iowa in one case, it may subserve a useful purpose to note that in *State v. Chicago, M. & St. P. R. Co.* (Iowa) 55 N. W. 331, another ruling of that court has been made, which is correctly reflected in the following language of the syllabus: "An order of the railroad commissioners that the defendant railroad company transfer cars delivered to it by another company, from its station to another point, as a switching service and at switching rates, will not be enforced where such point is beyond the yard limits, and the service rendered is on the main line, and is done under orders, as in case of trains, and not under the direction of the yard master." The court, in its opinion, said that if the order of the railroad commissioners was to be enforced by a decree, as prayed, such enforcement involved a change in the management of the company as to the classification and operation of its trains, and for this reason a demurrer to the petition containing the prayer above indicated was held to have been properly dismissed. Indirectly, there was thus considered one of the minor questions to which the law under discussion might naturally give rise, but, as this question is not necessarily involved, we shall proceed to consider other questions, which cannot be ignored.

It is insisted by the plaintiffs in error that section 3 of the act under consideration is not within the inhibition of the following language of section 1 of the 14th Amendment of the Constitution of the United States, to wit: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law." In the construction of the Federal Constitution and statutes, state courts must follow the Supreme Court of the United States. *Franklin v. Kelley*, 2 Neb. 79; *Bressler v. Wayne County*, 25 Neb. 468. In delivering the opinion of the court in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014. Mr. Justice Brewer briefly reviewed the history of the adjudications of the United States Supreme Court respecting legislative control over railroads. As such a review is not inappropriate in the consideration of this case, and as no one is more likely to correctly summarize such history than Judge Brewer, his language is quoted, as follows: "In *Chicago, B. & Q. R. Co. v. Cutta*, 94 U. S. 155, 24 L. ed. 94, and *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L.

ed. 97, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Mr. Justice Miller in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 569, 30 L. ed. 244, 248, in respect to those cases: 'The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state within which a railroad company did business to regulate or limit the amount of any of these traffic charges.' There was in those cases no decision as to the extent of control but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331, 29 L. ed. 636, 644; and while the right of control was reaffirmed a limitation on that right was plainly intimated in the following words of the chief justice: 'From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.' This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S. 690, 689, 31 L. ed. 841, 843, 2 Inters. Com. Rep. 56. Again, in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. ed. 970, 981, it was said by Mr. Justice Blatchford, speaking for the majority of the court: 'The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.' And in *Chicago & G. L. R. Co. v. Wellman*, 143 U. S. 339, 344, 36 L. ed. 176, 179, is this declaration of the law: 'The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates.' *Budd v. People*, 143 U. S. 517, 36 L. ed. 247, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: 'In the cases before us the records do not show that the charges fixed by the statute are unreasonable.' Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground." Commenting upon the principles involved in the cases which he had just reviewed, Mr. Justice Brewer said: "It has always been a part of the judicial function

to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In *Chicago, M. & St. P. R. Co. v. Minnesota*, referred to in the above review of cases by Judge Brewer, the restrictions just referred to were applied to such facts and in such a manner as to illustrate their inhibitory force. In that case there was under consideration a law of Minnesota which empowered a commission to prescribe rates for the transportation of freight upon the several railroad lines in that state. Upon a failure of any railroad company to comply, within a fixed time, with the rate established by such commission, the commission was empowered by law to post such rate, which thereupon became as binding upon the railroad company concerned as though adopted and promulgated by its authority. Under the provisions of this law, the supreme court of Minnesota had held that the rates thus published were the only ones that were lawful, and therefore in contemplation of law the only ones that were equal and reasonable, and hence that, in a proceeding by mandamus to compel a railroad company to comply with this rate, there was no fact to traverse, except the alleged violation of the law in refusing compliance with the recommendations of the commission. In delivering the opinion of the majority of the Supreme Court of the United States, Mr. Justice Blatchford said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice." That the rates referred to in the

foregoing quotation were fixed by a commission to which that power has been delegated by the legislature of Minnesota, in principle, was the same as though the legislature itself had exercised that power, for the latter could not delegate to the former a power not possessed by itself. Considered independently of the entirely fortuitous circumstance that the commission had fixed rates, the majority of the Supreme Court of the United States in effect held, in *Chicago, M. & St. P. R. Co. v. Minnesota*, that it was not within the power of the legislature to provide, as an absolute finality, that only certain fixed rates could be charged by railroad companies for the transportation of freight. In the subsequently decided case of *Reagan v. Farmers' Loan & T. Co. supra*, the entire court seems to have assented to the correctness of the following proposition, therein quoted from the majority opinion in *Chicago, M. & St. P. R. Co. v. Minnesota*, to wit: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination." As this seems unquestionably to be the conclusion established by the able review of the cases which has been hereinbefore quoted from *Reagan v. Farmers' Loan & T. Co.*, it should be accepted as such an authoritative construction of the part of the 14th Amendment which is involved in this case that it must bind this court, whatever its views independently of this construction might have been.

In view of this construction by the Supreme Court of the United States placed upon the part of the 14th Amendment with which we are now concerned, let us consider some of the provisions of the 2d section of the act entitled "An Act to Regulate Railroads and to Compel Them to Put in Transfer Switches," the same being chapter 11, Laws 1898. The first sentence of this section is imperfect, but its evident meaning is that where freight shall be shipped over two or more lines of railroad, between points in this state, it shall be the duty of all such railroads to receive and deliver such freight in car lots, on board cars, upon such transfer switch as connects their lines. By this section it is furthermore required that the railroad company, at the point of shipment, shall make a through waybill to the point of destination, the rate for the shipment not to be the sum of two or more locals, but for the shortest mileage distance by any railroad between the point of shipment and the point of destination. For the sake of illustration, let us suppose that a triangle is formed by three distinct lines of railroad within this state; that of each of two of these lines the length is 100 miles; and that the length of the line on the third side is 25 miles. A shipper of a ton of hard coal, we will suppose, directs that his coal be sent from the intersection of the short line with one of the longer lines, over both of the longer lines, to the point at which such coal shall reach the extremity of the short line furthest from the initial point of

shipment. It will thus be required to travel 200 miles to reach its destination; it might have done so by traveling 25 miles. Chapter 24, Laws 1893, has been held in *Ames v. Union P. R. Co.* 64 Fed. Rep. 165, 4 Inters. Com. Rep. 885, to have fixed inadequate rates, and the enforcement of this statute is now suspended by injunction. Nevertheless, we shall assume, for the mere purposes of illustration, that these rates afford as fair a basis between themselves for comparisons as any other that could be found. For hauling 2,000 pounds of hard coal, a railroad company, under this maximum rate law, was permitted to charge for a distance of 25 miles the sum of 76 cents; for hauling the same ton of coal 200 miles, there might be required as compensation the sum of \$2. It may be objected that this case is merely hypothetical, and that, practically, this supposed condition is impossible. Let us therefore suppose that a dealer finds it necessary to send a car load of hard coal from Omaha to Plattsmouth. For some reason, perhaps to avoid the payment of drayage charges, he elects to send the coal by the way of Columbus, and as he has the right, under this law, he requires it to be billed over the Union Pacific Railway to Columbus, and thence over the Burlington & Missouri River Railway to Plattsmouth. There are by this route required to be traveled 91 miles over the line of the first-named railway, and 180 miles over the other,—in all, 271 miles. The same shipment might be made by the Missouri Pacific Railway, in which case the haul would be but 26 miles. Referring again to the maximum rate law for what may be assumed to be relatively fair rates, at least in the judgment of the legislature which passed the act under consideration, we find that the rate for 25 miles, the rate most nearly approximating that for the distance between Omaha and Plattsmouth by a direct line (as stated in the first illustration), is 76 cents per ton, while by the lines in fact traveled, had they been in fact exactly 220 miles, the rate would be \$2.20 per ton; that is, \$1.44 in excess of what could have been charged over the shortest available route. And these are but fair illustrations of the practical results brought about by chapter 11, Laws 1893; and apparently, that there may be no means of avoiding this result, this law forbids any charges to be made for transfer switching. Even the reasonableness of the charge for transporting over the short line, the Supreme Court of the United States, as we have already seen, has held is a question for judicial investigation, requiring due process of law for its determination. If, as was held in *Chicago, M. & St. P. R. Co. v. Minnesota*, the establishment of an arbitrary rate, which deprived the railroad company of its right to a judicial investigation by due process of law under the form and with the machinery provided for the investigation judicially of the truth of the matter in controversy, and the substitution therefor, as an absolute finality, of the action of a commission not clothed with judicial functions or possessed of the machinery of a court of justice, was in conflict with the Constitution 31 L. R. A.

of the United States, there is no escape from the conclusion that a law which, as a finality, establishes a rate dependent, not upon the length of a haul by the route chosen by the shipper of freight, but by the length of a much shorter route of which he refuses to avail himself, is open to the same objection. No argument can be made to sustain this law, which equally would not tend to sustain those under which the Supreme Court of the United States held invalid the rates established by commissioners in Minnesota, and other rates fixed in a similar manner in Texas. This law, in addition to the objections held sufficient as against the statutory regulations of rates in Minnesota and Texas, is subject to the criticism that no railroad company can know, in advance, for what compensation it may be required to haul freights over its line. There is therefore no way by which we can escape the logical result of these conditions authoritatively declared by the Supreme Court of the United States sufficient to vitiate other legislative enactments, in which but a portion of the objectionable features of the statute under consideration was embodied. The attempt to establish rates of compensation, as was done in chapter 11, Laws 1893, must therefore be held to be in violation of the provisions of the 14th Amendment, and therefore to be nugatory.

It is, however, insisted by the plaintiff in error that, independently of legislative establishment of rates, it lies within the power of courts to define what rate over connecting lines is reasonable, and to enforce its observance. This question, too, has received the attention of courts, and always, we believe, with the result reached in the cases we shall now review.

In *Paxton & H. Irrig. Canal & L. Co. v. Farmers' & M. Irrig. & L. Co.* 45 Neb. 884, 29 L. R. A. 853, Judge Post, for this court, said: "It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies as quasi public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may by the courts be compelled to enter into particular agreements or assume particular relations, however just and equitable, towards each other. That subject has recently engaged the attention of the Supreme Court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative rather than judicial in character, notwithstanding the provisions of the interstate commerce act. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499; *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763. See also *Beach, Priv. Corp.* 839; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com.

Rep. 351." Such of these citations as refer to cases determined by the Supreme Court of the United States we shall now consider at such length as shall be profitable.

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. supra*, Waite, Ch. J., delivering the opinion of the court, said: "A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other." Later in this opinion he said that it was not the law that every railroad company which forces a connection of its road with that of another company has a right under the Constitution of Colorado, or at the common law, to require the company with which it connected to do a connecting business at the junction, if it does a similar business with any other company under any other circumstances. This, he said, might be made the law by the legislative department of the government, but it did not follow as a necessary consequence from the constitutional right of a mechanical union of tracks, or from the said constitutional prohibition against undue or unreasonable discrimination in facilities.

In *Pullman's Palace Car Co. v. Missouri P. R. Co. supra*, it was sought to compel the use of the cars of the plaintiff over the line of the St. Louis, Iron Mountain, & Southern Railway Company, though that company had been consolidated with the Missouri Pacific Railway Company, Chief Justice Waite, in the opinion delivered by him for the court, in this case, said: "The business [of the sleeping-car company] is always done under special written contracts. These contracts must necessarily vary, according to the special circumstances of each particular case. Certainly, it cannot be claimed that a court of chancery is competent to require these companies to enter into such a contract for the furnishing and hauling of Pullman cars, as the court may deem reasonable. A mere statement of the proposition is sufficient to show that it is untenable."

In the *Express Cases, supra*, the circuit court had required by its decree that the railroad companies which were defendants should, as common carriers, afford each express company certain facilities for the transportation of its business as a common carrier, the character of such facilities to be the same as, by virtue of a contract formerly in existence, it had been the duty of each railroad company to provide. By this decree the rate of compensation to be paid had been fixed at not exceeding 50 per cent more than the railroad company's prescribed rate for the transportation of ordinary freight, and not greater than the railroad company would charge for the transportation of express matter on its own account, or for any other express or other corporation, or for private individuals, and a bond was required to secure such payment. The right of each party to apply for a modification of this decree under the rules in equity proceedings had been reserved by the decree itself as to the measure of compensation prescribed. In the opinion of a majority of the court, delivered by Chief Justice Waite, the following language was used:

31 L. R. A.

"The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same terms that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that we said in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. supra*, followed at this term in *Pullman's Palace Car Co. v. Missouri P. R. Co. supra*, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the states, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power we do not doubt. The legislature may impose a duty, and, when imposed, it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage, by contract, or by statute, the courts cannot be called on to give it effect."

The other citations in *Paxton & H. Irrig. Canal & L. Co. v. Farmers' & M. Irrig. & L. Co. supra*, need not be considered at length, for, while inferior in authority, they follow the same line as do the cases above reviewed.

The same doctrine was recognized in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014.

Among the cases cited by the plaintiff in error is *Texas Exp. Co. v. Texas & P. R. Co.* 6 Fed. Rep. 437, determined in the circuit court of the United States for the northern district of Texas, in which case it was said: "If it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judi-

cial department of the government to do this. When and how far it may become necessary or expedient to do so must be left to the legislature to determine and declare; and until the legislature does so provide, the parties hereto, and all others similarly circumstanced, must be remitted to their right and power to contract in reference to the compensation for such service, subject to the limitations placed upon defendants by their duties as exclusive public carriers on public highways, that their terms for carrying shall be reasonable, and such as involve no unjust discrimination; to be determined in each particular case by the agreement of the parties in interest, and in case of their failing to agree, to be determined by the proper court on full statement and proof of the particular case." The language of the latter part of the above quotation is relied upon by the attorney general to sustain the proposition that, if the provisions of the statute cannot be upheld, this court may supply the deficiency; and, separated from its context, this part of the quotation doubtless tends strongly in that direction. This part of the quotation, however, is greatly qualified when we take into account that immediately preceding this portion, favorable to the contention of the plaintiff in error, it was said that "if it is practicable to define express matter with reasonable certainty, and to fix by law maximum rates for its carriage, it is most clearly not within the province of the judicial department of the government to do this."

From this review of the Federal decisions with reference to this subject-matter, it is clear that it does not lie within the power of courts to formulate contracts whereby shall be regulated the rights and duties of parties concerned, even though each of such parties is a common carrier. The practical difficulties which in the *Express Cases* surrounded, and in the judgment of the Supreme Court of the United States rendered futile, the attempt of the circuit court to define the du-

ties of the express companies, on the one hand, and the railroad companies, on the other, apply with still greater force to the case at bar. In the *Express Cases* there were on either side the proposed parties to a contract relation which was to exist for a considerable space of time in the future, and all these parties were in court. Between themselves they had formerly been able, without difficulty, to make a contract which the circuit court believed sufficiently furnished analogies for all the points to be adjusted. In the case at bar the only criterion furnished for the adjustment of rates is that no more shall be charged for such haul as, by the election of the shipper, shall be made necessary, than the cost of shipment by the shortest route possible. In this case there was before the district court no party interested in shipments other than the carrier. The parties who, it was assumed, proposed to ship, were unnamed and unknown, and there was no attempt to suggest the points between which shipment should be made, or the compensation therefor which should be established. If it was impossible for the circuit court, in the *Express Cases*, practically to solve the problem with which it was confronted, there can be no question as to the futility of every effort of this or any other court to formulate rules or rates in compliance with the uncertain requirements of section 2 of chapter 11 of the Laws of 1898. The district court, therefore, very properly declined attempting the performance of this hopeless task. There has been suggested no method by which the act under consideration can be put into effect which has not already been considered; and, in justice to the attorney general, it is but fair to say that, to sustain the provisions of this act, he has advanced every available argument and consideration which, in our opinion, is even plausible.

The judgment of the District Court is affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut

v.

William CONLON, *Appt.*

(65 Conn. 478.)

A statute authorizing the mayor and certain other officers to issue a license "to such persons as they find proper persons to engage in a temporary or transient business," for a fee not less than \$1 nor more than \$100, as the authority issuing such license may direct, and making such business when unlicensed a misdemeanor except in the sale of products of a farm or the sea, is, so far as it applies to ordinary and lawful business, a violation of the Connecticut bill of rights, declaring that all men "are equal in rights and that no man or set of men is entitled to exclusive public emoluments or privileges from the community."

NOTE.—For amount of license fees, see note to *State, Tol. v. French* (Mont.) 80 L. R. A. 415.
81 L. R. A.

(January 24, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for Tolland County convicting him of selling goods without a license in violation of Pub. Acts 1898, p. 271.
Reversed.

The facts are stated in the opinion.

Messrs. Charles E. Perkins and Jeremiah J. Desmond, for appellant:

The Constitution protects the rights of every person to follow any calling or occupation not harmful to society, in common with others.

Bertholf v. O'Reilly, 74 N. Y. 515, 80 Am. Rep. 323; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 84; *Tiedeman*, Pol. Powers, pp. 11-196, note.

Whether the legislature could prohibit sales of goods by any one who was not permanently established in business, would be, to say the least, very doubtful; but to give one person in

a city the right to say who should or should not exercise that right, to deprive one person of it and give it to another at his discretion, cannot be sustained upon any principle of liberty.

Cooley, Const. Lim. p. 393.

This case does not come within the cases of license.

Nor does it come within the rules governing the sale of liquors or gunpowder or other injurious or dangerous substances or trades which are or may be nuisances.

Slaughter-House Cases, 83 U. S. 16 Wall. 86, 21 L. ed. 394; *Tiedeman*, Pol. Powers, p. 197.

It may be admitted that certain rules and regulations may be made as to transient or temporary sellers of goods.

Com. v. Crowell, 156 Mass. 215.

In *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49, an ordinance requiring a very high license fee from peddlers, but exempting residents of the borough, was held invalid.

See also *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 289; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220; *Barthe v. New Orleans*, 24 Fed. Rep. 568; *Richmond v. Dudley*, 129 Ind. 112, 18 L. R. A. 587; *Re Frazee*, 68 Mich. 396; *Anderson v. Wellington*, 40 Kan. 173, 2 L. R. A. 110; *Chicago v. Trotter*, 186 Ill. 480; *State v. Mahner*, 48 La. Ann. 496.

Although many of these decisions were cases of ordinances, and not acts of the legislature, the principles upon which they are decided are general and constitutional, and apply to legislative acts as well as to ordinances.

State v. Dubarry, 44 La. Ann. 1117; *Rich v. Naperville*, 42 Ill. App. 222; *Ex parte Sing Lee*, 96 Cal. 354; *State Center v. Barenstein*, 66 Iowa, 249; *Hannibal v. Price*, 29 Mo. App. 280; *State v. Orange*, 50 N. J. L. 389.

Mr. Joel H. Reed, State's Attorney, for appellee:

This statute is a proper exercise of the police power of the state.

Cooley, Taxn. 412, 413; *Com. v. Smith*, 6 Bush, 303; *Mork v. Com.* Id. 397; Cooley, Const. Lim. 742-746.

Where the legislative meaning is plain and not open to construction, as is the case with this statute, and the powers therein exercised are not restricted by the terms of either state or national Constitution, it is not competent for the courts to declare the statute void for the reasons named. They cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.

Cooley, Const. Lim. 197-201; *Bishop's Fund v. Rider*, 13 Conn. 103; *State v. Wheeler*, 25 Conn. 290; *White v. Stamford*, 37 Conn. 578; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Calden v. Bull*, 3 U. S. 3 Dall. 386, 1 L. ed. 648; 1 Bl. Com. 91; *Bridgeport v. Housatonic R. Co.* 15 Conn. 496; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Booth v. Woodbury*, 32 Conn. 118; *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 388; *Camp v. Rogers*, 44 Conn. 291; *Wheeler's Appeal*, 45 Conn. 306.

If the court has the power to declare it void it will not do so except in very clear cases.

White v. Stamford, *supra*; *Lothrop v. Stedman*, 42 Conn. 588.

31 L. R. A.

Hamersley, J., delivered the opinion of the court:

"An act concerning sales of merchandise by itinerant peddlers" contains the following provisions:

"Sec. 1. The mayor of any city, the warden of any borough, and the selectmen of any town, may issue a license to such persons as they find proper persons to engage in a temporary or transient business, in one locality, either in a building, tent, or other premises, for the sale of goods, wares, and merchandise, . . . in their respective cities, boroughs, or towns, for a term not exceeding one year, upon the applicant paying to such municipal corporation a fee not less than \$1 nor more than \$100, as the authority issuing such license may direct.

"Sec. 2. Any person engaging in any business mentioned in section 1 of this act, except in the sale of articles that are the product of a farm or of the sea, without obtaining a license therefor, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$7 nor more than \$200, or imprisoned not less than thirty days nor more than six months, or both." Pub. Acts 1893, p. 271.

The state's attorney for Tolland county filed an information charging the defendant with a misdemeanor under this act in the sale of boots and shoes at a store in the city of Rockville. The defendant demurred to the information, because the statute is void, as being contrary to the provisions of the Constitution of Connecticut and of the Constitution of the United States, and to the principles of natural justice. The demurrer was overruled; and the defendant was tried, convicted, and sentenced. This is an appeal from the judgment of conviction; and the only error assigned by the defendant is the action of the superior court in overruling the demurrer.

The legislature has power to require a license for the transaction of any business, either for the purpose of raising a revenue, or for the purpose of regulating the conduct of such business, as public interests may demand. This power, however, is, in the manner of its exercise, subject to the limitations embodied in the Constitution, including in that term the Constitution of the United States as well as that of Connecticut. The former, so far as it relates to such question, is in reality a part of the latter, and must be so regarded by this court in determining the validity of any legislative act. The question whether or not a particular law is obnoxious to any such limitation does not depend upon the wisdom of the law. We therefore dismiss as immaterial all considerations urged in argument as to the propriety of this legislation, and consider only the legal effect of the act, and the power of the legislature to enact such a law.

1. What is the legal effect of the act? The validity of the law in this case depends upon its real legal effect, and not merely upon its phraseology. In determining whether any law invades a right secured by constitutional enactment, the court looks at the essence as

well as the form. *Re Clark*, 65 Conn. 17, 28 L. R. A. 243. The act is not an exercise of the power of taxation. This is too plain for argument. It is purely a trade regulation; and the crime of which the defendant was convicted consists solely in the violation of such regulation. The power, first, to regulate the conduct of all business, or of any particular business, harmless in its nature, and which every citizen has the right to carry on; and, second, to regulate, even to the extent of prohibition, any business in its nature injurious to the public,—is vested in the legislature in the broadest terms; but the exercise of that power in the two cases is governed by different principles. In the latter case the controlling object is giving to the public that protection from danger which the state is bound to give, and ordinarily the legislature must be the judge of the degree of danger and of the required protection. It may restrict the business by requiring large license fees, or by other protective regulations; and it may restrict the conduct of the business to a limited number of persons, or to persons possessing certain qualifications, to be determined by public officers to whom the administration of the law is given, or, in certain cases, to such persons as these public officers may select; thus treating the persons intrusted with the business as quasi public officers, and authorizing their selection on grounds of special fitness, similar to those applicable to the appointment of any state officer or agent. The illustrations of such regulations of a business dangerous to the public are familiar and the cases maintaining the power of the legislature to establish them are too numerous to cite.

But the law in question is not a regulation of a business dangerous to the public, and does not come within the special principles applicable to such regulations. It relates to all business "for the sale of goods, wares, and merchandise," to the bread and meat essential to the support of life, and to every commodity a human being has need of. The only distinction made by the law is that between a business that is temporary and transient and all other business. It does not define a "temporary or transient" business. Such phrase has no technical legal meaning. The natural meaning of the words as generally understood does not furnish a definite guide to what the statute permits and what it prohibits. Its validity might perhaps be questioned on the ground that the language used is too vague to constitute and define a crime, but that question was not discussed in argument. The defendant is punished for selling boots and shoes in the conduct of a temporary and transient business. There is nothing in the nature of such business more dangerous to the public when called temporary than if called permanent. There is no distinction as to public danger between a boot and shoe business conducted by a man for an indefinite time, and the same business conducted after his death, by his executor in the settlement of his estate, for a short and definite time. The statute does not relate to any temporary business involving dangers peculiar to itself. It draws no line of distinction except between

a business that is temporary and one that is not temporary. One is no more dangerous to the public than the other. One is no more essential to the conduct of human affairs than the other. Indeed, it would be impracticable to carry on the necessary transactions of life without "temporary and transient business for the sale of goods, wares, and merchandise." It may be that future conditions will produce a general conviction that any temporary business is as dangerous to public morals and good order as lotteries, disorderly houses, tippling shops, or those suspicious vagrants who more than 200 years ago were called "peddlers and petty chapmen," and whose business was absolutely prohibited. 8 Col. Rec. 485. It is unnecessary to consider how far the legislature may anticipate common experience in declaring a business generally regarded as harmless and lawful to be dangerous to public morals and order. It is enough that the legislature has made no such declaration as to the business under discussion. The act therefore must be held to deal with temporary or transient business for the purpose of regulating an ordinary and lawful business essential to the conduct of human affairs, in which all citizens have an equal right to engage. The legislature has full power to regulate such a business, but its regulations must be governed by very different principles from those which may govern the regulations of a business in its nature dangerous to the public. In the one business no citizen has an absolute right to engage; in the other all citizens have the right, and an equal right, to engage. The difference is vital.

What is the regulation prescribed by this act? It is simply a prohibition of the business unless a license is obtained from the officers of the municipality where the business is to be conducted. If the terms on which such license should be granted were defined, a different question would be presented. If the legislature believes that fraud and deception are increasingly liable to be practiced in the conduct of any kind of business, or of all business, it may undoubtedly require, by way of security against such fraud and deception, the persons engaging in such business to take out licenses on terms prescribed by law and applying equally to all citizens. In Massachusetts, "An Act to Prevent and Punish Fraud in Sales of Goods, Wares, and Merchandise at Public or Private Sale by Itinerant Vendors, and to Regulate Such Sales," was recently passed. The act attempted to define "itinerant vendors" so as to include ordinary transient business, provided security for their customers by requiring a deposit of money to be made with the state, and by other regulations, and required the amount of the license fee charged to be ascertained according to law, and a license to be issued to whoever complied with the law. This act was held not to violate the Massachusetts Constitution by a majority of the supreme court. *Com. v. Crowell*, 156 Mass. 215. However such an act might be regarded under our Constitution, it is wholly different from the act under discussion, which not only forbids the transaction of the business without a license, but permits the local

authority to grant a license to one, and to refuse it to another, in pursuance of a discretion unguided and unrestrained by law. It says: "The mayor may license such persons as he finds to be proper persons to engage in a temporary business for the sale of goods, wares, and merchandise," and "any person engaging in such business without obtaining a license therefor shall be guilty of a misdemeanor." The unrestrained power of selecting the favored recipients of a license is given to the mayor. All persons who cannot obtain this special privilege are forbidden to carry on the business under a penalty that may extend to a fine of \$200 and imprisonment in the common jail for six months. If the word "may," as here used, could be given the effect of "shall," the question would be presented in a little different form. It would be our duty to construe "may" as "shall," if necessary to give effect to an act, and the context would permit such construction. But here the context plainly forbids that construction. The conditions of the act do not support a mandate to issue a license upon compliance with rules established by law. On the contrary, they clearly provide for the exercise of a discretion unrestrained by law. The phrase "such persons as he finds proper persons to engage in a temporary business" is too vague to support any definite judicial or quasi judicial action. There is not a regulation established which the licensees are bound by law to observe, and there is absolutely no legal test and no indication of who may be a "proper person." Without some test fixed by law, every person must be presumed to be a proper person to conduct an ordinary and lawful business. The mayor is authorized to select from those legally presumed to be proper persons such as he finds proper. The necessary legal effect of this phrase is "such persons as he pleases." So that, if "may" were construed as "shall," the act would then say: "The mayor shall license such persons as he pleases." Again, the provision giving the mayor absolute power to fix the license fee at \$1 for one year, or \$100 for one day,—i. e. to fix the license fee so that it shall be, at his pleasure, either nominal or prohibitive,—in connection with the other provisions, renders it certain that the purpose of the statute, as well as its legal effect, is to authorize the mayor to permit or forbid the transaction of an ordinary lawful business at his pleasure. This purpose of the act to secure to favored persons special privileges in the conduct of a lawful business, open of right to all citizens, is further indicated by the provision that exempts from the operation of the act "articles that are the product of a farm or of the sea."

We can find no escape from the conclusion that the legal effect of the act is to authorize the local officers of each municipality to grant exclusive privileges to such persons as they please in the transaction of a lawful business essential to the conduct of human affairs, and in which each citizen has an equal right to engage for the support of life.

2. Has the legislature power to enact such a law? The Constitution of Connecticut is somewhat peculiar in its limitation of legis-

lative power. The "legislative power of this state" is, in the broadest terms, vested in the "general assembly." This power is, in a certain way, defined and limited by the provisions dividing the powers of government into distinct departments, and by those relating to the operation of the state government and duties of particular officers. But, unlike the Constitutions of many states, it contains no specific limitations on the exercise of legislative power, except some slight restrictions in one or two recent amendments. The limitations, however, are no less real, and perhaps more effective, than if phrased in specific terms. Our bill of rights constitutes the fundamental condition on which all powers of government can be exercised. Its more definite declarations are chiefly concerned with the administration of justice, especially of the criminal law, the preservation of the trial by jury, the protection of private property from confiscation for public use, the right of the citizen to bear arms, and the subordination of the military to the civil power; but the protection of the citizen in the equal enjoyment of those essential rights belonging to citizens of a free government is guaranteed, not in narrow phrases of detailed statement, but in terms as broad as those which vest the legislative power in the general assembly or the judicial power in the courts. The bill of rights begins as follows: "That the great and essential principles of liberty and free government may be recognized and established, we declare that all men when they form a social compact are equal in rights; and that no man or set of men are entitled to exclusive public emoluments or privileges from the community." No legislative act is law that clearly and certainly is obnoxious to the principle of equality in rights thus solemnly made the condition of all exercise of legislative power. It is patent that not everything that can be called a right is included in this guaranty. The protected rights are those that inhere in "the great and essential principles of liberty and free government" recognized in the course of events that resulted in our independence, and established by the adoption of our Constitution. The language used is purposely broad, as the language in reference to the absolute power of legislation is broad; and the relation of limitation to power can, in the nature of things, be settled only through specific applications as emergencies arise. Among the principles thus established were those universally accepted as so essential to free government as to justify the resort to armed rebellion in our war of independence; and, of these, equality under the law, in the rights to "life, liberty, and the pursuit of happiness," was clearly recognized.

Upon the first establishment of government in Connecticut, reliance for the security of civil rights and liberties was placed on the fact that the legislature, in which was concentrated all powers of government, depended on the free and annual election of the people but as early as 1650 the free enjoyment of certain "liberties, immunities, and privileges" was recognized as essential to the stability of commonwealths, and the denial

thereof as threatening their ruin. The enjoyment of such rights, however, was then recognized as due only to "every man in his place and proportion." Code 1850, p. 1. The full recognition of the principle of equality in rights, as well as of the necessity of protection by a fundamental law, was of later growth. In 1873 the right of every man to "enjoy the same justice and law within this colony" was recognized. Revision of 1872. These principles were embodied in a statutory declaration of rights, which remained substantially unchanged until the adoption of our Constitution. During the period preceding and following the Revolution, the conviction became general that equality under the law in the enjoyment of certain rights was so essential to free government that it must be defended against invasion even from the law-making power. In a proclamation issued June 18, 1776, Gov. Jonathan Trumbull expressed the conviction of the colony of Connecticut, in maintaining that the people "form themselves into society, and to set up and establish civil government for the protection and security of their lives and properties" from invasion by those "appointed by the people the guardians of their lives and liberties," and that the course of the King of Great Britain in "depriving us of our natural, lawful, and most important rights, and subjecting us to the absolute power and control of himself, and the British legislature," justified a rebellion. 15 Col. Rec. 450. And the declaration by Congress that equality under the law, in the right to life, liberty, and the pursuit of happiness, is a self-evident truth, was formally approved by this state November 7, 1776 (1 Rec. Conn. pp. 3, 243), and in August, 1777, was ordered to be recorded at length in the state records, "that the memory thereof may be preserved to posterity" (1 Rec. Conn. 367). It was an express purpose of our Constitution "effectually to define, secure, and perpetuate the liberties, rights, and privileges" derived from our ancestors, and we deem it clear that our bill of rights includes this principle of equality among those principles essential to liberty and free government, to establish

which it declares that all members of our political society are equal in rights, and that "no man or set of men is entitled to exclusive public emoluments or privileges from the community." Our legislation affecting any important interest has been so generally confined within the clear lines of legislative power that there has been no occasion to apply the limitations of the first section of the bill of rights. The nearest approach to a judicial determination on this subject is in *Norwich Gaslight Co. v. Norwich City Gas Co.* 25 Conn. 88, where the court holds that, if the law then under consideration can be fairly viewed as intended to operate as a discriminating restriction upon carrying on an ordinary business in respect to which the government has no exclusive prerogative, it comes directly within the definition of a monopoly, and may be obnoxious to the first section of our bill of rights. The application of the bill of rights, approved in that case is, plainly necessary to the decision of this. We entertain no doubt of its correctness, and feel bound to hold distinctly that an act of the legislature, the only legal effect of which is to grant exclusive privileges in the conduct of an ordinary lawful business, in respect to which the government has no exclusive prerogative, is obnoxious to the first section of the bill of rights, and void. There is, in respect to its validity, no distinction between such a law and one authorizing such privileges to be granted by subordinate officers in the exercise of a mere arbitrary discretion, wholly uncontrolled by law.

The act upon which the information against the defendant is based, so far as its provisions relate to the right to engage in any lawful "temporary or transient" business, cannot operate so as to make engaging in such business a misdemeanor, and therefore the information does not show any legal offense.

It is unnecessary to consider the other grounds on which the defendant demurred to the information.

There is error in the judgment of the Superior Court, and it is reversed.

The other Judges concur.

INDIANA SUPREME COURT.

James B. MICHENER *et al.*, Appts.,
v.
SPRINGFIELD ENGINE & THRESHER
COMPANY *et al.*

(.....Ind.....)

1. Under the reformed procedure a court having both law and equity

jurisdiction cannot dismiss a bill to enjoin the enforcement of a judgment merely because the facts stated do not entitle complainant to such relief, if it can be so amended as to entitle him to some relief.

2. A surety will be discharged, even after judgment against him, by the discharge of the principal because of matters inherent in the transaction.

NOTE.—Enjoining judgments against or in favor of sureties.

I. Against sureties.

- Remedy at law as a bar to injunction.
- Valid defense must be shown.
- In matters of negligence or for failure to make a legal defense.
- In summary proceedings.
- For newly discovered evidence.

I.—Continued.

- Where defense was prevented.
- For equitable defenses.
- On account of statutes.
- Pleading and parties.
- Injunction bonds.

II. In favor of sureties.

In *MICHENER v. SPRINGFIELD ENGINE & THRESHER Co.* a surety was refused equitable re-

3. A surety against whom a default judgment is taken, after which the principal's liability is discharged for failure of consideration, may file a bill under Rev. Stat. 1894, § 627, to review the judgment against him for newly discovered matter, without disturbing that in favor of his principal.

4. A suit to enjoin a judgment against a surety will not lie on the ground that the principal's liability has been subsequently discharged, where a statute permits the surety under such circumstances to file a bill to review the judgment against him for newly discovered matter, without affecting that in favor of his principal.

(April 26, 1893.)

A PPEAL by plaintiffs from a judgment of Circuit Court for Howard County in favor

of defendants in an action brought to enjoin the enforcement of a judgment. *Reversed.*
The facts are stated in the opinion.
Messrs. Bell & Purdum, C. N. Pollard, and Morrison & Holman, for appellant:
The discharge of the principal in an obligation discharges the surety or indorser from such obligation, even after a judgment has been taken against him upon default, and he is entitled to injunctive relief to prevent the enforcement of the judgment.
Brandt, Guaranty & Suretyship, 1st ed. § 125, 2d ed. 149; *Ames v. Maclay*, 14 Iowa, 281; *Beall v. Cochran*, 18 Ga. 88; *Miller v. Gaskins*, Smedes & M. Ch. 524; *Dickason v. Bell*, 13 La. Ann. 249; *Cowley v. Northern P. R. Co.* 46 Fed. Rep. 825; *Nealis v. Dicka*, 72 Ind. 374; *Buskirk*, Pr. 318; *Elliott*, Appellate

hief of injunction against a judgment by default rendered against him, where the principals successfully resisted and prevented a judgment against them on the ground of failure of consideration, as he had adequate remedy of review under Ind. Rev. Stat. 1894, § 627, providing that any person who is a party to a judgment may file in the court where such judgment was rendered a complaint for a review of the same. This is in accord with the general doctrine.

I. Against sureties.

a. Remedy at law as a bar to injunction.

Where there is an adequate remedy at law in the trial court, or by proceedings in error or on appeal, or by affidavit of illegality, an injunction will not be granted in favor of a surety against a judgment.

So, where a surety claims that he is released and the plaintiff moves for leave to issue execution on the judgment, the surety cannot enjoin such proceedings on the judgment, as he can obtain relief in the other proceedings. *Martin v. Orr*, 96 Ind. 27.

And in *Gilder v. Merwin*, 8 Whart. 522, it was held that a surety cannot obtain an injunction against a judgment on the ground that since the judgment he has discovered that he was relieved by an extension granted to the principal, where he has an adequate remedy at law by application to open the judgment.

And the failure of a creditor to prove up his claim on a note against the estate of the deceased maker thereof will not authorize a surety to enjoin a judgment on the note obtained by such creditor against himself, as he might have paid off the claim and proved up the same, or had himself appointed administrator if none had been appointed. *Grindol v. Ruby*, 14 Ill. App. 439.

So, a surety is not entitled to an injunction against a judgment on the ground that his liability is only secondary, where he has an adequate remedy by paying the debt and suing the principal for reimbursement. *Stein v. Benedict*, 83 Wis. 608.

And an injunction will not be granted against the levy of an execution issued on a judgment on a forged replevin bond in an action of trespass, on the ground that the surety never had his day in court on the question of forgery, where there is a remedy by affidavit of illegality. *Rounsville v. McGinnis*, 93 Ga. 579.

And the sureties on a claim bond cannot enjoin proceedings on an execution on the ground that the plaintiff and defendants in attachment tried that case with another, where they were not prejudiced and there is an adequate remedy in the court from which execution issued. *Trieste v. Enslin* (Ala.) 17 So. 366.

that a surety on a bail bond had no notice of the judgment not served on him will

. A.

not authorize an injunction, as he has a remedy by action of nullity or appeal. *Cook v. State*, 16 La. 226.

Under Mansf. (Ark.) Dig. § 2435, authorizing a judgment in case of conviction against the principal and surety on a supersedeas bond without notice, where such judgment in a criminal case is rendered at a subsequent term without notice the same will not be enjoined, because if void there is a remedy by appeal, and if not void equity will not interfere. *Shaul v. Duprey*, 48 Ark. 381.

A surety is not entitled to an injunction against a judgment rendered against him and his principal, on the ground that his principal was not served with process, as the remedy is by motion in the case. *Mason v. Miles*, 68 N. C. 564.

b. Valid defense must be shown.

A surety is not entitled to an injunction against a judgment, where he does not show a valid defense to the same.

An execution will not be enjoined on the ground that an entry was not made upon the execution showing who was principal and who was surety, where the judgment was against several joint makers of a note, as such entry is not required by law, although one of the parties was a surety. *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549. See *Gatewood v. Burns*, *infra*, I. c.

And a surety on the forthcoming bond for property seized on execution cannot enjoin a judgment against him on the ground that his principal has made away with the property, as this is not a good excuse for nondelivery. *Laughlin v. Ferguson*, 6 Dana, 111.

The surety on a note is not entitled to an injunction against the judgment thereon, on the ground that in another suit by the principal for an injunction against collection of the same debt a judgment was rendered against the sureties on the injunction bond to which complainant was not a party. *Gowan v. Graves*, 10 Helsk. 579.

An indulgence granted to a principal will not entitle his bail to an injunction where his conduct operated as an estoppel. *Bay v. Tallmadge*, 5 Johns. Ch. 305.

And a surety consenting to an indulgence granted to the principal cannot obtain an injunction against the judgment for the debt. *Furber v. Bassett*, 2 Duv. 433.

And an injunction will not be granted against a judgment at law, on the ground that the defendant was a surety for plaintiff in another matter, and that he might thereafter be liable as such surety. *Thomas v. Bush*, 1 Bibb, 506.

In *Skinner v. Barney*, 19 Ala. 668, it was held that a judgment at law would not be enjoined at

Procedure, §§ 182, 183, 185; *Walker v. Heller*, 90 Ind. 198.

The court may decree the satisfaction of a judgment upon a complaint for that purpose.

McQuat v. Cathcart, 84 Ind. 587; *Bowen v. Clark*, 46 Ind. 405.

Messrs. Blacklige, Shirley, & Moon for appellees.

McCabe, Ch. J., delivered the opinion of the court:

The appellant, James B. Michener, brought this suit against the Springfield Engine & Thresher Company and Edgar A. Simmons, sheriff of Howard county, concluding with a prayer to enjoin an execution and judgment against him and for all just and proper relief, and for satisfaction thereof. It ap-

pears from the complaint that John H. Kennedy, Benjamin E. Hockstedler, and Christian Kly, as principals, on December 1, 1888, executed three several promissory notes to the appellee company, amounting in the aggregate to \$415, in consideration of a sale to them by said company of a separator engine and thresher of its manufacture; that, after the execution of said notes, appellant, Michener, wrote his name across the back of each as accommodation guarantor or indorser thereon; that after the maturity of the \$140 note it was paid by said principals; that afterwards, the next note falling due, calling for \$187.50, said payee brought suit on both of the unpaid notes against the principals and appellant as indorser, and on July 12, 1890, appellant was defaulted, and judg-

the instance of a surety, on the ground that the plaintiff therein is not the owner of the judgment, where such claim was not maintained by the evidence. The court does not pass on the question whether such a defense was valid or not.

A surety on the bond of a trustee for creditors is not entitled to an injunction against a judgment thereon, on the ground that a claim against the estate was fraudulently allowed, as the surety is only liable for the assets, and is not prejudiced by errors in their distribution. *Taylor v. Mallory*, 76 Md. 1.

So, a judgment against a surety was not enjoined where his principal procured his signature by fraudulent representations in which the plaintiff at law did not participate. *Griffith v. Reynolds*, 4 Gratt. 46.

Servicio at defendant's place of residence while he was known to be absent from the state, and judgment rendered on the Fourth of July, which is a legal holiday, will not authorize an injunction against an execution on a judgment, where there is no statute prohibiting courts from sitting on the Fourth of July if it does not fall on Sunday, although complainant was a surety, and the plaintiff was notified to sue the principal and failed to do so, but assisted him in taking his property out of the state, and such principal was insolvent. *Hamer v. Sears*, 81 Ga. 288.

And an injunction was refused against a judgment on a bond, although there was usury in another bond given by the principal to the same creditor, which was paid. *Cantey v. Blair*, 2 Rich. Eq. 46.

So, where the principal paid interest in advance to propitiate the creditor, where there was no agreement therefor. *Harnsberger v. Kinney*, 18 Gratt. 511.

The collection of a debt against a surety was not enjoined although the creditor agreed, on request, to proceed against the principal debtor and failed to do so, where it was not shown that the surety was induced to forego some advantage which he would otherwise have taken. *Wilds v. Attix*, 4 Del. Ch. 200.

An injunction will not be granted against a judgment on a replevin bond, on behalf of a surety who never signed it, where he acknowledged it to be under his hand and seal, and an innocent purchaser acquired the same without notice of the defect. *Maupin v. Whiting*, 1 Call (Va.) 224.

Under Tex. Rev. Stat. art. 2874, providing that no injunction shall be granted to stay any judgment or proceedings except so much as the complainant shall show himself equitably entitled to be relieved against, an injunction will not be granted for failure of attorneys to plead that the obligors on a bond signed as sureties on conditions, where such defense would not have availed, or for stipu-

lating that the judgment should abide that in another case, where the defense was not made known to the attorneys. *Ballow v. Wichita County*, 74 Tex. 339.

c. In matters of negligence or for failure to make a legal defense.

The negligence and failure of a surety to make a defense where the same would be good at law will prevent an injunction; and equitable relief has been denied where it was claimed on the ground of release, set-off, usury, indemnity, mistake, nonliability, secondary liability, or that plaintiff was not entitled to sue on account of his relation with the principal.

So, an injunction will not be granted on the ground of new evidence, where complainant was negligent in making his defense at law. *Floyd v. Jayne*, 6 Johns. Ch. 479.

And a surety failing to exercise any diligence in making or ascertaining his defense, or not excusing his lack of diligence, cannot obtain an injunction against the judgment. *Smith v. McLain*, 11 W. Va. 664; *Smith v. Powell*, 60 Ill. 21.

The failure of a surety in an action at law to plead his discharge will prevent an injunction against the judgment. *Jackson v. Patrick*, 10 S. C. N. S. 197; *Meek v. Howard*, 10 Smedes & M. 502.

So, a surety of a sheriff amerced for the failure of a deputy to return an execution cannot enjoin such judgment where he failed to defend at law. *Bierne v. Mann*, 5 Leigh, 364.

And a surety having an opportunity to avail himself of the defense at law, of indulgence to the principal, and omitting to do so, cannot afterwards resort to a court of equity to obtain the benefit of such defense. *Schroeppell v. Shaw*, 3 N. Y. 446.

So, a surety who fails to plead his discharge at law cannot thereafter enjoin such judgment, as this is a legal defense in Illinois whatever may be the rule in England. *Parker v. Singer Mfg. Co.* 9 Ill. App. 383.

And the release of a surety by neglect "to sue the administrator of the principal" where the surety is injured, is a defense both in law and equity, and, not having been made at law, cannot afterwards be a ground for enjoining the judgment; and "a verbal request to sue without a resulting injury" to the surety does not afford any ground for equitable relief. *Herbert v. Hobbs*, 8 Stew. (Ala.) 9.

A sale execution and proceedings on a judgment will not be enjoined at the instance of a surety claiming a release and that he was not served with process or did not appear, where he has neglected to avail himself of an affidavit of illegality through mistake of his attorney. *Hambrick v. Crawford*, 55 Ga. 385.

And failure of a surety to make the legal defense

ment was rendered thereon against him for \$339.08 and costs, taxed at \$21.90; that said judgment against him was based exclusively on his said indorsement of said notes; that Kennedy, Hockstedler, and Kly appeared, and thereafter made defense to said action, and at the March term of said court for 1892, upon the issues duly formed between them and said company, a trial thereof resulted in a verdict and judgment in their favor that the consideration of said notes had wholly failed, and that said plaintiff company take nothing by their suit, and that said defendants recover their costs; that, notwithstanding the full discharge of said principals by said judgment, which remains in full force, the said company is trying to collect said judgment against the appellant, and to that

end caused an execution to issue thereon for the aforesaid amount thereof, and the aforesaid amount of costs, less a credit of \$70, and placed the same in the hands of the sheriff of said county, Edgar A. Simmons, made a defendant in the complaint, which he still holds, and threatens to levy on the property of appellant, and to sell the same to satisfy said writ. The court overruled appellees' demurrer to the complaint, the demurrer being based on the ground of the alleged insufficiency of the facts in the complaint to constitute a cause of action. Appellees call in and sustain this ruling by assigning cross error thereon. The appellee company moved the court to dismiss the cause for want of jurisdiction, which motion the court sustained, and dismissed the cause for want of

of discharge of other sureties will bar him from equitable relief from the judgment by a bill of discovery, as the bill of discovery should have been filed as soon as judgment was taken, where no excuse is made for not filing it before the judgment was taken. *M'Grew v. Tombeckbee Bank*, 5 Port. (Ala.) 547.

And the failure of a bail to plead his discharge to an action on a sci. fi. will prevent an injunction against the judgment obtained thereon. *Allen v. Hamilton*, 9 Gratt. 255.

So, a surety after permitting a judgment, and after levy of execution, voluntarily uniting in withdrawing the effects of his associate from the operation of such process, and permitting a second judgment "for the validity and for the satisfaction of the demand," cannot then come into equity and have the judgment and execution enjoined on the ground that he was released by indulgence to the principal. *Creath v. Sims*, 46 U. S. 5 How. 102, 12 L. ed. 110.

A surety cannot maintain an action for injunction on the ground of a set-off for money paid by him and a cosurety for plaintiff, where the amount paid by plaintiff is not stated and no reason given for not making a legal defense. *Wolcott v. Jones*, 4 Allen, 367.

So, a surety asking for an injunction against a judgment containing usury must tender the amount loaned, with interest, as 1 N. Y. Rev. Stat. 772, § 8, Stat. 1837, p. 487, § 4, providing for a suit without any tender, only applies to a "borrower," besides the complainant should not have waited until after judgment. A further claim that the surety was discharged by an extension of time to the principal was held insufficient because not made at law and by two of the judges on the further ground that the agreement for extension was void being made for an usurious consideration. *Vilas v. Jones*, 1 N. Y. 274, Affirming 10 Paige, 76.

So, the claim of a surety that he did not defend as he was a mere surety and was ignorant of the usury will not authorize an injunction against a decree on the ground of usury, as he should have been diligent and ascertained such defense. *Moran Woodyard*, 8 B. Mon. 537.

So, where a surety obtained a judgment against his cosurety for contribution, and the defendant in that suit by a bill of discovery could have maintained the defense that the plaintiff had been fully indemnified, an injunction against the judgment was denied. *Wright v. Klug*, Harr. Ch. 12.

And mistake of law as to bar of a debt by limitation will not authorize an injunction. *Harner v. Price*, 17 W. Va. 523.

A surety was refused an injunction against a judgment on a bond for purchase money payable to court commissioners where the injunction was claimed on the ground that other sureties were

to sign it, and did not, where no defense of *non est factum* was made at law or excused. *Shields v. McClung*, 6 W. Va. 79.

Or against a judgment for money surrendered by a collector to the confederate government, where there was no forcible seizure, and no allegation of the loyalty of the collector, and there was negligence in not making a defense. *Rogers v. Parker*, 1 Hughes, C. C. 143.

Or where he claimed that the principal should be first exhausted, but he did not have it determined, as he might have done, in the action at law, that he was a surety, under N. C. Code, §§ 2100, 2101, providing for such determination. *Gatewood v. Burns*, 99 N. C. 257.

See *Work v. Harper*, *supra*, I. a.

Under Swan's (Ohio) Stat. 482, providing that where a showing is made that one or more of the persons bound, signed as surety for his codefendant, the execution should direct the debt to be made out of a principal first, a surety who neglects to have the fact that he is such ascertained cannot enjoin an execution sale of his property on the ground that the principal must be first exhausted. *Elliott v. Elmore*, 16 Ohio, 27.

And a surety cannot have a judgment against him enjoined on the ground that his principal is the equitable owner of such judgment, where such defense was not made in the action in which the judgment was rendered and no excuse is given for failure to make it. *Stein v. Benedict*, 83 Wis. 603.

An injunction will not be granted in favor of an indorser on a note against a judgment on such note on the ground that a bank—the real party in interest—was prohibited from obtaining such bills by negotiation of its own paper, by the statutes of the state, where negligence is shown in not making such defense at law. *Lee v. Insurance Bank*, 2 Ala. 21.

In *Kelley v. Kriess*, 68 Cal. 210, it was held that an injunction will not be granted where complainant neglected to defend the action at law or to prosecute a motion for a new trial.

And that a defendant at law was a married woman and surety for her husband is not ground for enjoining an execution sale on the judgment, where such defense was not made at law or excused. *Wilson v. Coolidge*, 42 Mich. 112.

But in *Medart v. Fasnatch*, 15 La. Ann. 621, it was held that an injunction may be obtained by a wife against the enforcement of a judgment against her and her husband jointly, on a debt made in fraud of the law, where she is surety for her husband, as the disability of the wife gives equity jurisdiction.

And in *Bradshaw v. Combs*, 102 Ill. 423, where a surety had been released by an extension granted to the principal without the consent of the surety, an injunction was granted against an execution. The question as to whether or not the defense was

jurisdiction. This ruling is questioned by the assignment of errors by the appellant.

The ground on which the learned counsel for appellees seek to support the action of the trial court is that, this being an application to a court of equity for the extraordinary relief by way of injunction, it has no jurisdiction of the cause, because the plaintiff had a plain and adequate remedy at law; and that he had such remedy at law, they cite *Ross v. Banta*, 140 Ind. 120 (rehearing, 140 Ind. 145). It was there held that a judgment by which the party recovering it had secured an unfair advantage, and wherever by accident, mistake, fraud, or otherwise an unfair advantage has been obtained in proceedings at law, and it is against conscience to make use of such ad-

vantage, a court of equity will restrain the party from making use of the same; and, after judgment, any facts which prove it to be against conscience to execute such judgment, and of which the injured party could not avail himself in defense of the suit, will authorize the court to interfere by injunction, and restrain the party from enforcing the judgment. But we held in that case that the facts which gave rise to the appellant's right to relief occurring after the rendition of the judgment against him constituted material new matter under our Code, authorizing a review, though it would not have authorized a review prior to the Code; and that the remedy of review of a judgment at law authorized by the Code was a remedy at law, and was adequate; and therefore de-

a legal one is not discussed in the opinion, although made in the briefs.

And in *Felch v. Lee*, 15 Wis. 265, an execution sale was restrained on behalf of the surety, where the principal was the equitable owner of the judgment. The case does not show why defense was not made at law.

A judgment obtained by a second indorser against the first will be enjoined where the proceeds of a discounted note were divided between the maker and second indorser under an agreement, although the defense was not made at law, where the question of jurisdiction was not raised in equity. *Galbrath v. Martin*, 5 Humph. 50.

d. In summary proceedings.

A surety is entitled to an injunction against a judgment in summary proceedings, where he has had no opportunity of defending and he has a good defense to the action.

As, where a surety obtained a summary judgment, without notice, against a co-surety for the whole of the debt as though he was the principal, such judgment may be enjoined as to one half of the debt. *Creed v. Scruggs*, 1 Heisk. 560.

And a surety upon a bond for a writ of error may have enjoined an execution and proceedings upon a judgment, where his name has been forged to such bond. *Brooks v. Harrison*, 2 Ala. 209.

So, a judgment on a forged appeal bond, rendered in a court of last resort, may be enjoined by an inferior court, as such judgment is void as to the surety whose name is forged, and equity always gives relief, and the supreme court of Texas has not such equitable jurisdiction, although it had power to enquire into the execution of this bond, and the complainant is not concluded by the judgment, as he was not a party. *Stapleton v. Wilcox*, 2 Tex. Civ. App. 542.

And a surety on an appeal bond is entitled to enjoin an execution on a judgment of the supreme court, where his name is omitted in that judgment, as the execution is void as to him. *Trammell v. Watson*, 25 Tex. Supp. 210.

And an execution issued from the supreme court on an appeal bond will be enjoined at the instance of an indorser on a note who was a defendant in the lower court, and who did not appeal, and whose name was signed to the appeal bond without authority; and his equity is better than that of a surety on an appeal bond where the appeal prevented the debt being made from the principal. *Coles v. Anderson*, 8 Humph. 499.

Sureties on a sheriff's bond may obtain an injunction against a judgment taken on motion, without notice, for non-return of an execution, where the sheriff's term of office had expired before the return day, as the same could not be corrected in the supreme court rendering the judgment. 31 L. R. A.

ment because no errors appear on the face of the record. *Kinzer v. Helm*, 7 Heisk. 672.

And after a judgment against a sheriff and his sureties on a motion on notice only to the principal, the only ground for injunction is a statement of the facts constituting a plea of *non est factum*, and the fact that the sureties resisted the application for a judgment in the summary motion, in order to be a bar, must be shown by the record. *McClure v. Colclough*, 6 Ala. 492, 5 Ala. 65.

And sureties on a forfeited replevin bond may have the execution thereon enjoined in excess of their liability on the bond. *Miles v. Davis*, 36 Tex. 690.

And a surety on a claim bond is entitled to an injunction, where the bond has been quashed and afterwards a judgment of forfeiture was entered and there has been no trial of the right of property. *Alsop v. Allen*, 43 Tex. 598.

So, on a trial of the right of property in an attachment, where judgment went against the claimant for the property and against the surety for damages, and the latter tenders the damages, he may have an execution against him for the value of the property enjoined, where there was no judgment against him for the property requiring its return or making it subject to the lien judgment. *Gentry v. Lockett*, 37 Tex. 503.

And after a judgment had been rendered for plaintiffs for property claimed in attachment, and the sheriff had returned the claimant's bond forfeited, a bill by the surety to stay execution on the ground of release on account of consolidation of cases and change of venue taken, and because the forfeiture was void, is a bill under Ala. Code, § 3522, to stay proceedings on the judgment in a personal action, and injunction should issue on giving the statutory bond. *Ex parte Fechheimer*, 103 Ala. 154.

In *Langridge v. Judge of 21st Jud. Dist. Ct. 46 La. Ann. 20*, it was held that a surety on a bond for the appearance of a criminal was entitled to an injunction on the ground that the principal had not been called by the sheriff under order of court.

But in *Whiteside v. Latham*, 2 Coldw. 91, it was held that an injunction will not be granted against a judgment rendered on motion against a surety of the purchaser of property at a commissioner's sale, as no notice is necessary and the remedy is in that action.

And in *Clegg v. Darragh*, 68 Tex. 337, it was held that a surety on a claimant's bond is not entitled to service of process in the cause, but is bound to take notice of all proceedings, and that negligence and delay of eight months after judgment will prevent him from obtaining relief on the ground that the principal's name was signed without authority.

And a surety on a forthcoming bond cannot enjoin proceedings on the same on the ground that

nied the relief by injunction. It is therefore contended by the appellee company that the discharge of the principals on the trial, after the judgment against the surety, was a fact occurring after the judgment against the surety constituting "material new matter discovered since the rendition of the judgment," and hence that entitled appellant to the remedy of review, excluding him from the right to the extraordinary remedy by injunction. This contention granted would by no means justify the assumption that the trial court had no jurisdiction, and rightly dismissed the cause for want thereof. When the two jurisdictions of law and equity were separate, it might be, under that system, when the plaintiff's cause of action stated by him in a court of equity was of such a nature that it fell within the exclusive jurisdiction of a court of law, the court of equity had no jurisdiction of the subject-matter, and it could take no other action in the matter than to dismiss the cause for want of jurisdiction. This was so because courts of equity had no other powers than equity

powers. Not so in our reformed system of procedure. Not only does the same judge, under that system, exercise both law and equity powers, but he exercises both legal and equitable jurisdiction, and administers both legal and equitable relief in each case, when the facts pleaded and proved warrant it. How, then, can the cause be dismissed for want of jurisdiction merely because the plaintiff asks for equitable relief, while his facts show that he is entitled to legal relief? The court being clothed by the Code with power and jurisdiction to administer both or either legal or equitable relief in the same case, its jurisdiction is not, and cannot be, defeated by it appearing from the facts stated that the equitable relief sought cannot be awarded because such facts show that the only relief the plaintiff is entitled to is purely legal relief and *vice versa*; nor is the jurisdiction defeated because the facts stated in the complaint are not sufficient to entitle the plaintiff to either legal or equitable relief. The remedy in such a case is a demurrer for want of sufficient facts. On the filing of

there was usury in the debt for which the judgment was rendered, as it is questionable if a court of equity can go behind the judgment of forfeiture. *Baine v. Williams*, 10 Smedes & M. 113.

e. For newly discovered evidence.

A surety will be granted an injunction against a judgment on the ground of newly discovered evidence of usury, payment, or release.

So, a surety in a replevin bond given for a judgment may enjoin proceedings thereon, on the ground that the same contained usury of which he had no knowledge until after the execution of the same. *Crutcher v. Trabue*, 5 Dana, 80.

And sureties may be relieved of the judgment against them by the payment of principal and interest, where usury was not discovered until after judgment on account of the death of the principal. *Jones v. Kilgore*, 2 Rich. Eq. 63.

So, a discovery by a surety in a sheriff's bond, after judgment, of a receipt showing payment of the debt, will entitle to an injunction against the judgment. *Harvey v. Seashol*, 4 W. Va. 115.

And a surety may obtain an injunction against proceedings on a judgment, where the debt has been paid by his principal but he did not know of that fact in time to make a defense in the action at law, and the evidence has been discovered since judgment. *McGehee v. Gold*, 63 Ill. 215.

New evidence that a surety was released by an extension, discovered after judgment, will entitle to relief against the same, where it could not have been discovered before by due diligence. *Cox v. Mobile & G. R. Co.* 44 Ala. 611; *Kennedy v. Evans*, 31 Ill. 258; *Montague v. Mitchell*, 23 Ill. 451.

And a judgment against sureties will be enjoined where they were released by an extension granted to the principal for a valuable consideration, and the creditor also took collaterals which did not mature until after the debt, and the sureties had no knowledge of the release until after judgment. *Armistead v. Ward*, 2 Patton & H. (Va.) 504.

f. Where defense was prevented.

An injunction was granted in favor of a surety against a judgment, where the plaintiff at law had acted collusively or prevented a defense by improper conduct.

So, a judgment against a surety, obtained by misrepresentation of the attorney for plaintiff that he did not propose to molest her, but that the same

1 L. R. A.

was only to enable him to make the money from the principal and thus save her from liability, thereby preventing a defense, should be enjoined where she had a valid defense to the action. *Union Bank v. Geary*, 30 U. S. 5 Pet. 99, 8 L. ed. 80.

And a surety prevented from making a defense by fraudulent representation of plaintiff at law may obtain an injunction against proceedings on the judgment. *Kelley v. Krieses*, 63 Cal. 210.

So, an injunction will be granted against a judgment on a note, where the same was given to compound a felony, and a defense was prevented by falsehood and fraud of the plaintiff at law, in representing that judgment had already been taken. *Burpee v. Smith*, Walk. Ch. (Mich.) 327.

And preventing a surety from making a valid defense of release by the discontinuance of several actions, and by delay until his only witness had died, authorizes an injunction against the judgment. *Mack v. Doty*, Harr. Ch. (Mich.) 393.

And proceedings on a judgment and execution held by one surety against the other sureties for the whole debt will be enjoined, where the holder of the judgment had prevented a defense by representing that he would not take judgment for more than his share, and the sureties offer to pay that amount. *Markham v. Angier*, 57 Ga. 43.

And a surety on an administration bond may enjoin proceedings on a default judgment against the administrator upon an account twenty years old, rendered in a county other than that in which he resided, as the presumption of fraud between the administrator and creditor is almost conclusive. *Washington v. Barnes*, 41 Ga. 307.

g. For equitable defenses.

Where the grounds of relief are equitable a surety is entitled to an injunction against a judgment. Some courts hold that in matters of release of a surety on account of an extension granted to the principal an injunction will be granted, as this is an equitable defense. Some hold that the remedy is concurrent at law or equity. But the weight of authority is that this is a legal defense and a failure to make such defense, which is not excused, will prevent an injunction. See *supra*, I. c, *In matters of negligence or for failure to make a legal defense*.

Where a surety on a bond in the county court was to hold the fund as security for such suretyship, and he gave a note to the principal simply as

such a demurrer, the plaintiff may either amend his complaint pending the demurrer, or he may amend it after the demurrer is sustained. Appellant was deprived of this right by the dismissal of his cause. If we could say that the complaint was so defective that it could not be so amended as to state facts sufficient to constitute a cause of action entitling the plaintiff to either legal or equitable relief, then we could very well hold that, the result reached in the dismissal of the cause being the same that would have been reached in the sustaining of the demurrer, there was no available error, though the method of reaching the result was erroneous.

This leads us to inquire whether this complaint was so defective in its statement of facts as that it could not have been amended so as to state a cause of action, either legal or equitable. It is not contended by the appellees that it might not be so amended. The complaint states, and the demurrer admits, that appellant was an accommodation indorser, a mere surety for Kennedy, Hockstedler, and Kly on the notes which were the

foundation of the judgment against appellant, and that afterwards in the same action said principals defeated said notes against them on the ground of failure of consideration. In *Bridges v. Blake*, 106 Ind., at page 835, it was said: "Upon its face the mortgage purported to be a contract of suretyship, and the general rule is that to enforce such a contract it is essential that the obligation against the principal must be subsisting. The extinguishment of the direct engagement of the principal, no matter how accomplished, extinguishes the collateral liability of the surety." *Baker v. Merriam*, 97 Ind. 539, and cases cited; *State v. Blake*, 2 Ohio St. 147; *Brandt, Suretyship*, § 131." But there are exceptions to this general rule. For instance, the discharge of the principal by the act of the law in which the creditor does not participate will not release the surety. A familiar illustration of this rule is that the discharge of the principal in bankruptcy or under insolvent laws, on account of infancy, coverture, or *non compos mentis*, does not discharge the surety. *Gregg v. Wilson*, 50 Ind. 490; *Post v. Loscy*, 111 Ind. 74,

evidence, and was to pay the interest to the principal's wife, an injunction was granted against a judgment at law obtained by an assignee of the note, as the surety could not make the defense at law that the terms of the written contract were varied by a parol contract. *Cornelius v. Thomas*, 1 Tenn. Ch. 233.

An action by a surety to enjoin a judgment at law in favor of a co-surety against him for contribution may be maintained where there are new parties and new equitable issues in the suit, and the co-surety has received assets sufficient to reimburse him. *Simmons v. Camp*, 65 Ga. 673.

And a surety paying a debt for his insolvent principal pending a suit against him on an account assigned by the principal to a third party may have the judgment against him enjoined on the ground of equitable set-off, as the law only authorizes mutual set-offs. *Tuscumbia, C. & D. R. Co. v. Rhodes*, 8 Ala. 203.

And sureties are entitled to an injunction against a judgment in order to set off a judgment held by them against plaintiff's assignor. *Hobbs v. Duff*, 23 Cal. 566.

A surety who is released by the refusal of the creditor on request to sue the principal may obtain an injunction against the judgment at law, if his defense was refused in the action at law as doubtful on the ground that it was an equitable defense; and a surety may come into a court of equity and require the creditor to sue the principal. *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415, Reversing 2 Johns. Ch. 554.

And a surety may obtain relief by injunction against a judgment, where he has been discharged by an extension granted to the principal; and he is not bound by an attempt to defend at law, where such defense was held an equitable defense. *Dunham v. Downer*, 31 Vt. 249.

And where an injunction was asked against a suit at law, in behalf of the surety, on account of an extension to the principal, the chancery court allowed the action at law to proceed until judgment, as the defense might be made, but stayed execution. *Mackintosh v. Wyatt*, 3 Hare, 562.

In *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 606, it was held that where sureties are discharged by the act or failure of the principal and made no defense in the action at law, they may have en-

joined the judgment rendered therein, as the jurisdiction of chancery and common law is concurrent.

A surety was granted an injunction against proceedings on a judgment where there was a suit pending to settle his principal's estate, and the creditor was indebted to such estate, and relief was given by way of set-off and compensation. *Meade v. Grigsby*, 26 Gratt. 612.

In *McHaney v. Crabtree*, 6 T. B. Mon. 104, it was held that the release of a surety by extension or release granted to the principal is an equitable defense, and cannot be used as a legal defense to an action on an injunction bond given to enjoin a judgment.

h. On account of statutes.

Under the law of Mississippi the liability on an official bond of a sheriff is limited to the amount of the penalty, and a surety who has been compelled to pay the whole amount of his bond is entitled to an injunction against the enforcement of a judgment subsequently obtained by a third party, where the plea of payment *pais darrein continuance* was refused on the ground that the mandate of the supreme court was imperative. *Humphreys v. Leggett*, 50 U. S. 9 How. 297, 13 L. ed. 145.

Where the remedy by certiorari was lost without fault of complainant, on the ground that the act in regard to certiorari was unconstitutional, an injunction was granted against a judgment on a constable's bond for a false return of "No property," where all the property the debtor had was exempt. *Cobbs v. Coleman*, 14 Tex. 594.

A surety on a sheriff's bond who pays his part after the joining of issue in a suit on the bond may have the judgment thereon enjoined in an action of nullity, as La. Civ. Proc. 613, provides for an action of nullity against a money judgment on exhibition of a receipt previously lost proving payment, though such proof was not presented on the trial of the main case. In this case the payments were made after the answer was filed. *Florat v. Handy*, 35 La. Ann. 814.

See also, as to statute, *Elliott v. Elmore*, and *Gatewood v. Burns*, *supra*, I. c., and *Ex parte Fechtelmer*, *supra*, I. d.

i. Pleading and parties.

A surety is not entitled to an injunction against

60 Am. Rep. 677; Brandt, Suretyship, § 126; 24 Am. & Eng. Enc. Law, p. 778. This author, at section 125, says, and we think correctly, that, "if the principal is discharged because of matters inherent in the transaction, even after judgment against the surety, the latter will be exonerated thereby." But appellees' learned counsel contend that, notwithstanding these principles entitling appellant to relief, he cannot invoke the aid of the extraordinary remedy of injunction, for the reason that he had a plain, efficient, adequate, and complete remedy at law by a

complaint to review on account of new matter arising since the rendition of the judgment against him in the defeat of the obligation against his principals; citing *Ross v. Banta*, *supra*, in support of this contention. The judgment here involved being in the nature of a judgment at law, and as judgments at law can only be reviewed by virtue of the Code, that remedy, as was held in the case cited, is a legal remedy.

But it is contended by the appellant that he is not bound to resort to the legal remedy if that remedy is not as practicable and effi-

a judgment on the ground of set-off, unless he tenders the amount due. *Smith v. Smith*, 76 Tex. 410.

And a surety on a joint judgment on a note obtained from his principal by the plaintiff at law through fraud will not be granted an injunction, where the principal is not a party to the injunction action. *Emmons v. McKesson*, 5 Jones, Eq. 92.

So, a surety is not entitled to an injunction against a judgment on the ground of usury, where the principal is not made a party defendant in the injunction suit. *Boughton v. Allen*, 11 Paige, 321.

And an injunction will not be granted in behalf of a surety on a note on the ground of delay in bringing suit against the principal where the petition does not show that he signed the note as security, or served notice requiring the holder of the note to proceed against the principal. *Dailey v. Wynn*, 38 Tex. 614.

An injunction was refused against a judgment on a writ of error bond, which injunction was claimed on the ground that other defendants in the court below were also liable for the same debt, but who did not prosecute proceedings in error. *Turner v. Smith*, 9 Tex. 626.

And an injunction was refused against a judgment on a foreign transcript where the defendant obtained a complete record from another state showing that the judgment creditor had seized sufficient property of the principal debtor to satisfy the judgment, but it was not alleged that anything had occurred since the first judgment was rendered, releasing this complainant, and it was an attempt to introduce new evidence upon matters in judgment. *Campbell v. Briggs*, 8 Rob. (La.) 110.

But a surety on a note who is the only party defendant to a judgment need not make the other parties to the note defendants in his suit to enjoin the judgment. *Burpee v. Smith*, Walk. Ch. (Mich.) 327.

j. Injunction bonds.

A surety on an injunction bond given to stay a judgment against the acceptor of a bill of exchange has no claim, where such judgment was paid by the surety, against an indorser of the bill of exchange for remuneration of the amount so paid. *Bohannon v. Combs*, 12 B. Mon. 563.

In Louisiana the supreme court on affirming an appeal dissolving an injunction may amend the judgment below so as to embrace the surety on the injunction bond and condemn him in damages for enjoining a sale. *Mora v. Avery*, 22 La. Ann. 417.

An erroneous judgment against sureties on an injunction bond will not be reversed where they do not complain of error. *Martin v. Sykes*, 25 Tex. Supp. 197.

Where the principal sought to have a judgment against him and his surety enjoined, but did not make his surety a party in the injunction suit, and such surety was also on the injunction bond, the court properly entered judgment against both principal and surety for the debt on the dissolution. *L. R. A.*

tion of the injunction, as N. C. Rev. Code, chap. 32, §§ 14, 17, provide that on the dissolution of an injunction a judgment shall be rendered on the bond as on an appeal bond. *Emmons v. McKesson*, 5 Jones, Eq. 92.

See also *Gowan v. Graves*, *supra*, I. b., and *McHaney v. Crabtree*, *supra*, I. g.

II. In favor of sureties.

A judgment on a guardian's bond assigned to his surety, who paid only a part of the same, was enjoined at the instance of the guardian, where such judgment was for money charged against him as assets received from a former insolvent guardian for whom this surety and the second guardian were both sureties on his bond. *Flickinger v. Hull*, 5 Gill, 60.

Under Tenn. acts 1899, chaps. 69, 81, providing for a judgment on motion without notice in favor of a surety against his principal, a judgment so taken against a person not a party to the suit, where the relation of surety did not exist, will be enjoined, as the remedy at law is doubtful. *Ialer v. Turner*, 7 Humph. 116.

An execution issued on a judgment obtained by a surety without notice against a party whose name was forged to a note may be enjoined in any county where it is sought to be enforced, as the court rendering judgment could not give relief as it had no jurisdiction. *Douglass v. Joyner*, 1 Bart. 32.

And as analogous to a case of cosureties, a resident of a school district obtaining a judgment against such district and exhausting the school property and seeking to hold other residents liable, will be enjoined from further proceedings on the ground that he himself is also liable as a resident of that district. *Kenyon v. Clarke*, 2 R. I. 67.

And a judgment in favor of an acceptor against the drawer of a bill was enjoined where the plaintiff at law allowed his name to be used to prevent a defense which the defendant had against the real party in interest and the acceptor or surety had not paid anything on the bill. *Greenleaf v. Maher*, 2 Wash. C. C. 44 and 393.

So, a judgment obtained by a surety against his principal will not be enjoined on the ground that the payment for which the judgment was obtained was made by another surety, where there was negligence on the part of complainant in ascertaining such defense. *Slack v. Wood*, 9 Gratt. 40.

But a principal cannot obtain an injunction against a judgment on the ground of release of his surety by the creditor. *Ragsdale v. Gossett*, 2 Lea, 729.

For injunctions in favor of sureties, see, further, *Markham v. Angier*, *supra*, I. f; *Creed v. Scruggs*, *supra*, I. d; *Simmons v. Camp*, *supra*, I. g.

For sureties obtaining injunctions against judgments for matters arising subsequent to their rendition, see note to *Little Rock & Ft. S. R. Co. v. Wells* (Ark.) 30 L. R. A. 560.

I. T.

cient to the ends of justice and its prompt administration, both in respect to the final relief and the mode of obtaining it, as the equitable remedy; there the aid of equity, and injunction relief may be invoked. That is the true rule in such cases. *Thatcher v. Humble*, 67 Ind. 444; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Beach*, Inj. § 32, and authorities there cited; *Kilbourn v. Sunderland*, 130 U. S. 514, 32 L. ed. 1008; *Lewis v. Cocks*, 90 U. S. 23 Wall. 470, 23 L. ed. 71. And it is further contended by appellant that the legal remedy is not as practicable and as efficient as the remedy by injunction, because he contends that a complaint to review would require him to seek to review the whole proceeding, and thereby, if successful, he would open the whole case; not only the judgment against himself, but the judgment in favor of and discharging his principals from liability on the notes. If that is so, then there could be no review at all of any part of the proceeding; because the only ground for saying that there is a right to review in appellant at all is on the ground of the new matter of the discharge of the principals in the notes after the judgment had been taken against the surety; and if to review on account of that matter means to review the other judgments exonerating and discharging the principals from liability on the notes, as well as to review the judgment against the surety thereon, then there is no ground for review whatever. The statute provides that "any person who is a party to any judgment . . . may file in the court where such judgment is rendered a complaint for a review of the proceedings and judgment." Rev. Stat. 1894, § 627 (Rev.

Stat. 1881, § 615). Under this statute appellant was entitled to review the judgment against him without disturbing the separate judgment in the same proceeding in favor of his principals. The general prayer for relief was broad enough in this case to have justified the court in awarding the legal relief of a review of that judgment, and the facts stated in the complaint only lacked one element to entitle the plaintiff to the legal relief of a review, and that was to file a transcript of the record of the judgment referred to and described in the complaint. The facts stated did not entitle the plaintiff to equitable relief by way of injunction, because they show that he had an ample legal remedy by review; but that did not, as before observed, justify the dismissal. It did not state facts sufficient to warrant the legal relief by way of review, because it did not set forth as an exhibit thereto a complete transcript of the judgment, or so much thereof as is necessary to fully present the error complained of. *McDade v. McDade*, 29 Ind. 340; *Comer v. Himes*, 58 Ind. 573; *Meharry v. Meharry*, 59 Ind. 257; *Whitehall v. Crawford*, 67 Ind. 84; *Stevens v. Logansport*, 76 Ind. 498; *Frank v. Davis*, 103 Ind. 281. For that reason the court ought to have sustained the demurrer to the complaint, and allowed the plaintiff to amend his complaint in this respect if he so desired.

The judgment is therefore reversed, and the cause remanded, with instructions to overrule appellees' motion to dismiss, and sustain the demurrer to the complaint, with leave to the plaintiff to amend his complaint if he so desires.

ILLINOIS SUPREME COURT.

Jesse HOLDOM, Conservator, etc., of Paul Holz, *Appl.*,
v.

ANCIENT ORDER OF UNITED WORKMEN.

(159 Ill. 619.)

The killing of the insured by the insane beneficiary in a life policy under such circumstances that it would be murder if the beneficiary was sane does not forfeit the policy nor bar a suit for the money.

(October 11, 1895.)

A PPEAL by plaintiff from a judgment of the Appellate Court, First Department, reversing a judgment of the Circuit Court for Cook County in favor of plaintiff in an action

brought to recover the amount alleged to be due on a mutual benefit certificate in favor of one who while insane murdered the insured. *Reversed.*

Statement by **Phillips, J.**:

On April 10, 1888, appellee made and delivered to one Carl Holz a certificate in consideration of payment of an examination fee and all dues and assessments, etc. The certificate states that Carl Holz is a member of Allegheny Lodge No. 346, located in Chicago, and entitled to participate in the beneficiary fund to the amount of \$2,000, which at his death shall be paid to his son Paul Holz. Suit was brought by the beneficiary by his conservator on that certificate, the declaration averring that Carl Holz departed this life on the 16th day of December, 1890, and avers

Note.—For the effect of suicide to defeat recovery on an insurance policy providing that it shall be void in case of suicide "sane or insane," see *Billings v. Accident Ins. Co.* (Vt.) 17 L. R. A. 89, and *note*.

The case of *Shellenberger v. Ransom* (Neb.) 25 L. 81 L. R. A.

R. A. 564, denying that murder of an ancestor will defeat an inheritance by the murderer, is followed by *Carpenter's Appeal* (Pa.) 29 L. R. A. 145. **Contra**, *Riggs v. Palmer* (N. Y.) 5 L. R. A. 340. See also *note*, 25 L. R. A. 564.

compliance by Carl Holz with all the rules and laws of the order and at the time of his death was a member in good standing, and appellee had satisfactory evidence of death. Avers that appellant is a minor son of deceased and the beneficiary in the certificate, the appointment of conservator, and that \$2,000 has not been paid nor any part thereof. Appellee pleaded the general issue and a special plea alleging that the beneficiary in the certificate on December 15, 1890, killed and murdered the insured whereby he forfeited and lost all rights as a beneficiary under the certificate. Replication was filed to the special plea averring that the beneficiary did not murder the insured as alleged in the plea, but avers that he did kill the insured as alleged while the beneficiary was insane. To that replication appellee filed a general demurrer which was overruled, and appellee elected to stand by the demurrer on an agreed state of facts. Judgment was entered for plaintiff for \$2,000 with costs of suit. An appeal was prosecuted to the appellate court of the first district, where that judgment was reversed and a judgment entered for the defendant. The beneficiary by his conservator prosecutes this appeal.

Messrs. Munson T. Case and Case & Hogan, for appellant:

If the beneficiary, Paul Holz, killed the deceased, Carl Holz, without committing a crime, and thereby an injury was done the next of kin of the deceased, to whom would Paul Holz or the estate of Paul Holz be liable on this account? Certainly not to the insurance company.

Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571.

The defendant below could not plead in bar or as a set-off anything which did not constitute a cause of action on its part against Paul Holz or the estate of Paul Holz.

Manhattan L. Ins. Co. v. Broughton, 109 U. S. 121, 27 L. ed. 878; *Accident Ins. Co. v. Crandal*, 120 U. S. 527, 30 L. ed. 740; *Harrisburg v. Rickards*, 119 U. S. 199, 30 L. ed. 353.

No crime was committed by the beneficiary.

Schreiner v. High Court of Illinois Catholic O. F. 35 Ill. App. 576; dissenting opinion in *Riggs v. Palmer*, 115 N. Y. 519, 5 L. R. A. 340.

We may not "enhance the penalties and forfeitures provided by law for the punishment of crime."

People v. Thornton, 25 Hun, 456; *Owens v. Owens*, 100 N. C. 240.

The courts have uniformly refused to punish the estate of a deceased suicide when the suicide at the time of committing the act of self-destruction was insane.

Manhattan L. Ins. Co. v. Broughton, and *Accident Ins. Co. v. Crandal*, *supra*; *Mutual Ben. L. Ins. Co. v. Daviess*, 87 Ky. 541; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. Rep. 198; *Blackstone v. Standard Life & Acc. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486; *Buswell, Insanity*, §§ 814-822; 11 Am. & Eng. Enc. Law, pp. 187-189; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 81 L. R. A.

Am. Dec. 571; *Anthony v. Slaid*, 11 Met. 290; *Shearm. & Redf. Neg.* 4th ed. § 124, and cases cited.

Only such demands as constitute a subsisting cause of action can be set off; nothing can be pleaded as a set-off on which a separate action cannot be maintained.

22-Am. & Eng. Enc. Law, 267, 280-290; *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.*, and *Anthony v. Slaid*, *supra*.

Suicide is as great a temptation to the insured to benefit his estate under certain circumstances as murder of the insured is to the beneficiary.

Van Zandt v. Mutual Ben. L. Ins. Co. 55 N. Y. 176, 14 Am. Rep. 215.

An insane act is not distinguishable from an accidental act.

Breasted v. Farmers' Loan & T. Co. 8 N. Y. 805, 59 Am. Rep. 482.

Public policy should not be invoked to vitiate the contract in this case.

Sir George Jessel in Printing & Numerical Registering Co. v. Sampson, L. R. 19 Eq. 465; *Davies v. Davies*, L. R. 38 Ch. Div. 364; *Richardson v. Mellish*, 2 Bing. 242, opinions by Best, Ch. J., and Burroughs, J.

An infant cannot be held in an action based on contract by framing the action in tort.

Pollock, Torts, § 47; *Bishop, Non-Cont. L.* § 566.

The legislature has declared that insanity absolves from crime.

Rev. Stat. Ill. Crim. Code, §§ 282, 284.

Mr. James McCartney, for appellee:

An insane person is responsible in a civil action for his tort in all cases where a sane person would be responsible.

McIntyre v. Sholty, 121 Ill. 660; 1 Chitty, Pl. p. 76; *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 340; *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541; *Amicable Soc. v. Bolland*, 4 Bligh, N. R. 194; *Princes of Wales Assn. Co. v. Palmer*, 25 Beav. 605; *Shearm. & Redf. Neg.* § 57; *Porter, Ins.* *129 *et seq.*; *Cooley, Torts*, pp. 97 *et seq.*

An insane person causing the death of another by an act which would be felonious if sane, is liable in damages therefor.

Jewell v. Colby, 66 N. H. 399; *McIntyre v. Sholty*, *supra*.

A beneficiary in an insurance policy who kills the insured cannot recover the insurance money.

Mutual L. Ins. Co. v. Armstrong, 117 U. S. 591, 29 L. ed. 997; *Hatch v. Mutual L. Ins. Co.* *supra*.

A person insured in the Ancient Order of the United Workmen Society may change his beneficiary at will. The beneficiary has no vested interest in the insurance money until the death of the insured.

Bagley v. Grand Lodge of A. O. U. W. 181 Ill. 498; *Martin v. Stubbings*, 126 Ill. 387; *Supreme Council of C. K. of A. v. Franke*, 187 Ill. 118; *Metropolitan L. Ins. Co. v. O'Brien*, 92 Mich. 584; *Sabin v. Phinney*, 184 N. Y. 428.

Public policy would not favor permitting an insane person to profit by his own wrong.

Greenhood, Pub. Pol. pt. 1, Rule 11; *Cooley*,

Torts, pp. 97 *et seq.*; *McIntyre v. Sholty*, *supra*; *Krom v. Schoonmaker*, 3 Barb. 647; *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 849.

Phillips, J., delivered the opinion of the court:

The only question of law presented in this record is: Does an insane beneficiary in a life insurance policy, who kills the insured under such circumstances as would cause the killing to be murder if the beneficiary was sane, thereby forfeit his right to recover the insurance money? This presents a question of first impression. That an assignee who was sane, of a policy of life insurance, caused the death of the assured by felonious means, has been held sufficient to defeat a recovery on the policy. *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Prince of Wales Assn. Co. v. Palmer*, 25 Beav. 605.

The general doctrine is that insane persons are liable for damages caused by their torts, distinguishing these from criminal liability. In *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 849, it was held that the insanity of a bailee did not relieve him from liability for destroying property held by him as bailee. In *Cross v. Kent*, 32 Md. 581, a lunatic was held liable in damages for burning a barn whether occurring through negligence or as an insane act. *Taggard v. Innes*, 12 U. C. C. P. 77, it was held that insanity constitutes no defense in a civil action for damages in an action of trespass *vi et armis*. In *Williams v. Hays*, 148 N. Y. 442, 28 L. R. A. 153, it was held that insanity of one who is the owner *pro hac vice* of a vessel did not relieve him from liability to other owners for negligence in her management. On this latter case many authorities are collected and considered and the question is treated exhaustively. In *McIntyre v. Sholty*, 131 Ill. 660, it was held that insanity did not avail as a defense to a civil action from damages resulting from killing a person which was under circumstances that would have been a felony had the insane person who did the killing been sane at the time. Such is the current of authorities as to the liability of an insane person for his torts. By the great weight of authority it is held in such cases, the lunatic, not having the element of intention or malice, is only liable for damages that would be compensatory, and not liable for vindictory damages; and such is the rule in this state. *McIntyre v. Sholty*, *supra*.

The reason for the rule that an insane man shall be held liable for his tort is, where a loss must fall upon one of two persons equally innocent it must be borne by the one who caused it. The liability is in no way dependent upon the intent or design to commit the act, for a lunatic can have no will and can form no design or intent, and would not be liable for a tort wherein the intent is a necessary ingredient. Such is the rule with reference to torts. A very different question is, however, presented with reference to a contract of insurance and the liability of a company on its policy. In the absence of an express stipulation relieving the company from liability in such case where there is no

fraud or design, a fire insurance company is not relieved from liability on its policy by reason of loss by fire through negligence of the assured or his servants. *Shaw v. Robberds*, 6 Ad. & El. 75; *Walker v. Maitland*, 5 Barn. & Ald. 171; *Bush v. Royal*, 2 Barn. & Ald. 73; *Dobson v. Sotheby*, Moody & M. 90; *Waters v. Merchants' Louisville Ins. Co.* 86 U. S. 11 Pet. 213, 9 L. ed. 691; *Columbia Ins. Co. v. Lawrence*, 35 U. S. 10 Pet. 507, 9 L. ed. 512; *Catlin v. Springfield F. Ins. Co.* 1 Sumn. 484; *St. Louis Ins. Co. v. Glasgow*, 8 Mo. 713, 41 Am. Dec. 661; *Gates v. Madison County Mut. Ins. Co.* 5 N. Y. 469, 55 Am. Dec. 360; *Nelson v. Suffolk Ins. Co.* 8 Cush. 477, 54 Am. Dec. 776; *Mathews v. Howard Ins. Co.* 11 N. Y. 14; *Huckins v. People's Mut. F. Ins. Co.* 31 N. H. 247; *Johnson v. Berkshire Mut. F. Ins. Co.* 4 Allen, 388; *Mickey v. Burlington Ins. Co.* 35 Iowa, 174, 14 Am. Rep. 494; *Cumberland Valley Mut. Protection Co. v. Douglas*, 58 Pa. 423, 98 Am. Dec. 298; *Gore v. Farmers' Mut. F. Ins. Co.* 48 N. H. 41, 2 Am. Rep. 168; *National Ins. Co. v. Webster*, 83 Ill. 470.

If a loss is incurred by peril insured against, the liability exists even though the remote cause be the negligence of the assured or his servants, unless that negligence be so gross as to authorize the presumption of fraud. In *Karow v. Continental Ins. Co.* 57 Wis. 56, 46 Am. Rep. 17, in a clearly reasoned and well-considered case it is held, where there is nothing in the policy to the contrary, an insurer is not released from liability because the property was burned by the assured while insane.

The reason for such rule is that an insurance company for a consideration paid has assumed the risk of the property being destroyed by fire. That assumption of risk includes injuries to the property by fire resulting from the negligence of the assured or his servants where not expressly excepted. It also is an assumption of all risk of the assured becoming a lunatic or insane and destroying the insured property when in that condition, unless by the terms of the policy such liability is saved by an express exception.

An insane person may be liable for burning the property of another for the reason that where a loss must be borne by one of two innocent persons it must fall upon the one occasioning that loss, yet the burning of his own insured property does not necessarily injure the insurance company, if that company for a sufficient valuable consideration assumes that risk. That assumption of risk is the contract of the company for a consideration paid to it. In no consideration of policy or justice should it be relieved from its contract in the absence of fraud, malice, or design. These qualities cannot exist in the mind of an insane person. To hold that the insurance company should be relieved from liability under such circumstances would be to change the contract of the parties at the instance of one for its benefit to the prejudice of the other without his consent and where there is no misrepresentation, mistake, or fraud, covin, design, or malice. Such is not the law. A fire policy covers all risks

of loss or damage by fire except only such as are excepted by the terms of the policy and such as are caused by the intended voluntary act, design, or procurement of the assured. It had been held by repeated adjudications in various courts of this country and in Great Britain, where there is no express provision in a life policy, that in the event of the insured dying by his own hand the policy shall become void, the right to recover thereon is not forfeited and the policy is not vacated by reason of the suicide of the assured while in a state of temporary insanity.

The proposition is so fully established and recognized that a citation of authorities to sustain it would be supererogation. Here again the reason for the rule is like that in case of fire insurance policies. The contract of the parties is to be construed as it has been made and not to be changed at the request of one of the parties to it for that party's benefit without the consent of the other where there has been no fraud, mistake, misrepresentation, deceit, or other intentional wrong, to induce the making thereof or to accelerate the time of payment.

These rules do no violence to what has been termed a maxim of the insurance law of all nations, *i. e.*, that the assured cannot recover for loss produced by his own wrongful act. *Thompson v. Hopper*, 6 El. & Bl. 191. By which is meant an act intentionally wrongful. In a case before the supreme court of North Carolina in 1883 it appeared the complainant instituted proceedings for the assignment of dower in the estate of her husband for whose death she had been convicted as an accessory before the fact and sentenced to imprisonment for life. The trial court ruled against the allowance of dower, and on appeal it was held: "We are unable to find any sufficient legal ground for denying to the petitioner the relief which she demands; and it belongs to the law-making power alone, to prescribe additional grounds of forfeiture of the right, which the law itself gives, to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle. We have searched in vain for an authority or ruling on the question, and find no adjudged case; the fact that none such is met with affords a strong presumption against the proposition." *Owens v. Owens*, 100 N. C. 240.

In the recent case in the supreme court of Nebraska, of *Shellenberger v. Ransom*, 41 Neb. 631, 25 L. R. A. 565, it appears A died owning an estate and left surviving her husband, a son and daughter. The husband became tenant by the curtesy, and the children took an estate in fee. Under the statutes of that state on the death of a child the father inherits. The father murdered the daughter to obtain that inheritance. He conveyed the lands and the vendees filed bill for partition against the son who set up the fact of the daughter having been murdered by the father of which the vendees had notice, and prayed the court to find the father took no estate, etc. It was held: "Knowledge of the settled

maxims and principles of statutory interpretation is imputed to the legislature. To the end that there may be certainty and uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise. The well-considered cases warrant the pertinent conclusion that when the legislature, not transcending the limits of its power, speaks in clear language upon a question of policy, it becomes the judicial tribunals to remain silent;" and held the father became vested with the estate of the daughter.

The line between legislation and interpretation is clear, and for the courts to declare a forfeiture for crime where the legislature has remained silent is legislation by judicial tribunals,—a subject with which they have no concern.

There can be no public policy in the punishment of such persons. This discussion brings us back to the first proposition with which this opinion commenced and we hold:—

Where an insane beneficiary in a life policy kills the assured under such circumstances as would cause the killing to be murder if the beneficiary was sane, such killing does not cause a forfeiture of the policy nor bar his right of recovery for the insurance money.

The judgment of the Appellate Court is reversed and the judgment of the Circuit Court of Cook County is affirmed.

Rehearing denied March 10, 1896.

BOARD OF EDUCATION OF NORMAL SCHOOL DISTRICT, *Appt.*,

v.

Charles H. BLODGETT.

(156 Ill. 441.)

1. **Bonds given by the board of education** of a school district, to obtain money which was not borrowed or used for any purpose for which the board was authorized by its charter to issue bonds, are void.
2. **A complete defense under the statute of limitations** is property within the protection of a constitutional guaranty of due process of law.
3. **Deprivation of a remedy** is equivalent to the deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away.
4. **A right of defense is a remedy** of the defendant within the constitutional protection of rights.
5. **A school district or municipal cor-**

NOTE.—For a note on remedy as part of the obligation of a contract, see *Best v. Baumgardner* (Pa.) 1 L. R. A. 366.

See also *Beverly v. Barnitz* (Kan.) *post*, 74.

poration has the same constitutional protection that an individual would have against the abrogation by statute of its already complete defense under the statute of limitations.

(January 14, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for McLean County in favor of plaintiff in an action brought to recover money loaned by plaintiff to defendant for which illegal bonds had been issued. *Reversed.*

The facts are stated in the opinion.

Messrs. Fifer & Phillips for appellant.

Messrs. John E. Pollock and A. J. Barr, for appellee:

Money paid for illegal bonds may be recovered back.

Jackson County v. Hall, 53 Ill. 440; *Louisiana v. Wood*, 102 U. S. 294, 26 L. ed. 156.

The legislature might restore the remedy after the bar was complete.

Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483; *Hewitt v. Wilcox*, 1 Met. 154; *Wood v. Kennedy*, 19 Ind. 68; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Butler v. Palmer*, 1 Hill, 324; *Hampton v. Com.* 19 Pa. 329; *Baughner v. Nelson*, 9 Gill, 304, 52 Am. Dec. 694.

As to contracts for the payment of money there is no such thing as an adverse possession, but the statute simply affects the remedy, and not the debt.

Jones v. Jones, 18 Ala. 249; *Williams v. Jones*, 18 East, 439; *Le Roy v. Crowninshield*, 2 Mason, 157; *Medbury v. Hopkins*, 3 Conn. 472; *Lincoln v. Battelle*, 6 Wend. 475; *Byrne v. Crowninshield*, 17 Mass. 55; *Pearson v. Dwight*, 2 Mass. 84; *Egberts v. Dibble*, 3 McLean, 86.

A legislature has power, when it interferes with no vested right, to enact retrospective statutes to validate invalid contracts, or to ratify and confirm any act it might lawfully have authorized in the first instance.

Cooley, Const. Lim. 374; *United States Mortg. Co. v. Gross*, 93 Ill. 494; *Hawthorn v. People*, 109 Ill. 302; *Mason v. Wait*, 5 Ill. 127.

Baker, J., delivered the opinion of the court:

The board of education of normal school district, defendant below, and appellant here, was incorporated in 1867, by special act of the legislature. Private Laws 1867, vol. 3, p. 329. The act by which it was incorporated was declared to be a public act. On July 15, 1867, the board borrowed of W. E. Woodward \$1,500, and issued to him therefor three bonds for the sum of \$500 each, and numbered respectively 30, 31, and 32, said bonds bearing interest at the rate of 10 per cent per annum, payable semi-annually. Said bonds were afterwards purchased from the holders thereof by Charles H. Blodgett, appellee herein, at their full face value. He held them until after their maturity, when new bonds of like import, numbered 60, 61, and 62, respectively, and dated September 1, 1873, and running five years, were issued to him in lieu thereof. On March 2, 1874, the board executed and delivered to appellee a certain other bond for \$500, numbered 77; said bond bearing date said March 2, 1874,

running five years, and drawing 10 per cent interest, payable semi-annually. The bond states upon its face that it was issued in lieu of bond No. 36, surrendered; and the consideration therefor, \$500, was paid by appellee to the treasurer of the board.

Interest was paid on the original bonds until their maturity, and on bonds 60, 61, 62, and 77 up to September 1, 1877, but no interest has been paid on any of them since that date.

Section 9 of the charter of the board of education of normal school district reads as follows:

"For the purpose of erecting schoolhouses and purchasing school sites, it shall be lawful for said board to borrow, at a rate of interest not exceeding 10 per cent per annum, and issue bonds therefor, in sums not less than \$100; which bonds shall be executed by the president and clerk of said board, in the name of the board, and countersigned by the treasurer of the board; and to secure the payment of said bonds said board may mortgage any part or the whole property belonging to said board."

And it is stipulated and agreed in the case at bar that the money for which the above-mentioned bonds were given was not borrowed or used by the board of education for any purpose for which said board was authorized by its charter to issue bonds.

The board of education had no power to issue the bonds, and they were void. It was so held by this court in 1880, in the case of *Hewitt v. Board of Education*, 94 Ill. 528.

Afterwards an act was passed by the legislature which was approved June 17, 1893, and in force July 1, 1893, and which act was as follows:

"An Act to Amend an Act Entitled 'An Act in Regard to Limitations,' Approved April 4, 1872; in Force July 1, 1872."

"Sec. 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* That an act entitled 'An Act in Regard to Limitations,' in force July 1, 1872, be, and the same is hereby, amended by adding thereto the following, to be numbered section 27:

"Sec. 27. That when any person has paid money into any incorporated school district of this state, and bonds have been issued by such incorporation therefor, which are illegal, and where the statute of limitations has run against the recovery of the original consideration for which said bonds were issued, then in such case the statute of limitations is hereby extended, and the person so paying money for such illegal bonds, or his legal representatives or assigns, shall have a right of action in his own name, or as such representative against such corporation, for one year from the time this act takes effect, and not after, to recover the amount of the original consideration paid for such bonds, together with 6 per cent interest per annum on such original consideration from the date that interest ceased to be paid on such bonds until July 1, 1891, and 5 per cent interest per annum thereafter." Laws 1893, p. 139.

Thereupon, on July 6, 1893, and in less than a week after the act went in force, appellee brought this action of assumpsit in the

McLean circuit court to recover the amount of the original consideration paid for the above-mentioned bonds, with interest. The declaration consisted of the consolidated common counts. Appellant interposed the general issue and a plea of the five years' statute of limitations; and appellee replied to the latter plea, counting upon the act approved June 17, 1893, concerning limitations. The case was finally submitted to the court under a stipulation which waived formal issues on the pleadings, both parties to have the full benefit of all the facts appearing in the agreed state of facts signed by them. The stipulation of facts and the bonds were all the evidence offered. The court, upon that evidence, found the issues in favor of the plaintiff below, and rendered judgment against the defendant below for \$3,900 damages, and costs of suit; and from that judgment this appeal was prosecuted.

The principal question at issue in the case is in regard to the constitutionality and validity of the act approved June 17, 1893. The claim of invalidity is based on various contentions made by appellant. One of these contentions is that the act is in violation of the last clause of § 22 of art. 4 of the Constitution of Illinois, which provides as follows: "In all cases where a general law can be made applicable, no special law shall be enacted." Another is, that the act is a partial, unequal, and invidious statute, and for that reason forms no part of that "law of the land," in accordance with which, by the rule of the common law and by the mandate of § 2 of the Bill of Rights in the state Constitution, all men are entitled to have their rights determined. Another is, that under the Constitution the legislature cannot create a debt against a municipal or school corporation for corporate purposes, and subject it to a tax for its payment, without its consent. And the other is that the statute is in conflict with the rule that when the bar of a statute of limitations has become complete by the running of the full statutory period, the right to plead the statute as a defense is a vested right, which cannot be destroyed by legislation, since it is protected therefrom by § 2 of the Bill of Rights incorporated in the state Constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law."

We will consider the last of these contentions, only.

It has been stated so frequently in decisions and in the books, that "due process of law" and "law of the land" mean one and the same thing, that it may be regarded as elementary.

As early as 1820 this court decided, in effect, that a completed bar of the statute of limitations is a vested right. In March, 1819, the first legislature of the state enacted: "That all the laws and parts of laws passed by or under the authority of any territorial government, heretofore existing, be, and they are hereby repealed." A proviso excepted certain statutes of the territorial government, but did not except the statutes of limitation theretofore in force, and there was no saving clause that applied to them.

31 L. R. A.

The same legislature passed an act for the limitation of actions. Laws 1819, p. 351, and p. 141, § 8. In *Naught v. Oneal*, 1 Ill. 29, Appendix, and *Beecher's Breese*, 36, the court, in deciding a demurrer to a replication, said: "If the cause of action accrued one year or more before the repeal of the statute of limitations, still, the old statute of limitations is a good bar to the action. It is a complete bar before the repeal, and the repeal of a statute does not affect the rights acquired under the repealed statute." The question, as detached from tangible property, does not seem to have arisen in this court since that date, until now.

The doctrine, as we understand it, is well and correctly stated in *Cooley on Constitutional Limitations*, 6th ed. On page 448 he says: "When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant, or any species of assurance."

And on page 454 he says: "Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties,—a thing quite beyond the power of legislation."

The same doctrine is stated by other text-writers, in perhaps different but equally strong language. *Sutherland, Stat. Constr.* § 480; *Wood, Lim. Act.* p. 26, § 11, p. 30, § 12.

In almost all of the states of the Union in which the question has arisen, it has been held that the right to set up the bar of a statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and cannot be taken away by legislation, either by a repeal of the statute without saving clause or by an affirmative act; and that it is immaterial whether the action is for the recovery of real or personal property, or for the recovery of a money demand, or for the recovery of damages for a tort.

Brown v. Parker, 28 Wis. 21; *Davis v. Minor*, 1 How. (Miss.) 183, 28 Am. Dec. 325; *McCracken County v. Mercantile Trust Co.* 84 Ky. 344; *Girdner v. Stephens*, 1 Heisk. 280, 2 Am. Rep. 700; *Kinsman v. Cambridge*, 121 Mass. 558; *Bigelow v. Bemis*, 2 Allen, 496; *Stipp v. Brown*, 2 Ind. 647; *Ryder v. Wilson*, 41 N. J. L. 9; *McKinney v. Springer*, 8 Blackf. 506; *Baldro v. Tolmie*, 1 Or. 176;

Ball v. Wyeth, 99 Mass. 888; *Prentice v. Dehon*, 10 Allen, 353; *Yancy v. Yancy*, 5 Helsk. 353, 18 Am. Rep. 5; *Bradford v. Shine*, 13 Fla. 393, 7 Am. Rep. 239; *Moore v. Luce*, 29 Pa. 260, 72 Am. Dec. 629; *Couch v. Mc Kee*, 6 Ark. 484; *Woodman v. Fulton*, 47 Miss. 682; *Wires v. Farr*, 25 Vt. 41; *Rockport v. Walden*, 54 N. H. 167, 20 Am. Rep. 131; *Lockhart v. Horn*, 1 Woods, C. C. 628; *Harrison v. Stacy*, 6 Rob. (La.) 15; *Thompson v. Read*, 41 Iowa, 48; *Atkinson v. Dunlap*, 50 Me. 111; *Whitehurst v. Dey*, 90 N. C. 542; *McMerty v. Morrison*, 62 Mo. 140.

The rule, however, is held to be otherwise as to debts in Texas and in Alabama. *Bentlnck v. Franklin & G. City Co.* 38 Tex. 458; *Jones v. Jones*, 18 Ala. 248.

Great reliance is placed by appellee on the prevailing opinion in *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, where it was held that a debtor has no property in the bar of a statute of limitations as a defense to a promise to pay a debt, and that such bar, after it has become complete, may be removed by a statute. The decision, however, was by a divided court, there being a vigorous dissenting opinion by Justice Bradley, which was concurred in by Justice Harlan. The doctrine of the dissenting opinion is most in consonance with former decisions of this court, and is supported by the great weight of authority. That opinion seems to us to present the better view. It expresses so strongly and so well our understanding of the law, that we will quote from it at some length.

The learned justice says that the constitutional provision that forbids that any person shall be deprived "of life, liberty, or property without due process of law," was intended to protect every valuable right which a man has. He then adds: "The words 'life, liberty, and property' are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself,—that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others, or against the government itself.

Now, an exemption from a demand or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me

for money, as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the Constitution then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property.

The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the falling memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defense of the statutes is interposed. But it is nevertheless a right given by a just and politic law, and, when vested, is as much to be protected as any other right that a man has.

The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defense is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect."

The political rights and privileges delegated to counties, school districts, and cities are not within the constitutional provisions against laws which impair vested rights. But their property rights are protected by the same constitutional guaranties which shield the property of individuals from legislative aggression. *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Richland County v. Lawrence County*, 12 Ill. 1; *Milam County v. Bateman*, 54 Tex. 153; *Aberdeen Female Academy v. Aberdeen*, 18 Smedes & M. 645; *Grogan v. San Francisco*, 18 Cal. 590; *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56.

In our opinion, the act of June 17, 1893 amendatory of the act in regard to limitations is unconstitutional and invalid.

It follows that the circuit court erred in its rulings upon some of the propositions of law submitted to it, and in rendering judgment against the defendant.

The judgment is reversed.

Rehearing denied June 10, 1895.

KANSAS SUPREME COURT.

John L. BEVERLY, *Piff. in Err.*,

v.

Martha BARNITZ.

(55 Kan. 466.)

*Chapter 109, Laws 1893, commonly known as the "Redemption Law," whether applied to existing or future contracts, is not in conflict with the provision of the Federal Constitution (art. 1, § 10) that "no state shall . . . pass any . . . law impairing the obligation of contracts."

(Johnston, J., dissents.)

(December 7, 1895.)

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiff in an action to foreclose a mortgage and which refused to make the provisions for redemption provided by Laws 1893, chap. 109. *Reversed*

A decision was handed down in this case on April 30, 1895, but a petition for rehearing was subsequently filed and the court revised its ruling, rendering the former decision of no effect and it is therefore omitted.

The facts are stated in the opinion.

Mr. E. A. McMath, for plaintiff in error:

This law does not change, alter, or impair the contract rights of the parties to the mortgage.

In Kansas all of the features of the common-law mortgage have been long since wholly swept away or abrogated.

The mortgage merely gives a lien upon the mortgaged property which can be enforced, not in the manner prescribed in the contract itself, but only in accordance with the rules and practice of the court as the same may be prescribed or limited by statute.

Waterson v. Devoe, 18 Kan. 233; *Seckler v. Delfs*, 25 Kan. 165.

If the parties to this mortgage could not include in it a valid contract for vesting title, or right of possession, or regulating the time or manner of sale, still less could they make a valid contract which would limit the right of redemption.

Courts of equity have always strenuously resisted all attempts to abridge this right by contract, and have almost uniformly set aside and disregarded every restriction, or limitation, or condition, attempted to be placed upon this right by contract.

Vernon v. Bethell, 2 Eden, 113; *Spurgeon v. Collier*, 1 Eden, 55; *Poindexter v. McCannon*, 1 Dev. Eq. 375, 18 Am. Dec. 591.

Under the construction of the mortgage contract which obtained in Kansas at that time

*Headnote by MARTIN, Ch. J.

when this mortgage was made, and still obtains, and in view of the invalidity of any contract which the parties may have attempted, or may be presumed to have made, as to the extent of the estate thereby granted, or the right of possession, or the manner of sale, or in any way limiting the right of redemption, the mortgagee obtained no contract rights which are affected or impaired by the new law.

Jones, Mortg. § 18; *Paulling v. Barron*, 32 Ala. 9; *Moore v. Martin*, 38 Cal. 439; *Thorne v. San Francisco*, 4 Cal. 127; *Heyward v. Judd*, 4 Minn. 487; *Scobey v. Gibson*, 17 Ind. 572, 79 Am. Dec. 490; *Davis v. Rupe*, 114 Ind. 588; *Robertson v. Van Cleave*, 129 Ind. 229, 15 L. R. A. 68; *Traveler's Ins. Co. v. Brouse*, 83 Ind. 62; *Malony v. Fortune*, 14 Iowa, 418; *White v. Rittenmyer*, 30 Iowa, 278; *Holland v. Dickerson*, 41 Iowa, 367; *Babeock v. Gurney*, 42 Iowa, 156; *Fonda v. Clark*, 43 Iowa, 300; *Olmstead v. Kellogg*, 47 Iowa, 460; *International Bldg. & L. Assn. v. Hardy*, 85 Tex. 610, 24 L. R. A. 284; *Iverson v. Shorter*, 9 Ala. 713; *Northwestern Mut. L. Ins. Co. v. Neeves*, 46 Wis. 147; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Farnsworth v. Vance*, 2 Coldw. 108; *People v. Livingston*, 6 Wend. 526; *McCoun v. New York C. & H. R. R. Co.* 50 N. Y. 176; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936; *Cook v. Gray*, 2 Houst. (Del.) 455, 81 Am. Dec. 185; *James v. Stull*, 9 Barb. 483; *Butler v. Palmer*, 1 Hill, 324; *Chndrick v. Moore*, 8 Watts & S. 49, 42 Am. Dec. 267; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925; *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243.

The latter cases distinguish between such laws as affect the construction and operation of the contract, and those which affect merely the remedy, and hold that the laws in reference to which the parties must be assumed to have contracted were those which in their direct or necessary legal operation controlled or affected the construction and operation and obligations of the contract, not those which affected merely the remedy.

Connecticut Mut. L. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *Curtis v. Whitney*, 80 U. S. 13 Wall. 68, 20 L. ed. 513.

Whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature in its discretion, and to any extent, provided a substantial remedy be left to the creditor, and that such changes may constitutionally be applied to existing contracts.

5 Am. & Eng. Enc. Law, p. 595; *Cusic v. Douglas*, 3 Kan. 123, 87 Am. Dec. 458.

Decisions can be found in which similar legislation postponing or otherwise changing the remedy to the prejudice of the creditor has

NOTE.—The opinion of Chief Justice Martin in the above case, with that of the former Chief Justice, Horton, in *Watkins v. Glenn*, which is adopted by Johnston, J., as a dissenting opinion in this case, presents so fully the whole subject that no annotation upon it will be here attempted. The case, we are informed, has been taken to the Supreme Court 31 L. R. A.

of the United States, but the opinions are so valuable that it seems best to publish them without waiting for a decision on the writ of error.

See also on the question, *Pinhney v. Pinhney* (Me.) 4 L. R. A. 348, and *note*; *Best v. Baumgardner* (Pa.) 1 L. R. A. 356, and *note*.

been upheld, as within the province of the legislature.

Chadwick v. Moore, 8 Watts & S. 49, 42 Am. Dec. 267; *Von Baumbach v. Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Rader v. Southeastery Road Dist.* 36 N. J. L. 273; *Gardenhire v. McCombs*, 1 Sneed, 83; *Holloway v. Sherman*, 12 Iowa, 283; *Farnsworth v. Vance*, 2 Coldw. 108; *Curtis v. Whitney*, 80 U. S. 13 Wall. 68, 20 L. ed. 513; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468.

Whether this law is politic or not, courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, unless in conflict with the Constitution.

Cooley, Const. Lim. 216.

Messrs. Ferry & Doran for defendant in error.

Martin, Ch. J., delivered the opinion of the court:

On November 1, 1885, George A. Kirkland executed a negotiable promissory note to Martha Barnitz for \$1,500, payable in five years, with interest at 8 per cent per annum, and after maturity at the rate of 12 per cent per annum, which note was secured by a mortgage on a quarter section of land in Shawnee county, Kan., appraisement being waived. The land was afterwards sold to John L. Beverly, subject to the mortgage. On January 21, 1893, an action was commenced in the district court of Shawnee county to obtain judgment upon said note and to foreclose said mortgage. On July 7, 1893, a personal judgment was rendered for \$2,113.46, bearing interest from that date at the rate of 12 per cent per annum, and \$44.95 costs, and the land was ordered to be sold for the payment of said judgment. On January 9, 1894, an order of sale was issued, and the property was sold to Martha Barnitz by the sheriff on February 12, 1894, for \$2,000. On February 19, 1894, John L. Beverly filed a motion asking that upon confirmation of the sale the court order, adjudge, and determine that said real estate is subject to redemption as provided by chapter 109 of the Laws of 1893, which took effect March 17, 1893, and that the sheriff be ordered and directed to make to the purchaser the certificate of sale mentioned in said chapter, he being in actual possession of said real estate by his tenant, the same never having been abandoned, but being occupied in good faith. This relief was refused by the court, and it was ordered that the sale be confirmed, and a deed executed by the sheriff to the purchaser for said premises; holding that said chapter 109 is unconstitutional, so far as intended to apply to mortgages previously executed and delivered. On a proceeding in error in this court, said judgment was affirmed. The companion case of *Watkins v. Glenn* was decided at the same time, and the opinions appear in 55 Kan. 417. The plaintiff in error asks a rehearing.

Does this statute impair the obligation of this prior contract? If it does so in the slightest degree, it must be held unconstitutional as to such contract. If, on the other hand, the act affects only the remedy, or some

provision of the contract which is inoperative and void under the laws of Kansas, where the contract was made, then it must be held valid; and all legal presumptions, so far as this court is concerned, favor the validity of the act. Cooley, Const. Lim. 216, 217. When Chief Justice Marshall delivered the opinion of the Supreme Court of the United States in *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529, the learning upon the inhibition, "No state shall . . . pass any . . . law impairing the obligation of contracts," was well-nigh exhausted. Little was left for other or subsequent judges of that tribunal but to apply the law as there clearly laid down. The legislature of New York had in 1811 enacted an insolvent law which not only purported to liberate the person of the debtor, but to discharge him from all liability for any debt contracted previous to his discharge, on surrendering his property in the manner prescribed by the act; and it was held that, in so far as it purported to discharge a debtor from his obligation without performance, it was invalid, but not so as to releasing the debtor from imprisonment,—then a common and very persuasive remedy. The court says (page 197, L. ed. 549): "A contract is an agreement, in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that money on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it." And again (pages 200, 201, L. ed. 549, 550): "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation." See also *Mason v. Haile*, 25 U. S. 12 Wheat. 370, 6 L. ed. 660; *Beers v. Haughton*, 34 U. S. 9 Pct. 329, 359, 9 L. ed. 145, 157; *Penniman's Case*, 103 U. S. 714, 717, 26 L. ed. 602, 604.

In *Bronson v. Kinzie*, 42 U. S. 1 How. 311, 315, 316, 11 L. ed. 143-145, the court, speaking through Chief Justice Taney in respect to an Illinois mortgage, said: "If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in rela-

tion to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." In *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365, it was held that an enactment reducing the time prescribed by the statute of limitations in force when the right of action accrued is not unconstitutional, provided a reasonable time be given for the commencement of a suit before the bar takes effect. The court says (page 633, L. ed. 366): "The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue." In *Antoni v. Greenhow*, 107 U. S. 769, 774, 775, 27 L. ed. 468, 471, although the Virginia funding act of 1871 required the state to receive certain coupons for all taxes and demands due her, and authorized the writ of mandamus to compel the proper tax collector to receive the same; yet the act of 1882, which required the coupon holder to first pay his taxes in cash, and file his coupons in the court of appeals, and, after a circuitous proceeding, receive back his cash in lieu of the coupons, was held to affect the remedy, and not to constitute an impairment of the contract. In *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, it was decided that the Illinois statute of 1879 entitling the purchaser, in case of redemption, to receive interest upon his bid at the rate of 8 per cent per annum (the previous law prescribing 10 per cent), was applicable to all decretal sales of mortgaged premises thereafter made, although the mortgage was given before the passage of that statute; that such reduction in the rate of interest did not impair the obligation of the contract between mortgagor and mortgagee, because the amendatory statute did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period or payment, or affect any remedy which the mortgagee had by existing law for the enforcement of his con-

tract, and that existing laws, with reference to which the mortgagor and mortgagee must be assumed to have contracted, are only those which in their direct or necessary legal operation controlled or affected the obligations of their contract. And in the opinion the court says (pages 64, 65, 108 U. S., and page 653, 27 L. ed.): "The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject necessarily to the law then in force defining the rights of purchasers." And again, the court says (page 66, 108 U. S., and page 653, 27 L. ed.): "That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract." In *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, it was held that a state was not forbidden by the clause of the Federal Constitution under consideration from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in the courts, the judgment creditor having no contract whatever in that respect with the judgment debtor. The court held that the state law regulating the rate of interest on judgments formed no part of the contract, and quoted approvingly (page 171, 146 U. S., and page 930, 36 L. ed.) from the opinion of Chief Justice Marshall in *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 343, 6 L. ed. 606, 650, as follows: "If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it." In *Curtis v. Whitney*, 80 U. S. 13 Wall. 68, 20 L. ed. 513, the court held that a statute which requires the holder of a tax-sale certificate made before its passage to give three months' notice, with a copy of the certificate, the name of the holder, and the time the deed will be applied for, to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate; and accordingly a tax deed was adjudged void for want of the notice. Mr. Justice Miller, in delivering the unanimous opinion of the court, said (pages 70, 71, L. ed. 514): "That a statute is not void because it is retrospective-

has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in many ways by state and national legislation. For such legislation demanded by the public good, however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force."

In each of the foregoing cases, except that cited from 43 U. S. 1 How. 311, 11 L. ed. 143, the Supreme Court of the United States held that the state statute enacted subsequently to the making of the contract affected the remedy only, and not the obligation of the promisor to perform his contract, and other cases of like character might be cited. In some cases expressions have been used in the opinions of the judges which, if taken alone, would obliterate the line of demarcation between the obligation of the contract and the remedy for its enforcement; but as was well said by Chief Justice Marshall in *Ogden v. Saunders*, 25 U. S. 12 Wheat. 383, 6 L. ed. 647: "The positive authority of a decision is coextensive only with the facts on which it is made," and opinions of judges are to be understood in the light of the issues to be decided, and as limited by them. Thus, in *Louisiana v. New Orleans*, 102 U. S. 208, 26 L. ed. 182, Mr. Justice Field, in delivering the unanimous opinion of the court, said (pages 206, 207, L. ed. 183): "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened." But it was therein held that a state law requiring the registry in the office of the controller of judgments rendered against the city of New Orleans on former contracts, before any proceeding could be had for their enforcement, was a reasonable regulation and constitutional. The bonds in judgment were issued in 1854, and prior to the act of 1870 the judgment creditor was entitled to the writ of mandamus to enforce collection. That act, however, purported to debase the courts of the state of authority to allow any summary process or mandamus against said city to compel payment, and required that judgment creditors file transcripts of their judgments in the office of the controller, after which the judgments should be paid in the order of their registration. The supreme court of Louisiana held that this act was valid, and the plaintiff's case was dismissed, and all relief denied, and this decree was affirmed by the Supreme Court of the United States. This

31 L. R. A.

decision is in line with *Curtis v. Whitney*, *supra*, where the holder of the tax deed was defeated because he did not comply with the subsequent state law requiring him to give to the occupant notice of the time when he would apply for a deed, together with a copy of the tax-sale certificate. The cases are in entire harmony, and yet it seems impossible to reconcile the proposition of the two great contemporary jurists who wrote the respective opinions; each concurring, however, in the opinion of the other. It is too much to expect perfect accuracy and clearness of doctrinal statement at all times, even from great judges. *Edwards v. Kearney*, 96 U. S. 595, 24 L. ed. 793, involved the validity of the exemption clause in the North Carolina Constitution of 1868. Under the prior statutes the exemptions to debtors in that state were quite limited, the provision of the new Constitution being much more liberal, and it was held that this was unconstitutional, as applied to prior contracts. Some expressions in the opinion of the court, delivered by Justice Swayne, might lead to the conclusion that no other or further exemptions were permissible than those existing at the date of the contract; but this would be a contradiction of the doctrines announced by the supreme court in prior and subsequent cases, and the concurring opinions of Justices Clifford and Hunt plainly show that the decision was placed upon the ground that the extension of the exemption was so large as to seriously impair the creditor's remedy for collection of his debt. Mr. Justice Clifford saying: "Beyond all doubt, a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract." In the opinion delivered by Mr. Justice Swayne, he says: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." And this clause of the opinion is made the syllabus in the report of the case. It would be difficult to justify the first clause of this sentence by any decision of the supreme court, or upon any principle of general jurisprudence. We know that the general remedies provided by our state laws do not form part of a contract, for, if so, they would necessarily be effective in any state or country where suit was brought to enforce the contract. It is a fundamental principle, not requiring in its support the citation of authorities, that the remedy is governed by the *lex fori*, and not by the *lex loci contractus*. A lawyer suing in the courts of this state upon a contract made in Louisiana, New York, or Illinois, would be thought reckless indeed if he should presume to ask remedies allowable under the laws of those states, respectively, but, not recognized here. The most that can be truthfully said is that each civilized state is under a moral obligation to afford to foreign or domestic creditors adequate remedies for the

enforcement of their rights, but these are subject to change at any time, whether as to existing or future contracts. If, by the last clause of the proposition, it is meant that any substantial impairment of the contract is forbidden, certainly there can be no objection to it; but the value of a contract may be incidentally lessened by state legislation without impairing its obligation at all, as decided in many cases by the supreme Federal tribunal. In *Seibert v. United States*, 122 U. S. 284, 30 L. ed. 1161, the syllabus in *Edwards v. Kearney*, *supra*, is quoted approvingly, but its principle was in no wise necessary to a decision of the case. By the act of March 23, 1868, the legislature of Missouri authorized the issue of bonds in payment of subscriptions to the stock of railroad companies, and therein stipulated that the county court should from time to time levy and cause to be collected, in the same manner as county taxes, a special tax, in order to pay the interest and principal of any such bond, and it was held by the supreme court that it was a material part of this statutory contract that such creditor should always have the right to a special tax, to be levied and collected in the same manner as county taxes, and that a subsequent act of the legislature which took away this right, and gave in return no equivalent means of payment, was an impairment of the contract. There are other cases of like character, and certainly a creditor who takes the bond of a municipality upon the assurance of a statute which authorizes its issue, and provides the means for its payment, has a right to rely upon such statute as implicitly as upon the stipulation of the terms of payment in a private contract; but a bondholder would have no just cause to complain if the number of the terms of court should be reduced, or the obtaining of an order of attachment rendered more difficult, or the law as to the appointment of receivers modified. Such matters do not enter into the contemplation of the parties in making a contract, so as to forbid a legislative change, nor follow the contract into other jurisdictions. The correct doctrine is concisely stated in 3 Am. & Eng. Enc. Law, p. 753, as follows: "The remedy provided by law for the enforcement of a contract is no part of its obligation, and whatever pertains merely to the remedy may be changed, modified, or abrogated by the legislature, in its discretion and to any extent, provided a substantive remedy be still left to the creditor, and such changes may constitutionally apply to existing contracts. But if the parties to a contract include in it, in express terms, the remedy to be sought upon its breach, or the means to be used for securing its performance, subsequent legislation changing the remedial process they have agreed upon is, as to them, inoperative."

This brings us to a consideration of the change of our law as to the redemption of real estate. Prior to 1893, lands could not be sold for less than two thirds of their appraised value, unless appraisement was waived in the mortgage or the bond or promissory note which it was given to secure; but in case of such waiver the order could not issue for the sale of the lands until six months after

the rendition of the judgment. Of course, the mortgagor might redeem at any time before actual sale, by paying his debt, interest, and costs. By the act of 1893 the statutes requiring appraisement were repealed, so that an order of sale may be issued at any time after the entry of judgment, and the land, after due notice, sold for whatever price it will bring. Upon confirmation, which may be had at any time after the sale when the district court is in session in the county, the creditor is entitled to the proceeds of the sale, up to the amount of his judgment, interest, and costs. Under our practice, a personal judgment is rendered in the first instance for the full amount due, and if the proceeds of the sale are insufficient to pay the whole judgment debt, interest, and costs, they are simply credited thereon, so that it is unnecessary to obtain a judgment over, as in the Federal courts of equity, and a general execution may issue for the balance due. The act of 1893 does not operate upon the rights of the mortgagee until his claim as such has been extinguished, either wholly, or to the full extent of the proceeds of the sale of the mortgaged property. The mortgagor, it is true, may redeem the land within a certain time by payment of the sale price and interest thereon, but this is a matter wholly between him and the purchaser. If the mortgagee or judgment creditor has deemed it best to become the purchaser, and thus voluntarily change his relation, it is difficult to see how he has any just cause of complaint. By the mortgage contract the real estate was pledged for the payment of the debt, subject to the equity of redemption. The state, by its proper officer, has at his instance sold the property for its payment; and after he gets the proceeds of the sale he has no further claim upon that property, although he may proceed by general execution to obtain any balance due by seizure and sale of other property. "In this state, the common-law attributes of mortgages have been by statute wholly set aside, and the ancient theories demolished. The mortgagee has a mere security, creating a lien upon the property, but vesting no title, and giving no right of possession whatever, either before or after breach. The statute confines the remedy of the mortgagee to an ordinary action and sale of the mortgaged premises." *Waterson v. Devoe*, 18 Kan. 228, 232, 233. "In this state a real-estate mortgage conveys no estate or title, in whatever form the mortgage may be drawn; it creates only a lien upon the mortgaged property; and such lien can be enforced only by a judgment or order of the district court. A holder of a real-estate mortgage cannot, even after condition broken, take possession of the mortgaged property, or of the rents or profits thereof, except by consent of all the parties, or by an action in the district court; and he cannot realize upon his mortgage, except by judgment of such court. And this is true, whatever the form of the mortgage may be. . . . Where the mortgaged property is not a sufficient security for the mortgage debt, the district court may in some cases appoint a receiver to take charge of the mortgaged property, and to receive the rents and profits

thereof, but in no case can the holder of the mortgage, without suit, and without the consent of the mortgagor or his assignee, take possession of either the real estate mortgaged, or the rents or profits thereof." *Seckler v. Delfs*, 25 Kan. 159, 165.

The act of 1893 does not purport to repeal or modify section 254 of the Code of Civil Procedure (Gen. Stat. 1889, ¶ 4349), which authorizes the appointment of a receiver in a foreclosure case "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured," or when "the condition of the mortgage has not been performed," and "the property is probably insufficient to discharge the mortgage debt." In such cases a receiver may be appointed at any time after the action is commenced, and the receivership may continue until the sale of the land by the sheriff, when the mortgagee's claim upon it is satisfied and extinguished, and, as a creditor, he has no further concern with it. The act of 1893 does not become operative until after the sale, and it matters not to the former creditor how the land is occupied during the period of redemption. Where appraisement is waived, as in this case, the mortgage creditor may now have a sale, on request, six months sooner than formerly. In certain contingencies the purchaser may obtain a deed as soon after judgment as under the old law; in others, he may be compelled to wait at most a year longer, but the redemptioner must pay interest in the meantime, which is generally accounted an equivalent for use and occupation.

It may be said, however, that the creditor is prejudicially affected by this change of the law, because purchasers may be unwilling to pay as high a price as before. But in this country land is not esteemed as in the old world. Here it is largely a subject of investment and speculation, and in many cases the purchaser would prefer a return of his money, with interest, to a deed for the land. A court could hardly say judicially that land would sell for less by reason of this change of the redemption law. Such considerations, like the lowering of the rate of interest to be paid by the redemptioner, are "too remote," as held in *Connecticut Mut. L. Ins. Co. v. Cushman*, *supra*, "to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract." A real-estate mortgage is not what it purports to be on its face anywhere. In Kansas it has been shorn of all its common-law incidents, as we have seen, and this is true in most of the other states. It may be stipulated in the mortgage that upon default of payment of principal or interest the mortgagee shall be entitled to possession of the mortgaged premises. It is vain. It may be solemnly agreed that in such case the rents and profits shall be applied towards the satisfaction of the debt and interest. It is as nothing. It may be provided that for any particular delinquency a receiver may be appointed. It is a waste of words. The mortgagor may even be driven by his necessities to bargain away in the mortgage his equity of redemption. Equity will treat it as void. For any such purpose,

31 L. R. A.

the Kansas short form of mortgage, authorized by statute (Gen. Stat. 1889, ¶ 3886), which contains not a word upon any of these subjects, is no less potent than the most tedious ironclad instrument ever devised by the wit, the cunning, and the avarice of man. All such clauses are treated by the courts as if they were not. In *Clark v. Reyburn*, 75 U. S. 8 Wall. 318, 19 L. ed. 354, a decree of strict foreclosure was entered on a Kansas mortgage in the United States circuit court. There was no act of Congress nor state statute nor rule of court forbidding this practice, nor purporting to give any time to redeem after foreclosure; yet the supreme court reversed the decree, holding that as the 80th equity rule directs that the practice of the circuit courts shall be regulated, where no rule is applicable, by that of the high court of chancery in England, so far as it can be applied consistently with the local circumstances and conveniences of the district where the court is held, and as, by the English practice, a period of at least six months was allowed for redemption, the decree, cutting off the mortgagor without time to redeem, was erroneous. Mr. Justice Swayne, delivering the opinion of the court, said (pp. 321, 323, L. ed. 356): "The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable, and alienable, like other interests in real property. . . . As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim, 'Once a mortgage always a mortgage,' but any limitation of the right to redeem, as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to be oppressive, contrary to public policy, and void. By the common law, when the condition of the mortgage was broken, the estate of the mortgagee became indefeasible. At an early period equity interposed and permitted the mortgagor, within a reasonable time, to redeem upon the payment of the amount found to be due. The debt was regarded by the chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law. . . . After the practice grew up of applying to the chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the chancellor, according to circumstances of the case. It was only in the event of final default that the foreclosure was made absolute." And again he said (pp. 323, 324, L. ed. 356, 357): "The settled English practice is for the decree to order the amount due to be ascertained, and the costs to be taxed, and that upon the payment of both within six months, the plaintiff shall reconvey to the defendant, but in default of payment within the time limited, 'that the said defendant do stand absolutely debarred and foreclosed of and from all equity of redemp-

tion of and in said mortgaged premises.' . . . We have been able to find no English case where, in the absence of fraud, a time for redemption was not allowed by the decree. The subject was examined by Chancellor Kent, with his accustomed fullness of research. He came to the conclusion that the time was in the discretion of the chancellor, and to be regulated by the circumstances of the particular case, but he nowhere intimates that such an allowance could be entirely withheld."

The equity of redemption being a creature of the courts of chancery, and impliedly reserved by the mortgagor, notwithstanding any language incorporated into the mortgage, it results that the state legislatures may deal with and regulate it upon equitable principles, and may abate the rigors of the common-law foreclosure in any reasonable way, having due regard to the obligations of the mortgage contract as interpreted by courts of equity. The Federal courts of equity first allow six months from the decree of foreclosure in which to redeem, as an incident of the remedy; and this may be extended once or oftener, "at the discretion of the chancellor, according to the circumstances of the case." In some cases—notably, in foreclosures upon railways and other extensive properties—the time is extended for years, the subject-matter of the litigation being held in the meantime by receivers appointed upon the same equitable principles as prescribed by our statute hereinbefore cited. Again, such courts refuse to confirm master's sales where the purchase price is grossly inadequate, and in cases of peculiar hardship they deny judgment over, according to the 92d equity rule, for any balance due after the application of the proceeds of the mortgaged property in satisfaction of the debt. It is one of the advantages of courts of equity that their remedies are more flexible than those afforded by the common law. In this state, however, the district courts have full equity powers, and yet foreclosures are governed by rules almost inflexible. Personal judgments are rendered for the full amount due, and the proceeds of the mortgaged property are applied only as a credit thereon, so that execution may issue at once for any balance remaining; and, so far as the reports of this court show, no sheriff's sale has ever been set aside on account of inadequacy of price alone, if, indeed, such a thing can be done. *Capital Bank v. Huntton*, 85 Kan. 578, 591, and cases cited. In the case cited above from 75 U. S. 8 Wall. 318, 19 L. ed. 354, we have seen that the equity of redemption is regarded by the Supreme Court of the Union as an estate distinct from the right vested in the mortgagee, and this estate is indefinite in its duration. In accordance with the English rule, the time given in the first instance is at least six months, and then it may be extended "once or oftener, at the discretion of the chancellor." And in granting these extensions, according to the circumstances of each case, the Federal courts of equity have not the remotest idea of "impairing the obligation of contracts." They are endeavoring only to enforce them in a manner dictated by an en-

lightened system of jurisprudence, that seeks not the financial ruin of the mortgagor, in the application of his property to the satisfaction of his debt. From causes upon which all do not agree, and that we need not discuss, the burden of a private debt has been enormously increased of late years. Farms valued five years ago both by borrower and lender at \$3,000 or \$4,000, and mortgaged for \$1,000, are now knocked down under the sheriff's hammer for less than the mortgage debt, the accumulations of a lifetime being often swept away by the shrinkage, and this through no fault of the mortgagor. Now, may not a state legislature take cognizance of such a condition of affairs, and prescribe a rule, for application in its courts, regulating the equity of redemption, and even extending it beyond the time formerly allowed? In other words, why may it not, in a time of general depression, reasonably extend the indefinite estate impliedly reserved by the mortgagor, as the Federal courts of equity do in particular cases, beyond the six months allowed by the general practice? This reserved estate belongs to the mortgagor, and because of its indefinite duration the legislature ought to have power to regulate it, within reasonable bounds, so as to protect the interests and equities of both debtor and creditor.

Great reliance has been placed by counsel for defendant in error upon the authority of *Bronson v. Kinzie*, 42 U. S. 1 How. 311, 11 L. ed. 148; and it would be conclusive against our position, if a Kansas mortgage of 1885 is to be governed by the rules applicable to the Illinois instrument, of date July 18, 1888, which was enforced in that case. There, in order to secure the payment of a certain bond of \$4,000, Kinzie conveyed to Bronson, "in fee simple, by way of mortgage, one undivided half part of certain houses and lots in the town of Chicago, with the usual proviso that the deed should be null and void if the said principal and interest were duly paid; and Kinzie, among other things, covenanted that if default should be made in the payment of the principal or interest, or any part thereof, it should be lawful for Bronson or his representatives to enter upon and sell the mortgaged premises at public auction, and, as attorney of Kinzie and wife, to convey the same to the purchaser, and, out of the moneys arising from such sale, to retain the amount that might then be due him on the aforesaid bond, with the costs and charges of sale, rendering the overplus, if any, to Kinzie. In the opinion the court says (p. 315, L. ed. 144): "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. . . ." And (p. 318, L. ed. 146): "According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso, and at law, he had a right to sue for and recover the land. . . ." And (page 319, L. ed.

146): "When this contract was made, no statute had been passed by the state changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must therefore be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time, and therefore entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed." Thus it appears that, under the laws of Illinois then existing, the mortgage contract was in law what it purported to be on its face,—it gave the legal title and the right of possession to the mortgagee on default of payment; and this no Kansas mortgage has ever done, whatever may have been its stipulations. It therefore could not be otherwise than that the laws of Illinois formed part of the very obligation of the contract, and the rights vested by its terms with the sanction of the laws of Illinois could not be devested by any subsequent law of that state. Where a remedy is agreed upon in the contract itself, with the sanction of the state law, the obligation and the remedy are indistinguishable, and in such case it is entirely proper to say that the subsisting remedy is a part of the obligation of the contract. On the other hand, it is safe to say that the general remedies afforded by the state jurisprudence and practice, entirely aside from anything contained in the contract, never constitute any part of its obligation, and may be changed from time to time; and this is the doctrine of *Bronson v. Kinzie*, as quoted in the first reference to the case in this opinion. The case of *Howard v. Bugbee*, 65 U. S. 24 How. 461, 16 L. ed. 758, although from Alabama, is in no way distinguishable from *Bronson v. Kinzie*, as will appear from the briefs and the opinion; and the authority of the earlier case was, of course, followed. In Alabama, as well as in Illinois, the real-estate mortgage was clothed with its common-law attributes. *Paulling v. Barron*, 32 Ala. 9, 11; 1 Jones, *Mortg.* § 18. *Bronson v. Kinzie* was also decided in part upon a subsequent law requiring an appraisal, and prohibiting a sale for less than two thirds of the appraised value, and there are other cases of like nature; but as appraisal laws, and those regulating the equity of redemption, depend upon different principles, it is unnecessary to occupy time now with their consideration.

It can be no objection to the statute under review that redemption comes after, and not before, the sale, for this is a feature favorable to the creditor. He may now have the sale advertised as soon as his decree of foreclosure is entered, and he is entitled to the proceeds whenever the sale is confirmed, and this may be at any time afterwards that the district court is in session. The new law speeds the sale, which is unfettered by any stay or appraisal law. Neither can it be a valid objection that the mortgagor or his assignee may redeem the property by paying its sale price with interest thereon; for the utmost relief that the courts can afford the creditor, as to the mortgaged property, is to sell it and

apply the proceeds to the payment of the debt. If any balance remains, the creditor must always look to other property; and our state laws are as favorable to the creditor in this respect as those of any other state in the Union, and, as we have seen, more favorable than the remedies administered by the Federal courts under their practice.

Section 24 of the redemption act in question has been the subject of much criticism. It relates to the appointment of a receiver, under certain circumstances, after the sale, and the application of the income up to the execution of the sheriff's deed; but no question arises under that section in this case, for the record does not show that any receiver was ever appointed or applied for under that section, nor under § 4349, Gen. Stat. 1889. It would seem that, even if said section should be held invalid, the other sections might yet stand firm.

There is a broad line between this case and *Greenwood v. Butler*, 53 Kan. 424, 23 L. R. A. 465, where the decree of foreclosure had been entered, and the rights of the parties fixed thereby, prior to the passage of said chapter 109, Acts 1893. If a state legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statutes of limitation; if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first instance in cash, to be afterwards refunded, and the coupons taken up; if it may reduce the rate of interest on redemption from decretal sales; if it may lessen the interest on former judgments; if it may require the holder of a tax-sale certificate to give three months' notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office, as a prerequisite to payment, and divest the courts of the power to grant remedies in force when the judgments were rendered; if it may reduce the terms of court, in number and duration; if it may amend the laws as to attachments, garnishments, and receivers so as to take away causes therefor which were before sufficient; if, in short, "it may regulate at pleasure the modes of proceeding" in the courts, and all this as to existing obligations,—it is difficult to frame a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages as to define and make more certain the indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure, and which indefinite estate is extended by the Federal courts of equity for six months in the first instance, and afterwards, "once or oftener," in the discretion of the chancellor, according to the circumstances of the case. Even if the statute in question should impair the remedy formerly grantable upon a foreclosure, yet it should not for this reason be held invalid, for there is no constitutional inhibition against an impairment of the general remedies for the enforcement of broken contracts; and each

and every of the special examples just cited is an instance of the impairment or abolition of a remedy allowable and in force when the obligation was incurred.

Upon the whole, it does not appear that any judgment or decision of the Supreme Court of the United States requires this court to hold said chapter 109 unconstitutional, whatever may have been remarked by judges in delivering their opinions; for it is quite impossible to harmonize all that they have said, although the judgments or decisions may not be in conflict. Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the final arbiter, the Supreme Court of the Union. This opinion is of unusual, perhaps unwarrantable, length; but the question involved is so important, and the respect of the writer for the deliberate judgment of his predecessor and the associate justice who concurred with him so profound, that it has been deemed best to state fully the reasons which lead to a different conclusion from that reached by the former majority of the court.

The motion for a rehearing will be granted, *The judgment of the District Court overruling the motion of plaintiff in error for the issue of a certificate of sale, instead of a deed, will be reversed, and the cause remanded for further proceedings in accordance with this opinion.*

Allen, J., concurring.

Johnston, J., dissenting:

This case, together with *Watkins v. Glenn*, 55 Kan. 417, was submitted upon ample briefs and oral argument at the March, 1895, session, and after a full consideration a decision was reached in April following, when it was determined by a majority of the court that the redemption law has no retroactive operation and therefore does not apply to mortgage contracts existing at and before its passage, and that, if the legislature intended the act to apply to such contracts, it would violate section 10 of article 1 of the Federal Constitution. The judgment of the court was pronounced by Chief Justice Horton, and I am still satisfied with the views then expressed. The opinion delivered by Chief Justice Horton embodies a careful review of the authorities, and such a clear and forcible exposition of the law, that I am satisfied no additional force could be added by any further comments that I might make. I refer to that opinion for the grounds of my dissent to the allowance of a rehearing and to the judgment of reversal.*

*The opinion referred to was as follows:

HORTON, Ch. J.:

On March 1, 1886, Marshall H. Glenn and Lillie O. Glenn, his wife executed and delivered their promissory note for \$1,500 to the trustees of the Home for Friendless and Destitute Children, in the city of Wilmington, and at the same time, to secure the payment of the note, they executed and delivered their mortgage deed to the home upon the following described real estate: "The south half of the northwest quarter of section twelve (12), township thirty-two (32), range seven (7) west, of the 6th p. m. in Harper county, in this state." The note and

mortgage were subsequently assigned and transferred to J. B. Watkins, the plaintiff. This action was commenced in the district court of Harper county, on the 14th of April, 1891, to foreclose and sell the mortgaged premises to pay the indebtedness secured thereby. On May 13, 1891, the defendants Glenn and wife filed the following amended answer, omitting caption: "(1) The defendants, Marshall H. Glenn and Lillie O. Glenn, for their answer to plaintiff's petition in the above entitled cause filed, deny each and every allegation therein contained. (2) These defendants, for a further answer to said petition, say and allege that the said note and bond sued upon in this action have been fully paid by these defendants long prior to the commencement of this action, and on or about the 1st day of March, 1886. (3) These defendants further aver that said note, if any there be, was given for a loan of money, and that the interest on said loan was to be at the rate of 10 per cent; and the amount in the bond was to bear the rate of 7 per cent interest, and 3 per cent of said interest is represented by the mortgage and note, held by the defendant Thomas S. Moffett, and the interest on said bond is therefore usurious and illegal. (4) These defendants further aver that said bond or note is non-negotiable, and all the facts above set forth were and always have been well known to the plaintiff herein. (5) These defendants further allege that the plaintiff, J. B. Watkins, is a member of the American Banking Association, a combination and association having for its object and purpose the controlling, regulating, and fixing the amount of money in actual circulation, and for the controlling, regulating, and fixing the rate of interest, and the rate of use and forbearance of money charged and to be charged by its members of their customers and borrowers. That said association is illegal, unlawful, and contrary to public policy. That by reason of the existence of said combination and its actions as aforesaid, in the furtherance of the object of said combination, these defendants have been injured and damaged, and their ability to pay and meet their contracts has been controlled. Wherefore these defendants demand judgment against the plaintiff for costs of suit, and for such other and further relief as equity may require."

Thomas S. Moffett, one of the defendants, filed an answer and cross-petition to recover \$337.50 of Glenn and wife, and also to foreclose a mortgage upon the premises described in plaintiff's petition, executed on the 1st of March, 1886, by them to secure a note of \$225 with interest. Glenn and wife filed an answer to this cross-petition. The mortgage executed and delivered to the home contained the following provision: "It is further agreed that in case of default in the payment of said bond, or any part thereof, or any of the sums of money to become due herein specified, according to the tenor and effect of said bond, or in the case of the breach by the said party of the first part of any of the covenants or agreements herein mentioned by said first party to be performed, then, and in that case, the bond secured hereby shall bear interest at the rate of 12 per cent per annum from date, and this conveyance shall become absolute, and the party of the second part be at once entitled to the possession of the said above-described premises, and to have and receive all the rents and profits thereof."

Trial had before the court without a jury, on the 29th of January, 1894. The court found that the allegations of the plaintiff's petition were true, and that there was due the plaintiff, as therein alleged, from the defendants Marshall H. Glenn and Lillie O. Glenn, \$1,500 as principal, and \$952.55, as interest, aggregating \$2,452.55, and that the mortgage in plaintiff's petition set forth was and is a first and prior lien on the premises described therein. The court further found that there was due to the defendant T. S. Moffett, from Glenn and wife \$438, with interest, and that the mortgage set out in his petition was a second lien upon the premises. Subsequently the court rendered personal judgments upon its findings against Glenn and wife, and for a foreclosure of the mortgaged premises, and a sale thereof to pay the judgment, interest, and costs. The judgment or decree of foreclosure provided: "It is hereby further ordered, adjudged, and decreed that the sheriff making said sale shall execute and deliver to the purchaser or purchasers of said mortgaged premises, or any part thereof, at said foreclosure sale, a good and sufficient certificate of purchase for the premises so sold, upon the confirmation of said sale, as provided by the laws of the

state of Kansas (Laws 1893, chap. 100, §§ 1, 2, 26), containing a description of the property purchased and the amount of money paid by each purchaser, together with the amount of costs up to said date, and stating that, unless redemption is made within eighteen months thereafter according to law, the purchaser, or his heirs or his assigns, will be entitled to a deed to the same; and that, upon the making and execution of such deed or deeds to such purchaser or purchasers, any of the defendants who may be in possession of said mortgaged premises, or any person or persons holding possession under, through, or by them, or either of them, since the commencement of this action, shall immediately surrender the possession of said premises to such purchaser or purchasers, upon production of such sheriff's deed. That upon production of such sheriff's deed to said mortgaged premises, if the parties in possession of the same neglect or refuse to surrender the possession of said premises to the purchaser at said sheriff's sale, a writ of assistance shall be issued by the clerk of the district court, upon the application of the purchaser at said sheriff's sale, directing the sheriff of said county to take possession of said mortgaged premises, and deliver the same to said purchaser. It is hereby further ordered, adjudged, and decreed that, from and after the execution of such deed or deeds, each and all of the defendants herein named shall be forever barred, both at law and in equity, from any right, title, lien, or interest in, to or against the mortgaged premises hereinbefore described."

Sections 1, 2, and 26 of said chapter 100 read as follows:

"Sec. 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date, stating that unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same; provided, that any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"Sec. 2. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs, and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lien holders shall be entitled to three months to redeem after the expiration of said six months."

"Sec. 26. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in section 1 of this act."

To the judgment, decree, and order of the court directing the issuance of a certificate of purchase, under chapter 100, Laws 1893, J. B. Watkins, the plaintiff below, excepted, and brings the case here for review and reversal.

The question for our determination in this case is whether chapter 100, Laws 1893, relating to the sale and redemption of real estate, was intended by the legislature to operate retrospectively, so as to apply to mortgage contracts existing at and before its passage. Involved in this is the further question whether, if the act was intended to apply to such contracts, it violates article 1, § 10, of the Constitution of the United States, which ordains that "no state shall pass any law impairing the obligation of contracts." The contention on the part of the plaintiff is that chapter 100 was not intended by the legislature to apply to mortgage contracts entered into prior to its passage, and that, if such were the intention of the legislature the act is unconstitutional as to such contracts. It is admitted upon the part of the de-

fendants below that if, under the provisions of the statute of 1893, there is any material change or impairment of the contract rights secured under the mortgage, however slight, it is unconstitutional. But the claim is that the statute acts on the remedy only; that the plaintiff has under that act a substantial remedy to enforce the provisions of his mortgage; and therefore that it is constitutional, and was intended by the legislature to apply to all contracts, whether made before or after its passage. It is conceded "that the laws which subsist at the time and place of making the contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *United States v. Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403. It has been ruled in *Seibert v. United States*, 123 U. S. 234, 30 L. ed. 1161, "that the remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and that any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void." Again in *Louisiana v. New Orleans*, 101 U. S. 203, 26 L. ed. 132, the court held: "The obligation of a contract is impaired by such legislation as lessens the efficacy of the remedy which the law in force at the time they were made provided for enforcing them. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb *Qui cito dat bis dat*—'He who gives quickly gives twice'—has its counterpart in a maxim equally sound, *Qui serius solvit, minus solvit*—'He who pays too late, pays less.' Any authorization of the postponement of payment, or of means by which such postponement may be effected, is in conflict with the constitutional inhibition."

Whether the contract sued on is modified or affected by the act of 1893, if held to apply, is a test to the constitutionality of the act. If that act lessens the value of the mortgage or its security, it cannot operate upon such a contract in existence at the time of its passage. The act provides that the mortgagor shall have eighteen months from the date of sale to redeem; that a receiver can only be appointed in case of waste; that the income during the period for redemption, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution or the owner of the legal title. Under the express condition of the mortgage sued on, in case of default in the payment of the debt secured, the mortgagee is entitled "to have and receive all the rents and profits of the mortgaged premises to apply upon his note or bond." Under the former law, a receiver could have been appointed to take possession of the mortgaged premises, collect the rents and profits thereof, and apply the same, less expenses, to the satisfaction of the debt. The act of 1893 deprives the mortgagee of this right, and therefore of a part of the security given by the very terms of his mortgage.

Again, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months, more than obtainable by him under the former law, with full right of possession, and without paying rents, profits, or taxes. Under the former law, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title, or right in any way to the premises. In the counties where the courts are almost continually in session, as Atchison, Shawnee, Sedgwick, and Wyandotte, and in other counties of the state where there are frequent sessions of the courts, a sheriff's deed generally issues in a few days after the sale. To contend that the actual possession of the mortgaged premises by the mortgagor or owner for any specific period of time, whether it be for six, twelve, or eighteen months, after a judicial sale, gives the same security to the mortgagee as the former law, which permitted the purchaser of the premises under a decretal sale to take possession as soon as the sale was confirmed and the sheriff's deed issued, is to claim that the possession of real estate is of no value whatever. As was forcibly observed by Allen, J., in *Greenwood v. Butler*, 52 Kan. 424, 23 L. R. A. 465: "It cannot be said that a sale of lands with a right of possession remaining in the judgment debtor for a year and a half thereafter is the

same thing as a sale with a right to immediate possession on confirmation of the sale. It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half. It diminishes the value of the lands to be sold by just exactly the value of the tenure, rent free, for a year and a half. The fact that the judgment would still draw interest does not affect the question as to the value of the security to be sold for its satisfaction." In our opinion, the obligation of the mortgage contract in this case is substantially impaired by the act of 1893, if that act operates upon contracts in existence at the date of its passage, as it injuriously affects the value of the mortgage security. The act, therefore, if applied to past contracts, is unconstitutional and void.

We think this conclusion is fully supported by the great weight of authority, and especially by the decisions of the Supreme Court of the United States, which are controlling in the interpretation of the provisions of the Federal Constitution. In *Pounds v. Rodgers*, 62 Kan. 359, it was ruled that "the sale of land for delinquent taxes, under the statute, constitutes a contract between the purchaser and the state, the terms of which are found in the law then in force. All matters relative to the sale and conveyance of land for taxes under any prior statute shall be fully completed according to the laws under which they originated, the same as if such laws remained in force." In *Bixby v. Bailey*, 11 Kan. 359, *Brewer*, J., speaking for the court, in referring to the redemption law of the 4th of June, 1861, observed: "It is insisted that under the law in force at the time of the decree and sale the debtor had two years to redeem, and therefore the sheriff's deed was void. The note and mortgage were executed before the redemption law, and therefore unaffected by its provisions." He cited *Bronson v. Kinzie*, 42 U. S. 1 How. 311, 11 L. ed. 143. In *Ogden v. Walters*, 12 Kan. 233, *Valentine*, J., stated: "At the time said mortgage was executed (in 1858) there was no law authorizing a redemption of land from a sheriff's sale, and the law of June 4, 1861 (Comp. Laws, 769), cannot have a retrospective operation so as to apply to said mortgage." In view of these expressions of this court delivered by such eminent and painstaking jurists as *Brewer* and *Valentine*, and considering that section 1 of chapter 109 provides for deeds to issue at once on sales of real estate not subject to redemption, and for certificates to issue on sales subject to redemption, we think the legislature did not intend that the provisions of the act of 1893 should apply to mortgage contracts existing at the date of its passage. No statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it should so operate is expressly declared. And courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. *Potter's Dwarrr. Stat. 75*; *Id.* 162, 163, note. *Sedgwick*, in his work on the Construction of Statutes and Constitutions (2d ed.), after stating that the retrospective or retroactive statutes, independently of certain exceptions, are within the scope of the legislative power, yet says that "such laws, as a general rule, are objectionable, and the judiciary will give all laws a prospective operation only, unless their language is so clear as not to be susceptible of any construction." Page 173. Again he says: "The courts refuse to give statutes a retroactive construction, unless the intention is so clear and positive as by no possibility to admit of any other construction." Page 166. If the legislature intended the act to be retrospective in its operation so as to apply to prior mortgages, the following decisions of the Supreme Court of the United States, and the reasons given therein, are conclusive that the act is unconstitutional and void as to such contracts: *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 327, 6 L. ed. 608, 610; *Green v. Biddle*, 21 U. S. 8 Wheat. 1-107, 5 L. ed. 547-573; *Bronson v. Kinzie*, 42 U. S. 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397; *Gantly v. Ewing*, 44 U. S. 3 How. 716, 11 L. ed. 798; *Ex parte City Bank*, 44 U. S. 323, 11 L. ed. 619; *Clark v. Reyburn*, 75 U. S. 8 Wall. 322, 19 L. ed. 356; *Walker v. Whitehead*, 83 U. S. 16 Wall. 314, 21 L. ed. 357; *Howard v. Bugbee*, 65 U. S. 24 How. 461, 16 L. ed. 753; *Planters' Bank v. Sharp*, 47 U. S. 6 How. 301, 12 L. ed. 447; *Gunn v. Barry*, 82 U. S. 15 Wall. 610, 21 L. ed. 212; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 637, 24 L. ed. 858, 862; *Memphis v. United*

States, 97 U. S. 233, 24 L. ed. 920; *Kring v. Missouri*, 107 U. S. 233, 27 L. ed. 510; *Buts v. Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490; *Fort of Mobile v. United States*, 116 U. S. 506, 25 L. ed. 626; *Curran v. Arkansas*, 56 U. S. 15 How. 819, 14 L. ed. 712; *Louisiana v. New Orleans*, 102 U. S. 208, 25 L. ed. 133; *Seibert v. United States*, 122 U. S. 284, 30 L. ed. 1161; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793. As sustaining the constitutionality of chapter 109 to prior contracts, we are referred to *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Morley v. Lake Shore & M. S. R. Co.* 140 U. S. 162, 36 L. ed. 925; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 30 L. ed. 825; *Curtis v. Whitney*, 60 U. S. 18 Wall. 63, 30 L. ed. 513; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468. The cases mostly commented upon are *Connecticut Mut. L. Ins. Co. v. Cushman*, and *Morley v. Lake Shore & M. S. R. Co.* *supra*. In the *Cushman* case, the action was between the purchaser of the mortgaged property, at the decretal sale, and the party entitled to redemption. The mortgagee was not a party, or interested. The court ruled that the Illinois statute for 1879, reducing the interest from 10 per cent to 8, was valid between the purchaser of mortgaged premises and the party entitled to redemption, although the mortgage was given before the passage of the statute. Mr. Justice Harlan, in delivering the opinion in that case, said among other things: "Certainly the obligation of that contract was not impaired by the act of 1879, for it did not diminish the duty of the mortgagor to pay what he agreed to pay, or shorten the period of payment, or interfere with or take away any remedy which the mortgagee had, by existing law, for the enforcement of its contract. The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute in force when the mortgage was executed, entitled it to demand." And after referring to *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793, and other prior decisions of the Supreme Court of the United States, remarked: "These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted, when the mortgage was executed, were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale. And the result of the sale in this case shows that the company, as mortgagor, has received all that it was entitled to demand."

In this case there is no showing that the mortgagee can or will receive all that he is entitled to demand under the decree complained of. If the plaintiff in this case had received the full amount of his mortgage, with interest and costs, he would not be here. In the *Morley* case, *supra*, the court ruled that a state statute, reducing the rate of interest upon judgments obtained within the courts of the state, is not, when applied to one previous to its passage, in violation of section 1 of the 14th Amendment of the Constitution of the United States. Mr. Justice Shiras, in delivering the opinion, observed: "Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until pay-

ment, or until the owner of the cause of action elects to merge it into judgment. . . . It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is in no sense a contract or agreement between the parties." These cases, and the other United States cases referred to, to sustain the decree of the trial court, are clearly distinguishable from the Federal decisions cited by us against the act of 1893, if it be given a retrospective operation.

Finally, it is suggested that, if chapter 109 is not retrospective, there will be great confusion in the courts in the mode of procedure in foreclosing and

selling mortgaged property. But the act of 1893 itself specifically provides that in some cases real estate may be sold without redemption, and in other cases be sold subject to redemption; hence the act does not command uniformity of procedure. Laws 1893, chap. 109, § 1. Further, the suggestion of confusion of procedure in the courts could be used as effectively against the decision in *Greenwood v. Butler*, *supra*, as in this case. There were many judgments rendered in this state before the passage of chapter 109, foreclosing mortgages upon real estate, where the sales did not occur until after the passage of the act. Yet this court held unanimously that the act had no retrospective operation as to judgments rendered before its passage. Therefore the argument concerning the confusion of procedure is one of degree only between judgments and mortgages existing prior to the passage of the act. We think such an argument is without substance. The judgment of the district court will be reversed, and the cause remanded, with direction to the court below to correct the decree complained of, and to order that, after sale and confirmation, a sheriff's deed shall issue according to law.

ILLINOIS SUPREME COURT.

James BEAVAN, *Appt.*,

v.

Sarah WENT *et al.*

(155 Ill. 562.)

1. The common-law rule that one citizen cannot inherit from another where

kinship must be traced through a non-resident alien cannot be rejected as repugnant or inapplicable to our institutions or the condition of things in this country, under a statutory adoption of the general principles of the common law so far as applicable.

2. The repeal of a statute which abrogated a common-law rule revives that rule.

NOTE.—Effect of state Constitutions and statutes upon the question of inheritance by or from an alien.

I. United States statutes.

II. State Constitutions and statutes and their construction.

III. Decisions under the English statutes.

Upon the question of an alien's right to inherit, see note to *Easton v. Huott*, *post*. — (1895).

Upon the question of the effect of state Constitutions and statutes upon inheritance through an alien, see note to *DeWolf v. Middleton* (R. I.) *post*, 146 (1895).

The effect of treaties upon the right of an alien to inherit will form a separate note.

As to treaty guaranties to aliens, see note to *Gandolf v. Hartman* (C. C. S. D. Cal.) 16 L. R. A. 277 (1892).

Upon the question of the disability of aliens and the escheat of property, see note to *American Mortg. Co. v. Tennille* (Ga.) 12 L. R. A. 529 (1891), and brief in *Toole v. Toole* (N. Y.) 2 L. R. A. 465 (1889).

I. United States statutes.

By the act of Congress of March 3, 1887, chap. 340 (1 Sup. U. S. Rev. Stat. vol. 1, 1874, 1891, p. 556), "An Act to Restrict the Ownership of Real Estate in the Territories to American Citizens," etc., it is enacted that it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States, or of some state or territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary 31 L. R. A.

course of justice in the collection of debts heretofore created: Provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.

II. State Constitutions and statutes and their construction.

Alabama.

An act of the legislature rendering an alien capable of inheriting as if he were a citizen is a removal only of the defect or want of inheritable blood, but cannot by construction be so enlarged as to render a deceased alien capable of transmitting to such alien an inheritance. *Congregational Church v. Morris*, 8 Ala. 182.

A state statute waiving the right to escheat, and giving an alien a right to take from a deceased alien, makes him sole heir, although there may be others of the same relationship to the decedent, who, if citizens, would take as heirs along with such one. *Ibid*.

The Constitution of Alabama of 1875, in which it is declared that foreigners who are bona fide residents shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens, forbade the legislature to make any discrimination against resident foreigners, but left the competency of the law-making power quite ample to conferring on non-resident aliens the same property rights as might be enjoyed by such resident foreigners or by individual or naturalized citizens. *Nicrosi v. Phillips*, 91 Ala. 299, 307 (1890).

It has been held that such constitutional provision was a limitation merely on the otherwise

3. A statutory provision that an estate shall descend in equal parts to next of kin does not make the descent to collateral kindred immediate, so as to avoid the effect of alienage of ancestors through whom kinship is traced.

(*Craig and Baker, JJ., dissent.*)

(January 15, 1896.)

A PPEAL by plaintiff from a decree of the Superior Court for Cook County sustaining a demurrer to a complaint filed to obtain partition of the real estate of William Went, deceased. *Affirmed.*

The facts are stated in the opinion.

boundless power of the legislature in the premises, and not the grant of power in any sense. *Ibid.*

The Alabama Code, § 1914, being § 2860 of the Code of 1876, provides that aliens, resident or nonresident, may take and hold property by purchase or descent or devise as native citizens. *Ibid.*

In *Nicrosi v. Phillipi*, *supra*, a wife died intestate without children or other descendants, possessed of real estate held to her sole and separate use, leaving her husband a natural-born citizen, and nonresident alien brother and sisters her surviving. It was held that under the above sections of the Code the brothers and sisters took the estate to the exclusion of her husband, whose marital rights had been excluded by the conveyance.

California.

It has been held that Cal. Const. art. 1, § 17, does not inhibit state legislation with respect to the right of an alien to inherit. *Re Billings' Estate*, 65 Cal. 593 (1884).

Foreigners who are bona fide residents are entitled to the same rights of property under the Constitution of the state of California as native-born citizens. *Mitchell v. Hagood*, 6 Cal. 148 (1858); *Stemsen v. Bofor*, 6 Cal. 250 (1856); *Norris v. Hoyt*, 18 Cal. 217 (1861).

The state Constitutions expressly prohibited nonresident aliens from inheriting. *Stemsen v. Bofor*, and *Norris v. Hoyt*, *supra*.

In *Farrell v. Enright*, 12 Cal. 450 (1859), the intestate, a resident of the state, left surviving him neither wife nor descendants nor parent, and only one brother, the defendant, and one sister, one of the plaintiffs. The brother was a resident of the state, but the sister and her husband, the plaintiffs in the action, were both aliens. Letters of administration were taken out, and under the probate proceedings the real estate was sold to a purchaser who conveyed to the defendant. Part of such real estate involved in the action had been in possession of the defendant ever since intestate's death. The plaintiffs, who had become residents of California, brought action to establish the sister's title to half the property as coheir with her resident brother. The court held that the sister had no claim, as she was not, at the time of the descent cast, within the terms of Cal. Const. art. 1, § 17, which provides that "foreigners who are or may hereafter become bona fide residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens," and that therefore the subsequent residence of such sister did not retract so as to confer upon her any right under such section to inherit any portion of the real estate of which her deceased brother died possessed.

In the above case the common law had been adopted in the state of California at the time of the intestate's death, and there was then no statute changing the doctrine. Cal. Const. art. 1, § 17, does not alter the position of nonresident aliens in re-

Messrs. Prentiss, Montgomery, & Hall, for appellant:

The "sisters and their descendants" are nonresident aliens, and as such are incapable of taking and holding real estate in this state because of our statute; therefore the estate descends as "intestate" estate to the heir at law or "next of kin" "capable of inheriting."

Rev. Stat. 1893, Hurd's ed. chap. 6; 4 Kent, Com. p. 541; 7 Am. L. Rev. pp. 56, 57; 1 Jarman, Wills, p. 311, and cases cited; 2 Redf. Wills, pp. 175, 176; *Mills v. Newberry*, 112 Ill. 123, 54 Am. Rep. 213; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84; *Schultze v. Schultze*, 144 Ill. 290, 19 L. R. A. 90.

spect to the inheritance of real estate, but only affects or removes the disability of bona fide resident aliens.

In *State v. Rogers*, 13 Cal. 160 (1859), the court held that if Cal. Const. art. 1, § 17, was to secure a certain protection to such resident aliens as might be in the state at the time of the descent cast, yet it was not designed to comprehend all the law in respect to the same, and further that the legislature could not abridge the privilege, but it was not disabled from extending it or adding other privileges, an alien being secured by the Constitution in that one privilege, state legislation, in so far as it did not conflict with any constitutional restriction, securing as many more privileges as it chose to give to aliens.

In the above case the constitutionality of the act of the legislature of California of April 19, 1856, relative to escheated estates, was involved. Under § 1 of such act, aliens were entitled to hold by inheritance real and personal estate as though they were native-born citizens of the state or of the United States, except that no nonresident foreigner could hold such estate within the limits of the state five years after the time when he inherited the same, and in case of his not appearing or claiming his estate within such period then the same was to be sold upon information of the attorney general and the proceeds deposited in the treasury of the state for the benefit of such nonresident alien, or his legal representatives, to be paid to them at any time within five years thereafter, upon production of satisfactory evidence that they were the legal heirs to, and entitled to inherit, such estate; and if they did not so appear and claim, and produce such evidence within the extended term of five years, the same became state property, placed to the credit of the school fund. The property was claimed by the state upon the ground that the same escheated to the state as the intestate died seized, without heirs capable of inheriting, and the defendants demurred on the ground that no cause of action had accrued to the state, for the reason that the five years had not elapsed since they inherited. The court held the act was constitutional, and that the statute denied the present right of the state to take the property, and that it was a good answer to one in possession to show such want of power in the state.

In the above case it was contended that Cal. Const. art. 1, § 17, was restrictive, as well as enabling; that its terms excluded any other rights or privileges to aliens than those given. But the court held such contention was erroneous, as the Constitution was not a grant of power or an enabling act to the legislature, but a limitation on the general powers of a legislative character, and restrained only so far as the restriction appeared, either by express terms or by necessary inference, the object of the provision being to secure a certain protection to such resident aliens as might be in the state at the time of the descent, the alien being secured by the Con-

While complainant traces his relationship with William Went through aliens, still there can be no doubt but that the statute of descents causes the estate to descend immediately from William Went, deceased, to appellant.

"The next of kin" takes immediately from the intestate, and not immediately through his alien ancestors. The statute is very plain. The language with reference to this particular question is as follows: "Such estate shall descend in equal parts to the next of kin to the intestate."

Starr & C. Rev. Stat. § 5, chap. 39.

While the right to inherit comes to him immediately through some person who was an

alien, the statute casts the estate directly upon him.

Bingham, Laws of Descent, p. 498; *Collingwood v. Pace*, 1 Vent. 413.

As between brothers, a father, although a *medium sanguinis*, is not a *medium hereditatis*.

Bingham, Laws of Descent, p. 492; *Parish v. Ward*, 28 Barb. 331.

So the descendants of one brother can inherit from the descendants of the other *ad infinitum* in case where the father of the brothers is an alien, because the descent is immediate.

McGregor v. Comstock, 3 N. Y. 408.

stitution in the one privilege, while he might be secured by the legislature in as many more as it chose to give,—provided there was no conflict with any constitutional restrictions upon its power.

The court in that case referred to the prior decision in *Farrell v. Enright*, 12 Cal. 450 (1859), relative to the construction of such section of the Constitution, and stated that the act of 1856 was not involved therein.

In *Norris v. Hoyt*, 18 Cal. 217 (1861), plaintiff relied upon a patent of the United States issued upon a confirmation of a grant from the Mexican government, and the defendants alleged that the plaintiff was a foreigner, and was not, and never had been, a bona fide resident of California; and further, that the defendants entered upon the land in question under an agreement on the part of the plaintiff to pay for improvements, provided it was established that the premises belonged to him. The court held that the alleged allenege or nonresidence of the plaintiff, if established, would have constituted no defense to the action, the alien being entitled to hold by act of the party, until office found, and therefore, until such time, could maintain an action of ejectment, but that the rule was otherwise in case of a title acquired by act of law, as by descent.

It is well settled in California that under the laws of Mexico aliens could inherit real estate. *McNeill v. Polk*, 57 Cal. 323 (1881); *Ramirez v. Kent*, 2 Cal. 560 (1852); *People v. Folsom*, 5 Cal. 373 (1855); *Merle v. Mathews*, 26 Cal. 477 (1864); *Racouillat v. Sansavain*, 32 Cal. 386 (1867).

The Civil Code of California, § 671, provides that any person, whether citizen or alien, may take, hold, or dispose of property within this state, and by § 672, if a nonresident alien take by succession, he must appear and claim the property within five years from the time of succession or be barred, the property in such case being disposed of as provided by title 8, part 3, of the Code of Civil Procedure of that state. Section 1404 enables resident aliens to take in all cases by succession, as citizens, and no person capable of succeeding under the provisions of that title are precluded from such succession by reason of the allenege of any relative, but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

The court in considering the above sections of the Code, in *Billings' Estate v. Hauver*, 65 Cal. 593 (1884), considered that the word "take," as used in § 671, was broad enough to include the taking by descent as well as by purchase, and as used to indicate the taking or acquisition of property in either of the modes above mentioned, and as not confined to the acquisition by purchase; and further, that the taking of property was not confined to an alien residing in the state, § 671 clearly extending the right to all aliens whether resident or nonresident of the state, the following section confirming such inter-

pretation of the preceding one, speaking of nonresident aliens taking by succession, which was the equivalent of descent, the sections of the Code not violating the provisions of the Constitution; and therefore nonresident alien heirs were held entitled to take equally with resident heirs.

In the above case the court followed the prior decision in *State v. Rogers*, 13 Cal. 159 (1859), decided under the Constitution of that state of 1849, which, as amended by the later Constitution, provides that foreigners of the white race eligible to become citizens of the United States under the naturalization laws thereof, while bona fide residents of that state should have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens.

In *State v. Lyons* (Cal.) 7 Pac. 763 (1885), the intestate died leaving no heirs resident within the state, and a public administrator was appointed who took possession. The petitioners, all nonresident aliens, sought to reverse a judgment obtained under Code Civ. Proc. § 1269, in favor of the state, alleging that they were the heirs at law and only heirs of the deceased, and had no notice, actual or constructive, of such proceedings, their petition being signed by the attorney in hand and at law. The court held the petitioner entitled under § 671 of the Civil Code, and that it was not necessary, in order for them to present their claim, that they should come to the state in person and claim the property, the general rule being that the parties, whether the plaintiff or defendant, resident or nonresident, might appear in court to claim their supposed rights either in person or by attorney.

In the above case the court followed and adopted the construction placed upon Cal. Const. art. 1, § 17, by the court in the cases of *State v. Rogers*, 13 Cal. 159 (1859), and *Re Billings' Estate* (Cal.) 1 Pac. 701 (1884).

It has been held, under Cal. Civ. Code, § 671, which provides that any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state, that an alien nonresident of the state might inherit property, and that such property vested in him upon the death of an intestate, and could only be devested by his failing to appear and claim within the times specified in the statute, and that an appearance by attorney was sufficient, personal appearance not being absolutely necessary. *Re Gulliford's Estate v. State*, 67 Cal. 390 (1885).

So, under Cal. Civ. Code, § 672, the court held that such section did not mean that a nonresident must necessarily appear in person, the manifest object of the provision of the Codes touching such matter being to give to nonresident aliens substantially the same rights to the property of a deceased relative as were secured to resident aliens by the Constitution, and that therefore a nonresident alien and his assignee had the same rights as a resident alien and his assignee, and further, that a nonresident appeared, whether he did so in person or by attorney

"Descent," or "hereditary succession," has been defined by Blackstone to be the title whereby a man on the death of his ancestor acquires an estate by right of representation as heir at law.

2 Cooley's Bl. Com. p. 201.

In the case of *McCarthy v. Marsh*, 5 N. Y. 263, the New York court of appeals held that under the New York statute a person might have collateral as well as lineal ancestors.

The word "ancestor" in this connection, it has been held, applies to the estate that is to descend, and the common-law rule is so changed by our statute that the statute should be held to mean that the estate of an intestate goes immediately to the next of kin or heir at law, and

that in this case William Went is the ancestor of the estate that is to descend, and not the source from whence Beavan derived his life, or in the language of the feudal law, his blood.

Bingham, *Laws of Descent*, p. 495; *McCarthy v. Marsh*, *supra*.

The common-law rule which prohibited a man from tracing his inheritable blood through his alien ancestors, is a rule of descent, and has been applied purely to feudal tenures.

Jackson v. Sanders, 2 Leigh, 118; *Furenes v. Mickelson*, 86 Iowa, 508; *Calvin's Case*, 7 Coke, 1; *Jackson, FitzSimmons, v. FitzSimmons*, 10 Wend. 21, 24 Am. Dec. 198.

Cessante ratiō legis, cessat ip̄sa lex.

or by an assignee, and that to give the word "appear" any other meaning would not be a liberal construction of the provisions of the Codes. *State v. Carrasco* (Cal.) 7 Pac. 766 (1885).

In *State v. Carrasco*, *supra*, an intestate left a widow and a minor child both nonresident aliens and the sum in hand under the administration was under proceedings commenced pursuant to Code Civ. Proc. § 1290, paid into the state treasury. Subsequently the child died leaving the mother its only heir, and she, by an instrument in writing, sold and transferred her right to the proceeds of the sale to the claimant, who sought by petition, under Code Civ. Proc. § 1272, to have the money paid over to him. Judgment in the court below was given in favor of the petitioner, but the state appealed, claiming that even if the widow of the deceased could have appeared and claimed the proceeds of his estate her assignee could not do so, and that his claim showed no cause of action. The court held that Cal. Civ. Code, § 671, changed the rule of the common law and provided that any person, whether citizen or alien, might take, hold, and dispose of property, real or personal, within the state, and that as the provisions of the Code were to be liberally construed the petitioner was entitled to such estate.

The words, "nonresident aliens," as used in §§ 671 and 672 of the California Civil Code, were interpreted as indicating those who were neither citizens of the United States nor residents of the state. *State v. Smith*, 70 Cal. 153 (1886).

The California Code of Civil Procedure, § 1272, only authorizes a nonresident alien to show that he did appear and claim the property within five years from the time of the succession, and gives him no more than the five years, and such five years have no reference to escheat proceedings commenced by the attorney general. *Ibid*.

Cal. Const. art. 9, § 4, which provides that the proceeds of the estates of deceased persons who may have died without leaving any "heir" shall constitute a part of the school fund, does not limit the power of the legislature to declare that aliens may be heirs, but speaks of the proceeds of the land evidently contemplating procedure in the nature of office found by which the right of the state may be ascertained and determined. *State v. Smith*, *supra*.

And art. 1, § 17, of the same Constitution, prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property, and there is no provision in the Constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of the state. *Ibid*.

In *Griffith v. Godey*, 113 U. S. 89, 28 L. ed. 334 (1885), the claimants were both aliens who had never taken steps toward naturalization. The court held that

under the Constitution of California as then in force, foreigners were invested with the same rights in respect to the possession and enjoyment of property as native-born citizens, provided they were bona fide residents of the state.

Colorado.

Nonresident aliens are capable of inheriting property in the state of Colorado by virtue of the statutes of that state (Gen. Laws, chap. 4, § 19, p. 90; *McConville v. Howell*, 17 Fed. Rep. 104 (1883)).

By the statute of that state above referred to, all aliens may take, by deed, will, or otherwise, lands and tenements, and any interest therein, and alienate, sell, and transmit the same to their heirs or any other persons, whether such heirs or other persons be citizens of the United States or not, and upon the decease of any alien having title to, or interest in, any lands or tenements, such lands and tenements shall pass and descend in the same manner as if such alien were a citizen of the United States, and it shall be no objection to any person having an interest in such estate that he is not a citizen of the United States, but all such persons shall have the same rights and remedies, and in all things be placed upon the same footing, as natural-born citizens of the United States, and the personal estate of an alien, dying intestate, who at the time of his death shall reside in this state, shall be distributed in the same manner as the estate of natural-born citizens, and all persons shall be entitled to their proper distributive shares of such estate under the laws of this state, whether they are aliens or not.

It was contended in *McConville v. Howell*, *supra*, that although the statute was broad enough to include the case then in question, yet it was not constitutional as within the provisions of § 27 of article 2 of the Constitution, but the court upheld the same, for the reason that the rights guaranteed by the Constitution could not be taken away, but other rights might be given to the same or to other persons, the legislature having power to go further in conferring such rights upon aliens, but no power to do less than that which was required by the Constitution.

Under Colo. acts Nov. 4, 1861, and April 18, 1880, aliens were capable of inheriting mining claims in that state. *Billings v. Aspen Min. & S. Co.* 51 Fed. Rep. 338, 10 U. S. App. 1, 2 C. C. A. 262 (1892).

Illinois.

The provisions of Ill. act 1887 were considered in *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84 (1899). By them a nonresident alien was not capable of acquiring title to, or taking or holding, any lands or real estate in that state by descent, devise, purchase, or otherwise, except that the heirs of aliens who had theretofore acquired lands in that state under the laws thereof, and the heirs of aliens who might acquire lands under the provisions of that act, might take such lands by devise or descent, and hold the same for three years and no

The legislature of this state has by direct enactment repealed this common-law rule.

Ill. Rev. Code 1829, p. 207, § 48; Rev. Laws 1845, chap. 4, § 1; 1 Starr & C. Rev. Stat. p. 264.

The act of 1887 repeals the act of 1851, and provides, among other things, "that a nonresident alien . . . shall not be capable of acquiring title to or taking or holding real estate."

3 Starr & C. Rev. Stat. p. 60.

Where a statute is *in pari materia* with a prior statute, whether the prior statute is repealed or unrepealed, to discover the true meaning of the latter, it is the duty of the court to consider the prior statute.

Church v. Crocker, 8 Mass. 21; *Eaton v.*

Green, 22 Pick. 580; *Goddard v. Boston*, 20 Pick. 410; *Bruce v. Schuyler*, 9 Ill. 230.

Only where a later act is clearly repugnant to a former one, will the former be repealed by implication. Seeming repugnance is not sufficient, but the two acts should be construed as *in pari materia* and effect be given to both if possible.

28 Am. & Eng. Enc. Law, p. 816, note 2, and cases cited; *Rhode v. Bank*, 52 Iowa, 375; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 152; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 480.

The legislature which used this term (next of kin) intended so to apply it as to describe the same persons who are described by them in the statute of Charles II.; for in our statutes

longer, if such alien at the time of so acquiring such lands was of the age of twenty-one years, and if not twenty-one years of age then for the term of five years from the time of so acquiring such lands, and if, at the end of the time therein limited, such lands had not been sold to bona fide purchasers for value, or such alien heirs had not become actual residents of the state, the same were to revert and escheat to the state the same as the lands of other aliens under the provisions of that act.

Objection was made to the Illinois act of 1887 upon the ground that it did not allow nonresident aliens, who would have been heirs of citizens under the Illinois statute of descents but for their alienage, to hold real estate which they might otherwise inherit as heirs for such a reasonable length of time as would enable them to sell the same and remove the proceeds of sale, reference being made to several treaties containing provision as follows: "Where on the death of any person holding real estate within the territories of the one party such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same and to withdraw the proceeds without molestation, exempt from all duties of distraint on the part of the government of the respective states," but the court held that the appellants being subjects of the grand duchy of Baden, with which state there was no treaty which contained such a provision, the treaties existing between the United States and Baden made in the years 1857, and 1868, having reference to the extradition of criminals and to naturalization only, containing no stipulation as to the acquisition or transfer or transmission of property, such treaties did not take the parties out of the provisions of the act. *Wunderle v. Wunderle*, *supra*.

It was also contended that the act should be liberally construed so as to extend the exception in section 1 to the alien heirs of citizens as well as to the heirs of aliens, and thereby give nonresident aliens, kindred of citizens, the right to take lands by descent or devise, and to hold as therein specified; but the court held that the legislature did not intend to declare that the nonresident alien kindred of citizens should so take and hold lands for certain periods, the design being to prevent the accumulation of landed estates in the hands of nonresident aliens, and therefore the exception could not be so construed as to embrace others than the class of persons therein specifically designated. *Ibid*.

In answer to the contention that the act of 1887 violated § 22 of article 4 of the state Constitution, which prohibited, *inter alia*, the general assembly from passing local or special laws changing the law of descent, for the reason that it was special in its 31 L. R. A.

character, as conflicting with some of the treaties made by the United States with foreign governments, which conferred upon the subjects or citizens of certain foreign countries the right to take and hold lands in this country by descent or otherwise, and that inasmuch as the act was overruled by those treaties as to nonresident aliens so protected by them, its effect was to deprive the nonresident aliens, not so protected by the treaties, of the right so to take and hold lands in that state, and to leave those who were protected by the treaties in full enjoyment of the rights, thus making a discrimination between the two classes of aliens, the act classifying aliens into those who could take by inheritance and those who could not.—the court held that if the law could be regarded as special because it did not apply to aliens protected by treaties, its special character in that particular was produced by the treaties and not by the provisions of such statute, the act being sufficiently general in its terms to embrace all nonresident aliens except those included in the exception specified in § 1; and further, that the limitation of its general application, arising from the exercise of the treaty-making power of the Federal government, did not make it special within the meaning of the state Constitution, and therefore the act was general as applied to all nonresident aliens not protected by treaties, and even if it had in express terms excepted from its operations those citizens or subjects of foreign countries to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still have been a general law as to a large number of nonresident aliens not embraced within the class so excepted. *Ibid*.

And the court further stated that this act, repealing the previous act of 1851 continued the privileges of that act to aliens who had acquired lands in Illinois under it, and conferred upon their heirs the right to take by devise or descent a defeasible estate in such lands, and therefore the embodiment of the exception in the act of 1887 did not make it a special law within the meaning of the state Constitution.

And further, that a statute ought to be upheld by the courts unless it was clear that it conflicted with the Constitution, and as it was not clear that the constitutional prohibition against special legislation was intended to refer to the operation of state laws upon different classes of foreigners, but only to their operation upon different classes among the citizens of the state, and that discrimination among different classes of nonresident aliens was intended to be forbidden by the prohibition of special legislation changing the law of descent, such an act could not be held to be a violation of the Constitution of Illinois, the right of inheritance being an incident of alienage or citizenship, and an alien could not take lands by

we have directed the personal property to be distributed to the next of kin as well as the real. It cannot be said the legislature intended that only those who could on the principles of the common law inherit real property should take the personal property and exclude all other relatives in the same degree of kindred, yet that must be the case unless the legislature meant two different descriptions of persons by the same words, of which there is not the least intimation in the statute.

Reeve, Laws of Descent, pp. 17, 18.

Our statute of descents and the statute of Charles II. respecting the distribution of personal property are almost identical.

22 & 23 Car. II. chap. 2; Reeve, Laws of

Descent, p. 83, and cases cited; *Bates v. Brown*, 73 U. S. 5 Wall. 710, 18 L. ed. 535.

In construing the meaning of the words "next of kin" as used in the statute of Charles II., the rule adopted by the court was that the quantity of blood was not to be regarded, but the proximity.

Smith v. Tracey, cited in *Crooke v. Watt*, 2 Vern. 124; Reeve, Laws of Descent, p. 70; *Rogers v. Weller*, 5 Biss. 169; *Campbell's Appeal*, 64 Conn. 290, 24 L. R. A. 667; *Heath v. White*, 5 Conn. 228; *Hillhouse v. Chester*, 3 Day, 166, 3 Am. Dec. 265; *Bush v. Bradley*, 4 Day, 298.

When feuds first begun to be hereditary it was made a necessary qualification of the heir who should succeed to a feud that he should

descent nor transmit them to others as his heirs by the common law.

And the court also stated that the act of 1887, in enacting that "a nonresident alien . . . shall not be capable of acquiring title to, or taking, or holding any land or real estate in this state by descent," was merely declaratory of the common law, by which if a man left no other relations, but aliens, his lands escheated to the state without office found. *Ibid.*

And also that the object of the exception to the statute was to save the rights of those aliens who had already "acquired lands in this state subject to the laws thereof," that was subject to the provisions of the Illinois act of 1861. *Ibid.*

And it was further stated that by the use of the words "heirs of aliens who may acquire lands under the provisions of this act," as found in the above act, reference was made to the case specified in the 8th section thereof, where a nonresident alien owning lands in that state at the time the act took effect disposed of the same during his lifetime, taking security for the purchase money, and afterwards he "or his nonresident heirs" again obtained the title on a sale made under a judgment or decree enforcing payment of any part of such purchase money, and that the claimants did not come within the terms of the exception mentioned in the 1st section of the act, for the reason that they are not the heirs of an alien, the intestate being a citizen and resident of the United States at the time of his death, but they came directly within the terms of the principal or enacting clause of section 1, for the reason that they were residents and subjects of the German empire and nonresident aliens, and were by the enacting clause of § 1, expressly and explicitly declared to be incapable of acquiring title to, or taking or holding, any lands or real estate in that state by descent, and therefore could not take by inheritance from their deceased brother, the act of 1887 being a valid law.

So, the alien heirs of citizens are not included among the "heirs of aliens" to whom the Illinois act of 1887 gives a certain time in which to sell the lands of their ancestor, or to become residents of the state. *Ibid.*

A statute as to the right of aliens to hold property which is general as applied to all nonresident aliens who are not protected by treaties, except the heirs who have already acquired lands or who may acquire them under general provisions therein specified, does not violate a constitutional prohibition against local or special laws changing descent. *Ibid.*

The nonresident alien heirs of a deceased citizen of the United States do not take such an interest in the lands of the deceased as they can hold until the state interferes with them and the interest so taken by them cannot be regarded as valid until a sale in a direct proceeding is instituted by the state. *Ibid.*

31 L. R. A.

In that case the lands of a deceased citizen of the United States were claimed by his nonresident alien heirs whose title was void under the Illinois statute of 1887, and it was held that the interest in the land descended to the next of kin competent to take under the Illinois statute, and that therefore the widow of the intestate who survived him was entitled to take the whole of the land under the statute of descent, Rev. Stat. chap. 39, § 1, cl. 8.

In *Schultze v. Schultze*, 144 Ill. 290, 19 L. R. A. 90 (1893), wherein the Illinois statute of 1887 was involved, the court distinguished the case from the preceding one of *Wunderle v. Wunderle*, *supra*, upon the ground that in the latter case there was no treaty existing between the grand duchy of Baden and the United States of which the claimants could take advantage, while in the former case a treaty existed between the United States and the Hanseatic republic of Bremen, under which the nonresident alien heirs of a deceased citizen of the United States had power to sell the land of the deceased, which they would have inherited but for their alienage, and to withdraw their proceeds within a given time from their ancestor's decease.

It seems, therefore, that if there had been a treaty in existence in the case of *Wunderle v. Wunderle*, *supra*, the nonresident alien heirs would have been entitled to the benefit of that treaty, but, in the absence of such a treaty, the state law controlled, and therefore the claim of such alien heirs to the benefit of the exceptions to the Illinois act of 1887 was barred.

So, in *Ryan v. Egan*, 156 Ill. 224 (1895), the court adopted the construction placed upon the Illinois statute of 1887, in the case of *Wunderle v. Wunderle*, *supra*, and held that nonresident aliens, nephew and niece, were not entitled to take under the will of a naturalized citizen.

Indiana.

The Indiana statute of March 9, 1861, provides "that it shall be lawful for any nonresident alien to acquire real estate in this state by descent or devise, and to hold, sell, alienate, and convey the same as if he or she were a citizen of the United States, but the time during which such alien may thus hold, sell, alienate and convey said real estate shall expire eight years after the final settlement of the decedent's estate from which such real estate was derived."

The same act provides, § 2, that if such nonresident alien, who has acquired land for such limited time, shall die before the expiration of such time, then his heirs, if bona fide residents of the United States, shall inherit and succeed as they would have done if their ancestor had been a resident of the United States.

And § 3 of the same provides that the nonresident alien heirs of any resident of this state, who shall have died before the passage of this act, may, dur-

be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seized of a feud of his own acquiring or *feudum novum*, it could not descend to any but his own offspring, no, not even to his brother, because he was not descended nor derived his blood from the first purchaser, but if it was a *feudum antiquum*, that is, one descended from his ancestor, . . . such collateral relation as was descended and derived his blood from the first purchaser, might succeed to such inheritance.

2 Bl. Com. 220.

In course of time the feudal rigor was abated, and a fictitious method was invented by which the collateral relations of the holder were al-

lowed to take by inheritance, it being deemed that he held a *feudum novum* as a *feudum antiquum*.

2 Bl. Com. 220, 224; *Campbell's Appeal*, *supra*; 24 Am. & Eng. Enc. Law, pp. 365, 366, note 7, cases cited.

In order to establish a title of such collateral relations it was necessary by the common-law rule of descent to trace their descent back to such common ancestor in each degree through "inheritable blood." If, therefore, any intermediate ancestor was an alien, he could have no heirs, therefore he could have no inheritable blood, and the estate escheated.

2 Bl. Com. 249; *Campbell's Appeal*, *supra*; 24 Am. & Eng. Enc. Law, p. 366.

By statute we have expressly repealed the

ing the period of eight years from and after the passage of this act, hold, alien, sell, and convey in fee simple any such real estate, in the same manner as they could do had their ancestors or deviseors departed this life subsequent to the passage of this act, provided the estate is not already vested in resident heirs.

In considering the provisions of the above statute the court, in State, Atty. Gen., v. Witz, 87 Ind. 190, 192 (1882), stated that nonresident alien heirs might inherit real estate, whether the ancestor died before or after the passage of the act, and that if he died after its passage such heirs would inherit and hold the estate for eight years after the final settlement of the decedent's estate, and if during such time such alien heirs died leaving heirs residing in the United States, such resident heirs would take and hold such real estate in fee simple; and further, that if such ancestor was a resident of the state and died before the passage of the act leaving nonresident alien heirs, such heirs would inherit and hold such real estate for eight years after the passage of the act, and if, during such time, such heirs conveyed such real estate the purchaser would acquire by such conveyance the title in fee to the same.

Iowa.

The Iowa ordinance of 1787 and the statutes of the territory of Iowa, including those of Michigan and Washington in force in the territory, did not alter the rule of the common law nor by those statutes could an alien resident or nonresident take lands by descent. *Stemple v. Herminghouser*, 3 G. Greene, 408 (1852).

It has been held that § 22, art. 1, of the Iowa Constitution, which provides: "Foreigners who are or who may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as natural-born citizens,"—applies only to resident foreigners, and those who might become residents, and that therefore so far as nonresident aliens were concerned, while they remained such, the common-law doctrine was unchanged; and further, that foreigners claiming by descent must be residents at the time of the descent cast. *Ibid*.

With respect to the Iowa statute regulating the descent of real estate at the time of the adoption of the Constitution (Stat. Feb. 13, 1849), which provided that the lands of any person dying intestate should descend in equal shares to his children, the court in the case of *Stemple v. Herminghouser*, *supra*, held that the statute evidently meant such children as had inheritable blood, as aliens, whether resident or nonresident, were not heirs, and therefore nothing less than a plain and express provision in relation to lands could change the rule of the common law. *Ibid*.

In *Stemple v. Herminghouser*, *supra*, an intestate died leaving a number of children residents of the 31 L. R. A.

United States, and also a number, natives of and residents in Prussia, him surviving. The children residing in the United States sought partition of the lands, and an allotment of the same among themselves, to the exclusion of the nonresident children, and the court held that such latter children were not entitled to inherit.—Greene, J., dissenting.

In *Krogan v. Kinney*, 15 Iowa, 242 (1868), the question was whether brothers of a decedent who were nonresident aliens could inherit as against a sister who was a citizen and a resident of the state. The court held that they were not so entitled; and further, that the Iowa act of March, 1858 (Rev. Stat. p. 421, § 2493) did not affect that case, inasmuch as it only provided that a nonresident alien might be capable in law of inheriting property devised by will to him, provided he would become a resident of the state subsequent to the date of such devise.

It has been held that the first section of the above act was limited to two classes of aliens; residents of the state, whether citizens or not, and residents of the United States who have made a declaration of their intention to become citizens; and that these were rendered capable of acquiring land in that state by purchase or descent. *Rhein v. Robbins*, 20 Iowa, 45 (1865).

And further, that aliens of the United States, nonresidents of the state of Iowa who have not made a declaration of their intention to become citizens, have no rights of property conferred upon them by the first section of such statute, although §§ 2 and 3 of the same give them certain qualified rights, namely the right of taking property by devise or descent, and also by purchase, provided that when they purchase they will in good faith sell and convey within ten years of the date of purchase, and that this section did not include the foreign aliens for the reason that by section 6 provision was made for such alien to take and hold property under a will made by a citizen of the state, provided such devisee subsequently became a resident of the state.

In *Rhein v. Robbins*, *supra*, where the plaintiffs, nonresident aliens, heirs of a deceased nonresident alien, and heirs at law of his son who died without issue in the state, claimed to be joint owners by inheritance, and sued in trespass, the defendant demurring upon the ground that the plaintiffs were nonresident foreigners and therefore incapable of inheriting land by descent, the court followed its prior holding in the case of *Krogan v. Kinney*, *supra*, but at the same time admitted that the statute of March 15, 1858 (Rev. Stat. §§ 2488-2493), was inexplicit and ambiguous.

And the court was further of opinion that the sections of the Revision referred to did not confer upon the nonresident foreigners the same right to property which a resident alien of the United States enjoyed, the sections in question taken as a

canon-law method of computing the degrees of relationship, and the fiction that the estate descends from a common ancestor who was the first purchaser does not exist in this state. Therefore the rule can have no application.

Starr & C. Rev. Stat. chap. 39; Campbell's Appeal, supra; 24 Am. & Eng. Enc. Law, pp. 357, 358, 364-366, 392, 409, title Succession. Mr. J. Warren Pease, for appellee Sarah Went:

The appellant in this case is prohibited from inheriting the land mentioned herein by reason of his alien ancestry.

Orr v. Hodgson, 17 U. S. 4 Wheat. 458, 4 L. ed. 618; Mooers v. White, 6 Johns. Ch. 365; 1

Washb. Real Prop. p. 74; Wms. Real Prop. p. 58.

The law never casts a freehold upon an alien who cannot keep it. Nor is a party permitted by the common law to trace his descent through his alien father or through alien relatives.

Levy v. McCartee, 31 U. S. 6 Pet. 102, 8 L. ed. 334; Jackson, Doran, v. Green, 7 Wend. 336; Jackson, FitzSimmons, v. FitzSimmons, 10 Wend. 9, 24 Am. Dec. 198; Redpath v. Rich, 3 Sandf. 79; 2 Kent, Com. p. 54; 2 Bl. Com. p. 249.

The word "descent," as ordinarily used, signifies more than a mere sudden transition from place to place, and, on the contrary, in-

whole indicating that the rights of acquiring and holding lands in that state were intended to be limited to aliens resident of the state or of the United States, and not to foreign aliens, except in the single instance of a devise by the will of a resident citizen to a foreign alien, who might become a devisee in such case, provided he subsequently removed to and became a resident of the state, thus indicating that the word "alien" as used in §§ 2 and 8 of the act referred to the resident alien of the United States and not to the foreigner; and further, that the legislature intended to confine the words "every alien" to those of the United States whether residents or not and not so as to include foreign aliens.

In *Purcell v. Smidt, 21 Iowa, 540 (1886)*, the constitutionality of the above act was involved, the particular question being whether art. 1, § 22, of the Iowa Constitution, which provided: "Foreigners who are or may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens,"—was a restriction upon the power of the legislature for extending the same privileges to other foreigners than those named in the clause, namely nonresident foreigners, or whether it simply enabled the clauses named to enjoy the rights specified, and limited the power of the legislature to exclude them. The court held that the act merely extended the rights in respect to the possession, enjoyment, and descent of property to others than those named in the Constitution, and was therefore constitutional, there being no prohibition as to the exercise of such power.

In construing the Iowa act of 1858, as embodied in §§ 2488-2493, Rev. 1860, both inclusive, in the case of *Purcell v. Smidt, supra*, the court held that § 1 of such act being § 2488 of the Revision, conferred upon resident aliens of the United States who had declared their intention to become citizens, and upon such as were residents of the state, the right to acquire title to real estate by descent or purchase, and was prospective only in its provisions. With regard to the 2d section of the act, being § 2489 of the Revision, the court held that such section conferred upon every alien wherever resident the right, after the act took effect, to acquire real estate by descent or devise but not by purchase; and with regard to § 3, being § 4490 of the Revision, that it conferred upon every alien wherever resident the right to take title by purchase from any person holding an absolute title, on the condition that he made a bona fide sale within ten years, to one capable of acquiring an absolute title, and that when such title was cast by descent from such alien purchaser, the heirs were subject to the same conditions, the section being retrospective. And with regard to § 5, being § 2492 of the Revision, the court held that it conferred upon all aliens, wherever resident, the right to acquire personal property by descent or distribution in the same manner as citizens after the time when the act took effect.

31 L. R. A.

In the construction thus placed by the court upon the above statute, the court overruled the prior decisions in which the construction of the statute had been considered, namely the cases of *Krogan v. Kinney, 15 Iowa, 242 (1863)*, and *Rhein v. Robbins, 20 Iowa, 45 (1865)*, although the Chief Justice and Justice Wright upheld the construction placed upon the statute as to the construction of the Constitution by such prior cases. *Purozell v. Smidt, 21 Iowa, 540 (1886)*.

With reference to the construction of the Constitution given by the court in *Purcell v. Smidt, supra*, and *Stemple v. Herminghouse, 3 G. Greene, 408 (1852)*, Justice Dillon, although dissenting from the reasons employed, and the construction given to the statute, concurred in the result holding that such Constitution conferred upon resident foreigners the right to transmit as well as to acquire property by descent.

In *Greenheld v. Stanforth, 21 Iowa, 586 (1886)*, the only question involved was the right or capacity of a nonresident alien to acquire real estate in that state by descent, and the court stated that so far as the right or capacity depended upon the construction of the act of 1858, the judgment of the district court must stand affirmed by reason of the different views of the members of the court as found in *Purcell v. Smidt, supra*.

In that case the action was for partition, plaintiff alleging that he and defendant were the owners of an undivided half of real estate, both acquiring their respective titles by descent as the only heirs of a naturalized citizen who died intestate, leaving no wife or children, and no blood relations in the United States, except the defendant, who was the daughter of a deceased brother. Plaintiff was a son of the sister of the deceased, and a nonresident alien at the time of the decease of the intestate, but subsequently became a resident of the United States and declared his intention to become a citizen. The defendant's demurrer, on the ground that the plaintiff was a nonresident alien at the time of the intestate's death, was sustained and affirmed on appeal. *Greenheld v. Stanforth, supra*.

In *Greenheld v. Morrison, 21 Iowa, 588 (1886)*, the question was as to the right and capacity of a nonresident alien to take a distributive share of an intestate's estate, no question arising in the determination of the case as to the construction of the act of 1858, inasmuch as so far as that act related to personal property it was only declaratory of the common law. The court held that, such being the case, aliens were capable of acquiring, holding, and transmitting movable property in like manner as citizens, and were not deprived of any of those rights by the state statutes, and that the provision of Iowa Rev. Stat. § 2422, which provided "that personal property shall be distributed to the same persons and in the same proportions as though it were real estate," did not prevent aliens from taking distributive shares of personal estate although

dictates a gradual transition through successive downward stages until the destination is reached.

Levy v. McCartee, 81 U. S. 6 Pet. 112, 8 L. ed. 338.

The widow of deceased is capable of inheriting, and there being no other person qualified under the law to succeed to the ownership of the lands in controversy, the title passes to her.

Wunderle v. Wunderle, 144 Ill. 40, 19 L. R. A. 84.

When a legacy lapses, or a devise is impossible to accomplish, then the subject-matter of the legacy or devise will go to the next of kin as estate undisposed of under the will.

Mills v. Newberry, 112 Ill. 128, 54 Am. Rep. 218.

nonresident aliens might not take real estate by descent.

In *Brown v. Pearson*, 41 Iowa, 481 (1875), the only heirs of a decedent who died in 1865, were a brother and three sisters, and the plaintiff asked that her right to an undivided one-fourth interest be confirmed. The defendants alleged that the deceased was a resident alien, and that one of the defendants was an actual resident of the state at the time of the intestate's death, and further that the other defendants were nonresident aliens at the time of the intestate's death, and that one of them so continued until the year 1874; the court entered judgment dismissing the petition, and quieted such defendant's title which, judgment was affirmed upon appeal, the court holding that under the Revision of the Iowa Statutes of 1880 a nonresident alien could not inherit.

Where an intestate died, after the Revision of the Iowa Statutes of 1880, leaving as his heirs resident and nonresident aliens, it was held that the children who were resident citizens of the state, under whom the defendant claimed, were his only heirs and inherited the whole estate to the exclusion of their nonresident alien brothers and sisters. *King v. Ware*, 53 Iowa, 97 (1880), following *Krogan v. Kinney*, *Rhelm v. Robbins*, and *Brown v. Pearson*, *supra*.

It is the settled law of Iowa that nonresident aliens cannot inherit under the statutes in force in 1881. *Ware v. Wisner*, 4 McCrary, 66, 69 (1883).

The Iowa Bill of Rights provides, § 22, art. 1, that "foreigners who are, or may hereafter become, residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens, and, under § 2442 of the Code of that state, the widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent."

In *Re Gill's Estate*, 79 Iowa, 296, 9 L. R. A. 126 (1890), it was held that the above provision meant any alien not residing in that state.

Prior to the year 1868 the law did not permit nonresident aliens to inherit lands situated in the state of Iowa. *Furenes v. Mickelson*, 86 Iowa, 506 (1892).

Article 1, § 33, of the Constitution of Iowa, which provides that foreigners who are or who may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens, applies only to foreigners who were at the time of its adoption, or who thereafter became, residents of that state. *Easton v. Huott* (Iowa) *post*, — (1895).

The words "who have heretofore acquired land in this state," contained in chapter 85 of the acts of the 22d General Assembly of the state of Iowa, refer, not to the widows and heirs, but to "aliens," and the right is given to the widows and heirs of 31 L. R. A.

In case it should be found by this court that appellant herein was entitled to take the undivided one half of the lands in controversy, then, in such case, we submit that the widow would be entitled to dower in such half.

Rev. Stat. 1893, Hurd's ed. ¶ 8, chap. 39; *Sutherland v. Sutherland*, 69 Ill. 481; *York v. York*, 38 Ill. 522; *Brown v. Pitney*, 39 Ill. 468; *Lesley v. Lesley*, 44 Ill. 527.

Messrs. Cratty Bros., Jarvis & Cleveland, and Flower, Smith, & Musgrove, for the other appellees:

Appellant has no interest in the property. If the will stands the entire estate is divided among the widow and the sisters. If the will fails the widow takes the entire estate.

Rev. Stat. chap. 39, §§ 1, 12, title *Descents*;

aliens to take title after the act took effect, when the alien from whom they claim acquired the title before the act took effect. *Ibid*.

The chapter above referred to provides, § 1, "nonresident aliens . . . are prohibited from acquiring title to, or taking or holding, any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided," and by § 2 any nonresident alien may acquire and hold real property to the extent of 820 acres, or city property to the amount of \$10,000 in value, provided that within five years from the date of purchase of such property the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative; and further, that such occupant become a naturalized citizen within ten years of the purchase of said property as aforesaid.

It has been held that the above act refers to widows and heirs of aliens without restriction as to the place of the residence of the widows, the heirs, or the aliens; and it is not material to the acquirement of title under that provision, whether the widow and heirs are aliens or nonresidents, or whether the deceased alien was a resident, and therefore if an alien, whether living in that state or in a foreign country, dies seised of lands situated in that state, his widow and heirs, wherever they may reside and whether aliens or not, may take title to the land by devise or descent. *Easton v. Huott* (Iowa), *post*, — (1895).

Kentucky.

Under Ky. Stat. 1800, which provides that any alien, other than alien enemies, who shall have actually resided within this commonwealth two years, shall, during the continuance of his residence herein, after the said period, be entitled to hold, receive, and pass any right, title, or interest to any lands or other estate known within this commonwealth, in the same manner and under the same regulations as the citizens of this state may lawfully do, it was held that an alien could inherit and take by descent provided he had actually resided in the country two years previous to the death of those through whom he claimed. *Louisville v. Gray*, 1 Litt. (Ky.) 147, 150 (1822).

In a case where the decedent died before the adoption of the Revised Statutes of Kentucky, the capacity of the alien to take by descent as well as the right of the commonwealth, in the event that there was no person to inherit, was held to depend and be governed by the pre-existing law, that is the common law which existed in that state. *White v. White*, 2 Met. (Ky.) 185 (1850).

Where the claimant did not reside in the state of Kentucky at the time of the death of the intestate, it was held that for that reason he was not entitled to the benefits of the provisions of the Kentucky act of 1800, and that the fact that he had taken the

Re Taylor's Will, 55 Ill. 252; *Lessley v. Lessley*, 44 Ill. 527; *McMurphy v. Boyles*, 49 Ill. 110; 11 Am. & Eng. Enc. Law, p. 565; Schouler, Wills, 2d ed. § 298; 1 Rapalje & L. Law Dict. 679; 2 Redf. Wills, 3d ed. 176; *Hard v. Ashley*, 117 N. Y. 606; *Floyd v. Barker*, 1 Paige, 481; *Mills v. Neuberry*, 112 Ill. 128, 54 Am. Rep. 218; *Ward v. Ward*, 184 Ill. 417.

Appellant claims by descent from William Went, deceased. He cannot inherit from said Went because he does not take immediately from Went, but mediately through several alien ancestors who interrupt the descent of the estate to him.

2 Kent, Com. 13th ed. 54, and cases cited; 1 Cooley's Bl. Com. bk. 2, *226, 249; Tiede-

necessary oath to become a citizen of the United States in another state of the Union did not render him capable of taking under such statute, nor did the fact of his subsequent naturalization affect his right to take, the property in the meantime having vested in the commonwealth. *Ibid*.

In order to entitle a person to the benefit of the Kentucky act of 1800, he must be a resident of Kentucky at the time of descent cast; otherwise he can claim no benefit under the statute. Yeaker v. Yeaker, 4 Met. (Ky.) 83 (1892).

And it has been held that the Kentucky statute of March 21, 1861 (Myers' Supp. pp. 85, 86), which provides that it shall be lawful for any nonresident alien to acquire real estate by descent or devise, and to hold, sell, alienate, and convey the same as if he or she were a citizen of the United States, but the time during which such alien may thus hold, sell, alienate, and convey said real estate shall expire eight years after final settlement of the decedent's estate,—did not repeal, nor was it in conflict with, § 1, art. 3, chap. 15, Rev. Stat., but conferred the right on nonresident aliens to inherit real estate, provided they sold and conveyed the same within the period therein mentioned; while under the Revised Statutes no alien could inherit real estate unless he had had an actual residence in the state for two years, the act of 1861 not being in conflict with the Revised Statutes, but merely cumulative. *Eustache v. Rodaquest*, 11 Bush, 42 (1874).

In that case the sister of the decedent was declared his heir, although she was a nonresident alien taking her title under the act of 1861, subject to the limitations prescribed thereby, and also subject to the widow's homestead right.

In that case it was further held that the provisions of the Kentucky act of 1861 were not affected or repealed by the later act of March, 1867, which provided that § 1, art. 3, chap. 15, of the Revised Statutes should be amended so as to read: "An alien, not being an enemy, shall, after he has declared his intention to become a citizen of the United States according to the forms required by law, be enabled to recover, inherit, hold, and possess by descent, devise, or otherwise, any real estate in real or personal property in the same manner as if he were a citizen of the state,"—the act of 1861 merely confining the inheritance to real estate, and limiting the time in which it could be alienated, the act of 1867 embracing both real and personal estate with an absolute right to hold them. *Ibid*.

Louisiana.

In *Phillips v. Rogers*, 5 Mart. (La.) 701, 745 (1818), the only question before the court was whether an alien could inherit real estate in Louisiana, and the court decided it in the affirmative, stating that the statutes of that state made no distinction in the nature of property in order to regulate the succession, and nothing showed that aliens must be ex-

cluded from the acquisition of real or personal property by will or succession and were not capable of inheriting either; all free persons, even the minor, pupil, lunatic, and idiot might transmit their estate *ab intestato*, and inherit from others, nothing appearing to exclude aliens from the inheritance of real estate.

Under article 1477 of the Louisiana Code "donations *inter vivos* and *mortis causa* might be made in favor of a stranger when the laws of his country did not prohibit similar dispositions from being made in favor of a citizen of that state," and a reciprocal right in favor of the citizens of the two countries was thereby established. *Duke Richmond v. Milne*, 17 La. 312, 36 Am. Dec. 618 (1841).

The provision contained in article 1477 of the Louisiana Code is limited exclusively to the incapacity of receiving donations *inter vivos* and *mortis causa*, and nothing in the Louisiana laws shows that foreigners are excluded from the acquisition of real or personal property by will or succession, and that they are not capable of inheriting either (La. Code, arts. 881, 882). *Ibid*.

The capacity of aliens to transmit their estates *ab intestato*, and to inherit from others in Louisiana, is shown by article 945, which declares that slaves alone are incapable of either, and therefore, as under article 948 the incapacity of heirs is not presumed; he who alleges such incapacity must prove it. *Ibid*.

Under the construction thus put upon the provisions of the Louisiana Code by the court in the above case, it was held that there was therefore nothing in the laws of that state that excluded aliens from the inheritance of any kind of property.

The case of *Duke Richmond v. Milne*, *supra*, arose out of the last will and testament of the deceased which contained a disposition of a sum of money to be employed in establishing and supporting a free school for the use of certain parishes. The legacy was claimed by the plaintiff as the future lord of the town, who alleged that by virtue of the powers conferred upon him by a meeting of the inhabitants of the town he was authorized to demand and receive the legacy. The defendants denied the capacity of the commissioner to take under the will, and submitted the question to the court whether, under the laws of Louisiana, the petitioners, being aliens, could be entitled to recover the legacy, the contention being that the plaintiff could not take under the laws of Louisiana because the laws of Scotland prohibited a similar disposition from being made in favor of citizens in Louisiana. The court held that, as the incapacity of aliens by the English and Scotch laws was only extended to their holding lands or acquiring heritage, either by purchase or succession; and as, under the laws of Scotland, an alien might acquire property in goods, money, and movable estate, and make a will, and sue for personal debts; and as, un-

Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; *Sanders' Justinian*, 27; *Domat's Civil Law*, by Strahan, § 2502; *Parish v. Ward*, 28 Barb. 381; *Jackson v. Sanders*, 2 Leigh, 118; *Bingham*, *Laws of Descent*, pp. 492, 495, 496; 11 & 12 Wm. III. chap. 6; 14 Am. & Eng. Enc. Law; p. 708; 23 Am. & Eng. Enc. Law, p. 325, note 1; 4 Kent, Com. *413; *Blacklaws v. Milne*, 82 Ill. 505, 15 Am. Rep. 339; *Orthwein v. Thomas*, 127 Ill. 554, 4 L. R. A. 434; *Bales v. Elder*, 118 Ill. 436; *Elder v. Bales*, 127 Ill. 425; *Croan v. Phelps*, 94 Ky. 213, 23 L. R. A. 753; *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 218; *Hays v. Thomas*, 1 Ill. 136; *Hillhouse v. Chester*, 3 Day, 166.

By virtue of the amendment of 1891 to the

alien statute, the devise to the sisters vested in them the entire estate, subject to the rights of the widow, except as against the state, and the conveyance by them to a citizen vests in such citizen a good title.

Rev. Stat. § 3, title *Aliens*; *Wunderle v. Wunderle*, 144 Ill. 65, 19 L. R. A. 84; 1 Cooley's Bl. Com. bk. 2, *240, 309; 2 Kent, Com. *53, 54, 61; 4 Washb. Real Prop. 565; *Fairfax v. Hunter*, 11 U. S. 7 Cranch, 603, 3 L. ed. 453; *Anderson*, Law Dict. 254, 324; *Livermore v. Bagley*, 3 Mass. 510; *Brown v. Fitz*, 13 N. H. 285; *Klein v. McNamara*, 54 Miss. 105; *Rex v. Fauntleroy*, 1 Car. & P. 421; *Rex v. Lyon*, Russ. & R. C. C. 255; *American Ins. Co. v. Avery*, 60 Ind. 566; *American Buttonhole*, O.

der those of England, he might either be a mortgagee, and recover his debt in countries where there was a positive prohibition to hold lands; and as it was shown that if the legacy in question had occurred in a Scotch instrument, it would, by the laws of Scotland, have been considered as a mere bequest of a sum of money, and not of heritable property; and that, as the courts of that country would give effect to such legacy, therefore the plaintiffs were entitled to receive such legacy.

Maryland.

In *Dawson v. Godfrey*, 8 U. S. 4 Cranch, 321, 2 L. ed. 684 (1806), it was held that a person born in England prior to the year 1775, and who always resided there, and was never in the United States, was not entitled in the year 1793 to inherit lands in Maryland from a citizen of the United States, for the reason that the common law, which was the law of Maryland, deprived an alien generally of the right of inheriting, unless he could show some exception in his case, there being none at common law, which gives the right to inherit distinctly from the obligation of allegiance existing either in fact or in supposition of law.

In *Spratt v. Spratt*, 29 U. S. 4 Pet. 393, 7 L. ed. 397 (1830), it was held that the Maryland act of 1791 authorizing the descent to alien heirs of lands held by aliens under deed or will, and that part of the District of Columbia, which was ceded to the United States by the state of Maryland, did not authorize the descent to such heirs of land in that part of the District which was purchased by an alien at a sale made under an order of the court of chancery, and for which no deed was executed by the purchaser on becoming a citizen of the United States or before his decease, the Maryland act not enabling aliens coming to the District of Columbia to transmit all real estate however acquired to their alien relations by descent, but only such lands as should be thereafter acquired by deed or will, the power being qualified.

The Maryland statute of March 3, 1837, was considered in *De Geofroy v. Riggs*, 133 U. S. 258, 80 L. ed. 642 (1890), and the court held that under it property in the District of Columbia and in the territories might be acquired by aliens by inheritance under existing laws. The act in question (24 Stat. at L. 476, chap. 340) provides, § 1, that, it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold, or own real estate, or any interest therein, in any of the territories of the United States or in the District of Columbia, except such as may be acquired by inheritance, or in good faith in the ordinary course of justice in the collection of debts previously created.

By the common law an alien is under a disability to inherit realty from a citizen, and no change is made in this respect by the Maryland act of December, 1791, as interpreted by the Supreme Court 31 L. R. A.

of the United States in *Spratt v. Spratt*, 26 U. S. 1 Pet. 343, 7 L. ed. 171 (1823), 29 U. S. 4 Pet. 393, 7 L. ed. 397 (1830); *Jost v. Jost*, 1 Mackey, 487 (1882).

Massachusetts.

In *Fox v. Southack*, 12 Mass. 143 (1815), it was held that the 9th article of the treaty with Great Britain of 1794, giving the subjects of either power the right to hold property within the dominions of the other, was not affected by a posterior war and applied to vested remainders as well as to other estates.

Michigan.

In *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430 (1870), the plaintiff sued for the recovery of certain escheated lands conveyed to him by the trustees thereof. The property was conveyed to an alien, the grant being confirmed under an act of Congress regulating grants of land in Michigan, under which all persons residing and occupying lands therein, which they or their grantors had continuously occupied and improved since a certain year, were entitled to estates in fee simple. The evidence showed that such alien married in the United States, and died leaving no children born therein, but leaving a person described as his daughter, also an alien by birth, him surviving. The daughter died leaving a husband but no children. The father had executed a deed to such daughter purporting to be acknowledged, but not witnessed, and it was claimed that, the father and daughter both being aliens, the latter could not inherit from him, in case the deed was void. The defendants claimed under the husband of such daughter, who went into possession after his wife's death and so continued until his death. The court held that, the conveyance by the father to the daughter being void because not made as required by the Michigan statute, the lands escheated to the territory and state of Michigan which had power to reconvey without inquisition of office found.

Missouri.

The Missouri Revised Statutes of 1845 provided that all aliens residing in the United States who shall have made a declaration of their intention to become citizens of the United States by taking the oath required by law, and all aliens resident in this state, shall be capable of acquiring real estate in this state by descent. In *Wacker v. Wacker*, 26 Mo. 426 (1858), it was held that the above statute did not apply to the nonresident alien.

The Missouri statutes, as they existed from the years 1835 to 1845, did not apply to nonresident aliens, but only permitted resident aliens to acquire real estate in that state by descent or purchase, but such statutes did not prevent nonresident aliens from taking as distributives the personal property. *Harney v. Donohoe*, 97 Mo. 141 (1898).

The Missouri act of February, 1855, so far changed the old law that an alien could not inherit realty as to permit the alien to take and sell within three years after the death of the ancestor, and by the

& S. Mach. Co. v. Burlack, 35 W. Va. 647; *People v. Caton*, 25 Mich. 388; *People v. Hoffman*, 97 Ill. 234; *Anderson v. Chicago, B. & Q. R. Co.* 117 Ill. 26; *Gormley v. Utte*, 116 Ill. 643; *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369; *Stamm v. Bostwick*, 122 N. Y. 48, 9 L. R. A. 597; *Potter's Dwarrr. Stat.* 139; *Domat's Civil Law*, by Strahan, §§ 2420, 2421.

Bailey, J., delivered the opinion of the court:

This was a bill in chancery, brought by James Beavan against Sarah Went, Susanna Went, Jane Holland, Elizabeth Yarnold, Frances Barnes, Charlotte Elizabeth Baylis,

Susan Baylis, and the unknown heirs of William Went, deceased, for partition. Sarah Went and several of the other defendants appeared and filed a general demurrer to the bill, which being sustained, and the complainant electing to abide by his bill, a decree was entered dismissing the bill for want of equity, at his costs, and he has now appealed to this court.

The bill alleges that the complainant is a resident of the state of Ohio and a naturalized citizen of the United States; that William Went, late of Chicago, departed this life August 10, 1892, being then seised in fee of certain lands in Cook county which the bill

act of November, 1855, the three years was limited to the time after administration had, and therefore, in a case where administration was closed in 1866, the three years would end in 1871, and a claim not made until the year 1884 would be barred by the act. *Pilla v. German School Assn.* 23 Fed. Rep. 700 (1885).

Under the Missouri laws of 1865, aliens residing in this country were entitled to the same capacity of acquiring, holding, and alienating real estate as a citizen of the United States, provided they had declared their intention of becoming citizens, and those residing in the state were entitled, whether they had made such declaration or not; and under the act of 1865, an alien nonresident in that state or in the United States, who had not declared his intention to become a citizen, and who was therefore not entitled to inherit, had a limited period within which to sell and convey real estate to one who could take and hold. *Sullivan v. Burnett*, 105 U. S. 334, 26 L. ed. 1124 (1881).

The Missouri act of March 30, 1872, provides, § 1: "All aliens shall be capable of acquiring by purchase, devise, or descent real estate in this state, and of holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States, and residents of this state." The court held that such statute was not retrospective and only applied to future acquisitions by aliens. *Ibid.*

The Missouri statutes of 1872 (Laws 1872, p. 79), removed all obstacles in the way of aliens acquiring real estate in that state, and therefore where a plaintiff claimed as heir to her deceased father who was a resident alien and died leaving children, all of whom, except the plaintiff, were residents of the state, and when the father died only resident aliens were entitled to inherit under the laws of this state, but a subsequent act removed the disability, it was held that the nonresident alien was entitled to inherit the property upon the death of the resident heirs intestate and without issue. *Utassy v. Giedinghagen* (Mo.) 83 S. W. 444 (1895).

The statute in question in the above case provides: "Aliens shall be capable of acquiring by purchase, devise, or descent real estate in that state, and of holding, devising, or alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States and residents of this state."

Nebraska.

By § 14, art. 1, Neb. Const. it is provided that no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property. *People, Dobson, v. McClay*, 2 Neb. 7 (1873).

By § 25 of the Nebraska Constitution of 1875 (art. 2, ed. 1893, Neb. Consol. Stat. p. 57) it is provided: "No distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property."

R. A.

By § 4366, Neb. Consol. Stat. ed. 1893, p. 1025, it is provided: "Nonresident aliens . . . are hereby prohibited from acquiring title to, or taking or holding, any lands or real estate in this state by descent, devise, purchase, or otherwise, only as hereinafter provided, except that . . . heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years and no longer, and if, at the end of such time herein limited, such lands so acquired have not been sold to a bona fide purchaser for value, or such alien heirs have not become residents of this state, such lands shall revert and escheat to the state of Nebraska."

Nevada.

The Statutes of Nevada, art. 1, § 16, provide that "foreigners who are, or may hereafter become, bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens."

In *State, Ling, v. Preble*, 18 Nev. 251, 253 (1894), it is stated that the rights of foreigners were not confined to those who had declared their intention to become citizens of the United States, or to those who, under the laws of the state, were entitled to become citizens by naturalization, the Constitution giving to all foreigners who were bona fide residents of the state certain rights which might be enlarged, but could not be abridged by the legislature, and further, that the rights which were guaranteed by the statutes could not be taken away, and that it was not within the power of the legislature of that state to limit the right to possess, inherit, or enjoy, such property, to aliens who might become citizens.

New Hampshire.

N. H. Act of June 20, 1827, gave alien heirs the right to take by descent. *Montgomery v. Dorton*, 7 N. H. 475 (1836).

New Jersey.

In *Mollivaine v. Coxe*, 8 U. S. 4 Cranch, 200, 2 L. ed. 506 (1806), it was held that a person born in the colony of New Jersey before the year 1775, and residing there till the year 1777, when he joined the British army, and thenceforth adhered to the British, claiming as a British subject and receiving compensation from that government, had a right to take lands by descent in the state of New Jersey; the New Jersey act by which such person was declared an offender against the form of his allegiance to the state not being sufficient to declare him an alien.

In *Yeo v. Mercereau*, 18 N. J. L. 387 (1842), an alien enemy purchased real estate in the United States prior to January, 1817, and remained in possession thereof after he became an alien friend. It was held, upon his death, that the children born in the United States might inherit by virtue of the 2d section of N. J. act of 1817, concerning aliens, for the reason that if an alien may purchase and hold lands to him and his heirs, he may transmit them by in-

seeks to have partitioned, and leaving a last will and testament as follows:

Chicago, March 16, 1892.

Know all men by these presents:

That I, William Went, being sound in mind and weak in body, do this day make this instrument. Born in Prestigne, Radnorshire, England, in the year 1828, on the 28th day of July, at present a citizen of the United States of America.

I will and bequeathe all real and personal property to my wife Sarah Lewis *nee* Went, in trust for my surviving sisters and their lawful descendants.

William Went.

That the foregoing will was duly attested

by witnesses, and was admitted to probate by the probate court of Cook county, August 15, 1892; that the testator left no issue or descendants of issue, but left him surviving Sarah Went, his widow, Susanna Went, Jane Holland, Elizabeth Yarnold, and Frances Barnes, his sisters, and Charlotte Elizabeth Baylis and Susan Baylis, the daughters of his deceased sister Charlotte Baylis, and that they and the complainant are the only next of kin and heirs at law of the testator; that the complainant is the son and only issue of William Beavan and Jane Beavan; that his father was the only issue of William Beavan and Jane Beavan, the last-named Jane Beavan being the only sister of William Went, the father of the

heritance to his children, the statute placing him on a footing with native-born citizens giving him inheritable blood; and even though his children were aliens they would take by inheritance.

Where lands escheated to the state in 1834, by reason of the alienage of the heirs of the person dying last seised, and such lands were subsequently, by special act, vested in the widow, it was held that the provisions of the New Jersey act of 1845, that such persons as would have been heirs of any person dying since 1817, in case such persons had been natural-born citizens, shall inherit the land of such person dying seised, were not sufficient to pass to such alien heirs the lands which had been so vested in the widow. *Den, Colgan, v. McKeon*, 24 N. J. L. 536 (1854).

So, the New Jersey statute of 1846, which enabled aliens to purchase lands and hold them to them and their heirs, was held not to remove the disability of alienage from persons who would otherwise have been their heirs. *Ibid.*

New York.

In *Jackson, Elmendorf, v. Jackson*, 7 Johns. 214 (1810), a native of New York, seised of lands, went to the Danish Island of St. Thomas in 1749, and there married a Danish subject by whom he had two daughters. He died in 1780. One of the daughters also died, without issue and before coming of age. The other daughter married a Danish subject and died in 1774, leaving an infant daughter who died in 1775. It was held that the two daughters were natural-born subjects of Great Britain within the Statute of 3 Geo. II., chap. 21, but that the granddaughter was an alien, and that the lands so acquired in New York did not escheat by reason of the alienism of the granddaughter, but went to the elder brother of the grandfather, the purchaser, as the next heir at law.

Where an alien died in the state of New York, intestate and without issue, during a war with his native country, leaving personal estate, it was held that his relations residing abroad, though next of kin, being aliens residing in the country of the enemy, were not entitled to distributive shares of the property, but that the whole went to his next of kin resident in that state. *Bradwell v. Weeks*, 13 Johns. 1 (1815).

But upon the hearing of the above case by the chancellor (*Bradwell v. Weeks*, 1 Johns. Ch. 206 (1814)), the court rendered a contrary opinion, which was reversed upon appeal as above shown.

In *Jackson, McCloughry, v. Skeels*, 19 Johns. 198 (1821), it was held that, by N. Y. act April 3, 1808, which vested the estate, patented to a deceased soldier, in his heirs, though aliens, in like manner as it would have descended to them if they had been citizens of that state at the time of his death (1781) according to the law of descent of that state, it was intended that the heirs should take according to the law of descent at the time of the passing of the act, and that the title of the heirs, so far as it respected

any limitation, was to be deemed to have accrued from the time of the passing of the act.

In *Goode v. Jackson, Smith*, 20 Johns. 707 (1823), it was stated that the permission by law to an alien to take and hold lands to him and his heirs, or a grant from the government by authority of law to an alien and his heirs, necessarily implied that he might transmit by descent to his children or other alien heirs, and that his heirs might take the land in question equally as if they were natural-born citizens.

In the same case it was also stated to be a general rule that when an alien was allowed specially by statute to take and hold lands to him and his heirs, he had a capacity to transmit by inheritance to his alien offspring, and they had equally a capacity to take, and further that when the legislature spoke without restriction or qualification of the heirs of an alien, they meant such heirs as he was then competent to have.

A grant of land to an alien soldier for military service during the Revolutionary war, the soldier dying during the war, was held to enable his heirs though aliens to inherit. *Jackson, People, v. Etz*, 5 Cow. 314 (1829).

Where an alien held lands under the provisions of the acts of 1802 and 1808, which authorized aliens to purchase and hold real estate, it was held, upon his dying intestate, that such lands descended to his heirs although they were aliens, the acts in question expressly conferring upon the aliens embraced in them the power of transmitting by hereditary descent to their heirs whatever real estate they might have acquired and died seised of in that state, giving to their blood an inheritable quality through which a title could be deduced, the established construction of those acts being, that the alien heirs of such purchasers were as capable of taking as though they were natural-born citizens. *Jackson, Smith, v. Adams*, 7 Wend. 267 (1831).

But where a naturalized citizen died in the year 1833, seised of real estate acquired in the year 1824, under a contract made in the year 1810, and ejectment was brought by his brother and sisters, who were aliens at the time of his death and had not complied with the requirements of the acts relating to aliens passed in 1825, the court held that they, by reason of their alienage, could not inherit the estate, even though they had been residents of the state since the year 1806; and further, that they could claim nothing under the equitable estate, as the act only recognized legal estates, the acts of 1802 and 1808 being destroyed by that of 1825, which applied as well to aliens who had come to reside in the United States before its passage as to those arriving subsequently. *Kennedy v. Wood*, 20 Wend. 230 (1833).

In *Peck v. Young*, 26 Wend. 613 (1841), action was brought to recover an undivided moiety of real estate whereof the father died seised in 1823. The father, of a foreigner by birth, became a citizen

testator, said William Went having no brothers; that William Beavan and Jane Beavan, the complainant's father and mother, William Beavan and Jane Beavan, his grandfather and grandmother, and William Went and Charlotte, his wife, the father and mother of the testator, were all deceased prior to the death of the testator. The bill admits that the complainant's father and mother, his grandfather and grandmother (the grandmother being the sister of the testator's father, and through whom he traces his relationship to the testator), were all nonresident aliens.

The bill further alleges that the four sisters and the two nieces of the testator, above mentioned, were, at the time of the testator's

death, and still are, nonresident aliens, they all being citizens and residents of the kingdom of Great Britain, and were and are, under the laws of this state, incapable of acquiring title or taking or holding lands or real estate in this state, by devise, purchase, or otherwise. Also, that Sarah Went, the testator's widow, on the 18th day of August, 1892, filed her renunciation of her rights under the will, and on the 11th day of January, 1893, filed her election to take her share in the estate of her deceased husband, as provided by law.

The bill claims that, by reason of the premises, Sarah Went and the complainant became each seised of an undivided one-half interest

the United States at the time of the Declaration of Independence. He left the plaintiff, his married daughter, a nonresident alien who came to the states in 1834, and claimed the property from the defendant, a tenant of the grandchildren of the deceased, the children of a deceased son of the intestate's second marriage. The court held that she was entitled to it by descent, and that her alienage could not be set up as a bar to the action; but whether the plaintiff took by descent from a citizen of the United States, or whether such descent was conferred upon her by the 2d clause of the 4th section of the act of Congress of 1802, was a question which was not decided by the court.

The court in the above case based its opinion upon the fact that, the father being domiciled in the United States, for that reason the daughter became a citizen by the disruption of the ties of allegiance of herself and her father to the Crown of Great Britain; and that if she had come here when she became of age and capable of acting for herself, even after the treaty of peace of 1783, there was no doubt that she could not transfer her allegiance by marrying a British subject and going to reside abroad; and that if she was an American citizen and legally domiciled here with her father, although actually left by him abroad for nurture, the fact that she married in that country after her rights as an American citizen had become complete at the close of the war would not deprive her of the capacity to take lands by descent here although from the time of her marriage there her domicile was that of her husband and continued such until she changed it again after his death.

The legislature may remove the disability of an alien heir and authorize him to take as by descent, but the state cannot by special act authorize an alien or nearer kin to take to the exclusion of a citizen of kin more remote, as it would be divesting an heir who had acquired a title under the general law of inheritance; but where there are no heirs who can be affected, and the property is in or must go to the people, the legislature has the power to authorize the party to take as by descent, or in any other manner. *Englishbee v. Helmuth*, 7 N. Y. Legal Obs. 186, 189 (1849).

In *Meakings v. Cromwell*, 5 N. Y. 136 (1851), a testator gave his wife a life estate in his real property, and directed that upon her death it should be converted into personal estate and divided among the parties named in his will, who were aliens, and as such incapable of taking by descent. The court held that they were entitled to the proceeds as personal estate, even though aliens.

The New York Revised Statutes (1 Rev. Stat. 720, §§ 15-19) empower resident aliens who have filed a declaration of intention to become citizens, to hold land by descent and also by devise, and also entitle the heirs of such parties, inhabiting the United States, to take by descent in case of their

death within six years. *Wright v. Saddler*, 20 N. Y. 320 (1850).

In *Heeney v. Brooklyn Benev. Soc.* 33 Barb. 360 (1861), the facts showed that a naturalized citizen purchased real estate in 1806, and died seised in 1843, and the plaintiffs' evidence proved that they were to be taken as his heirs, if they were qualified to inherit. One of the plaintiffs declared his intention to become a naturalized citizen, in 1840, and was naturalized in 1843, shortly after the deceased's death. The other plaintiff was naturalized in 1851, but at the time of the descent cast both plaintiffs were aliens. The question was, whether the New York statute of 1843 (Laws 1843, chap. 87, p. 62), had a retroactive effect so as to vest the title in them by descent. The court held that their subsequent naturalization did not entitle them to inherit, and that their disability to take as aliens by descent was not removed by the statute of 1843.

Nonresident aliens, the heirs of a resident alien, were entitled, under the New York statute of 1843, chap. 115, to take real estate by descent, provided that such as were of full age declared their intention to become citizens of the state as required by the act before the consummation of proceedings instituted by the state for the purposes of escheat. *Goodrich v. Russell*, 42 N. Y. 177 (1870).

Where a resident alien, who had filed no declaration of intention to become a citizen, died in the year 1844, seised of real estate which was subject to a mortgage, leaving two sons and a daughter of full age nonresident aliens, and also collateral kindred residents and citizens of the United States, and his three children executed a conveyance to a purchaser, who subsequently acquired, an act of the legislature releasing the state's title to him, and later it was sought to foreclose the mortgage as against the children of the deceased and such purchaser, without making the collateral kindred defendants; and the plaintiff became the purchaser at the foreclosure sale, and later contracted to sell the same to defendant, who refused the title,—the court held plaintiff's title good, as the estate descended to the children of the deceased whose title was defeasible by the state if of full age, unless they complied with the provisions of the New York statute and filed the declaration of intention to become citizens, the special act so acquired by the purchaser giving him a valid title. *Ibid*.

In *McCarty v. Deming*, 4 Lans. 440 (1871), it was held that aliens as referred to in the New York act of November 25, 1827, who failed to obtain naturalization for six years after the passage of the statutes, were excluded from its benefits, and upon their obtaining naturalization after the expiration of such period their property was subject to the provisions of the Revised Statutes regulating the descent of real property.

In *McCarty v. Terry*, 7 Lans. 236 (1872), the deceased, a native of Ireland, died in 1860, leaving no widow

in the premises in question, as tenants in common, and seeks to have them partitioned accordingly.

The first, and we think the only, question presented by the appeal is, whether any interest in the real estate of William Went, the testator, has descended to and become vested in the complainant. No cross bill having been filed by either the widow or sisters of Went, no question arises as to their rights as among themselves, unless a consideration of their rights becomes necessary to a determination of those of the complainant. Even then, if it be admitted, as the complainant contends, that the beneficiaries under the will, being nonresident aliens, were

incapable of taking any interest in real estate by devise, and that the will therefore is void, thus rendering the estate of Went intestate,—questions about which we now desire to express no opinion,—does it follow that any interest in the estate descended to the complainant?

It is, to say the least, doubtful whether, under our statute of descents, the complainant, so long as the deceased left a widow, became entitled to inherit any portion of his estate as next of kin. The complainant was a second cousin of the deceased, being a son of his first cousin. The only provision of the statute which, in express terms, provides for the descent of real estate to the next of

or child surviving him, all his relatives being aliens, except the plaintiff, his sister, and a nephew, the plaintiff being naturalized by reason of her marriage with a citizen of the United States. One of the defendants was in possession under a deed from the nephew, and the other defendants claimed interest as trustees under the will of the deceased, the trusts of which were declared void by the court. There being no proof of the citizenship of the nephew, the evidence not showing that he ever resided in the state in which it was claimed he was born or in any part of the United States, the court held that, under the act which gave the decedent the power and authority to hold property in the state, his estate descended upon his death to his alien heirs equally with those who were citizens, but the act did not apply to a case where the ancestor subsequently became a naturalized citizen, as in that case, he held, not under the act, but under the same laws as other citizens, and therefore alien heirs could not inherit from him unless he complied with the provisions of the Revised Statutes.

Where a naturalized citizen devised real estate to his wife, also a naturalized citizen, and died in the year 1868, the wife dying twelve months afterward, without will and without having disposed of the premises, leaving relations who were aliens with the exception of two, namely a brother and sister, and the sister leased the premises to the brother, and subsequently, in the year 1870, an act of the legislature was passed releasing the interest of the state in the lands to the sister, who was naturalized in the year 1866, it was held that the title of the sister so acquired under the act of the legislature was valid. *Ettenheimer v. Heffernan*, 66 Barb. 374, 377 (1873).

By chapter 38 of the New York Laws of 1875 it is provided: "If any alien resident of this state or any naturalized or native citizen of the United States who has purchased and taken, or who hereafter shall purchase and take, a conveyance of real estate within this state, has died or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, . . . such persons so answering the description of heirs . . . of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs . . . of such deceased person, as if they were citizens of the United States, the land and real estate owned and held by such deceased alien or citizen at the time of his death."

In *Dusenberry v. Dawson*, 9 Hun, 511 (1877), the only question in dispute related to the validity of a devise of real estate by an alien resident of the state, plaintiff insisting that the devise was valid under N. Y. Stat. 1845, chap. 115, § 5, the defendant contending that the devise was void for the reason that the testator had never filed the declaration of intention to become a citizen as required 31 L. R. A.

by § 6 of said act. The court held that the express language of the 5th section of the above act made the devise valid under the construction put upon the act in the prior case of *Goodrich v. Russell*, 42 N. Y. 177 (1870), that §§ 4 and 5 of the act omitted the requirement of filing the deposition by the testator's grantor or intestate in order that the devisee, grantee, or quasi heir might hold, there being no reason to suppose that the legislature intended to make it necessary.

In *Bradley v. Dwight*, 62 How. Pr. 300 (1881), it was stated that the title of a citizen of the state of New York, in actual possession of the lands, shall not be questioned or impeached by reason of the alienage of any person from or through whom such title may have been derived. Laws 1868, chap. 513; Laws 1872, chap. 141; Laws 1877, chap. 111.

And in *Harrison v. Harrison*, 3 N. Y. L. Bull. 65 (1881), it was held that nonresident aliens took under the New York act of 1855 as if they were citizens, with full power of disposition and transmission, and that upon their dying intestate the estate passed to their heirs at law capable of taking by descent or devise; that was to say, to such of their heirs as were citizens, but not to such as were nonresident aliens, the act making no provision for the latter, nor specially for the former, the former taking as an incident to the power of disposition and transmission conferred upon the original nonresident aliens.

In *Wieland v. Renner*, 65 How. Pr. 245 (1883), a naturalized citizen of the United States died in 1874, leaving seven brothers and sisters or their children, his only next of kin, all nonresident aliens, except the defendant and the plaintiff and his sister, and a nephew of the deceased who was a resident alien. The defendant was a daughter of a deceased sister, and the wife of a citizen residing in the states. She was the only person who could directly inherit from her uncle, and took possession claiming as sole owner. Plaintiff's mother, in 1875, sold her right to the property, by virtue of a treaty between the United States and Wurtemberg, to her son, the plaintiff, who claimed that he and the children of his deceased sister were entitled to share the property. The court held that the words "resident alien," in the New York statute of 1845, did not include or designate a "naturalized citizen," the act enabling resident aliens to take and hold real estate, including only those answering the description of heirs of a deceased alien, whether they were citizens or aliens; and that the act of 1874, which amended that of 1845 by inserting after the words "resident alien" the words "or any naturalized or native citizen," did not apply to the case, for the reason that the rights of the parties had become vested and fixed before the act was passed.

Under the laws of New York the disability of an alien to take as heir was removed, the Laws of 1845, chap. 115, § 4, as amended by the Laws of 1874, chap.

kin, other than children and their descendants, brothers and sisters and surviving parents, and their descendants, and the widow and surviving husband, is the 5th clause of § 1, chap. 89, of the Revised Statutes, and that provides merely that the estate shall descend in equal parts to the next of kin, "if there is no child of the intestate or descendant of such child, and no parent, brother or sister, or descendant of such parent, brother or sister, and no widow or surviving husband." And it is difficult to see how the complainant can inherit under this clause so long as the intestate left a widow surviving him.

Looking at the entire section, it will be

seen that the first clause provides that intestate estates shall descend to the children of the intestate and their descendants. By the second clause it is provided that, where there is no child of the intestate or descendant of such child, and no widow or surviving husband, it shall descend in equal parts to the parents, brothers, and sisters of the intestate and their descendants. The third clause provides that, where there is a widow or surviving husband, and no child or children or descendants of a child or children, one half of the real estate and all the personal estate, after the payment of debts, shall descend to the widow or surviving husband, the other half to descend as in other cases

261, and by the Laws of 1875, chap. 88, recognizing the rights of alien kin of a decedent who was at the time of his death a resident alien or a citizen of the United States, to take as his heirs the lands which would have descended to them in that capacity had they been citizens of the United States, the title of an alien male heir of full age being made defeasible by the state, upon his failing to file an affirmation respecting his intending citizenship as provided for in the act. *Kilfooy v. Powers*, 3 Dem. 198 (1884).

It has been held that the proviso contained in the New York statute and amendments thereto against males of full age, that they shall not hold the real estate as against the state unless they are citizens, or make and file a deposition as required by law, does not render them incapable to take the title, which in no case escheats to the state without the finding of an inquisition where there are heirs competent to take, all being so competent; but the adult male heirs cannot hold against the state unless they become citizens, or file the necessary deposition, the male heirs of full age taking a title defeasible by the state, unless, before the consummation of the proceedings instituted to declare the forfeiture, they become citizens, or file the necessary deposition, but if they do either their right and title become absolute and indefeasible. *Maynard v. Maynard*, 36 Hun, 227 (1885).

In *Maynard v. Maynard*, *supra*, the facts showed that the property was conveyed to the husband and wife in 1852, and that they were aliens but had filed the necessary declarations to enable them to hold real estate, although they were never naturalized. They both died in the year 1881, in possession, intestate and without children, and the father and mother of the husband, who survived his wife, died before him and his only heirs at law were two brothers and two sisters, and his nephews and a niece, children of a deceased brother, all defendants in the action and nonresident aliens. One of the defendants took possession after the husband's death, under a claim of ownership, although not related to either the husband or the wife, and the state, by act of the legislature (Laws 1883, chap. 249), released to him all the state's rights in the property, but the act declared that nothing therein contained should impair any right of the heir at law, devisee, grantee, or creditor. At the death of the husband one of his nephews was an infant. The court held that under the New York act of 1845, as amended by the acts of 1874 and 1875, the alien heirs of the husband, who were females or minors at the time of his decease, took an absolute indefeasible estate in the property, and that the title of the defendant which had been confirmed by the act of the legislature was not valid as against such alien heirs.

In *Nolan v. Command*, 11 N. Y. Civ. Proc. Rep. 295 (1886), it was held that a resident alien could take real estate by inheritance, and hold against everybody but the state, who might divest him by proceedings for that purpose, unless he filed the

necessary declaration of intention to become a citizen, and until such proceedings were instituted, might maintain action for partition, but even the fact that he had not declared his intention to become a citizen would not deprive him of his right of action, the only difference being that in such a case the state ought to be made a party defendant, and that the fact that during such proceedings the party declared his intention to become a citizen did not obviate the necessity of making the state a party.

The New York Laws of 1845, chap. 115, § 4, as amended by the act of 1874, chap. 261, and by that of 1875, chap. 88, recognize the right of alien kin of a person deceased, who was at the time of his death a resident alien or a citizen of the United States, to take, as his heirs, the lands which would have descended to them in that capacity had they been citizens of the United States. *Re Beck's Estate*, 31 N. Y. S. R. 965 (1880).

In *Wainwright v. Low*, 57 Hun, 386 (1890) Affirmed in 132 N. Y. 313 (1892), action was brought to recover possession of real estate. The facts showed that the owner of real estate, an alien by birth, upon her marriage with an American citizen executed an antenuptial deed of trust, in trust for herself for life, and at her death to such persons as she should by deed or will appoint. She died intestate without having conveyed the property except by such trust deed, leaving the plaintiff, her sister, who was never a citizen of the United States her only heir at law. The trustee under the deed subsequently conveying the property to the husband of deceased of which act plaintiff alleged that she had no notice, the defendant tracing his title from the husband as purchaser in good faith. The court held that under the New York statute of 1874 the sister was entitled as sole heir, and that such act was retroactive in its effect, and preserved the rights of persons who by its passage, had acquired interests and rights to lands which they were unable to enjoy by reason of the disability of alienage.

The New York statutes declare that "if any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, or of devisees under his last will, and being of his blood, such persons so answering the description of heirs or of such devisees of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs, or as such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease; but if any of the persons so answering the description of heirs, or

where there is no child or children or descendants of a child or children. The fourth clause relates solely to personal estate, and the fifth clause, as we have already seen, provides that, "if there is no child of the intestate or descendant of such child, and no parent, brother or sister or descendant of such parent, brother or sister, and no widow or surviving husband, then such estate shall descend in equal parts to the next of kin of the intestate in equal degree (computing by the rules of the civil law), and there shall be no representation among collaterals, except with the descendants of brothers and sisters of the intestate." The sixth clause provides that, "if any intestate leaves a

widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband;" and the seventh clause provides that, if the intestate leaves no kindred and no widow or husband, his or her estate shall escheat to the county.

But it is claimed that the right of the complainant to inherit in this case may be made out from the third clause, which provides that the half of the estate not given by that clause to the widow or surviving husband shall descend as in other cases, where there is no child or children or descendants of a child or children. But the only clause which directs the course of descent where there is no child or children or descendants of a child

of such devisees as aforesaid, of such deceased person, are males of full age, they shall not hold the real estate hereby made descendible or devisable to them, as against the state, unless they are citizens of the United States, and in case they are aliens, unless they make and file in the office of the secretary of state the adoption or affirmation mentioned in the 1st section of the act. *Daly v. Beer*, 32 N. Y. S. R. 1064 (1890).

In *Daly v. Beer*, *supra*, the facts showed that the intestate died seized of real estate which he took by devise from his father; that he left no father or mother, brother or sister, or descendant of any brother or sister, no paternal uncle or aunt, or descendant of any such uncle or aunt, but left two maternal aunts two of the defendants in the action, and two cousins, one the plaintiff and the other one of the defendants, both the children of a deceased maternal aunt, all of them nonresident aliens prior to the death of the intestate; that the plaintiff became a resident and declared his intention to become a citizen of the United States in 1889; that two of the defendants were aliens, and one a citizen by virtue of her marriage, the latter claiming as sole heir of the intestate, she having been in possession since the death of the intestate. The court held that under § 4 of chapter 115 of the New York Statutes of 1845, as amended by chapter 261 of the Laws of 1874, and chapter 36 of the Laws of 1875, alien heirs at law had power to take an absolute title to land, and that the parties took as tenants in common.

The above provisions of the New York statute were considered in the case of *Stamm v. Bostwick*, 122 N. Y. 48, 9 L. R. A. 597, Affirming 40 Hun, 25 (1890), wherein the question was whether a resident alien who, according to the statutes of that state, would answer the description of heir of a deceased citizen, could inherit and hold real estate owned and held by such deceased citizen at the time of his death. The land in question in this action was devised by a native-born citizen to a niece for her natural life, with remainder in fee to her lawful issue, such niece being a native-born citizen, and, at the time of the testatrix's death, the wife of the plaintiff, who, an alien by birth, filed his declaration to become a citizen after he came into possession of such estate, and was subsequently naturalized. The other party to the suit was a brother of the wife of the plaintiff, a natural-born citizen of full age, who was entitled as heir at law unless the plaintiff had the capacity to inherit and hold real estate under the provisions of the above acts. The defendants contended that the statutes had no application to the case inasmuch as the wife of the plaintiff was not a purchaser taking by deed but one who acquired land as devisee under a will. The court answered such contention by stating that in that case the intention of the legislature was best effectuated by giving to the word its most extensive signification, and that there certainly was

no public policy which dictated such a reading of the statute, and that there was no apparent reason why the legislature, intending as it did that aliens should inherit and hold real estate within the state, should have made the inheritance depend upon a purchase by deed by the ancestor, when the intention of the legislature was clearly expressed that resident aliens might grant and devise all lands that they were made capable of holding by the act in question, and as it was equally the intention that if they failed to dispose of it by deed or will it should, by § 4 of the act, pass to those who were made capable of taking and holding it.

In the above case the court further held that the land in question was acquired by the plaintiff's wife as purchaser, and that therefore the plaintiff had the capacity to inherit as her heir, and that as against every person, except the state, he could hold the land without making the disposition required by the 1st section of the New York act of 1874, the question whether or not his title was good as against the state being a question with which the defendant in that action was not concerned.

By the New York Session Laws of 1893, vol. 1, chap. 207, p. 385, § 1, any person who would otherwise answer to the description of heir or devisee of a person, who at the time of his death was a citizen of the United States, shall be entitled to inherit or take from said citizen, and hold, enjoy, convey, transmit, and devise any interest in real property situated in this state in the same manner and to the same extent and with the same effect as if he was himself a citizen of the United States, notwithstanding the fact that he is a nonresident alien; and the fact that any person otherwise qualified to take, hold, enjoy, convey, transmit, and devise any interest in real property situated in this state is a nonresident alien shall not prevent his taking, holding, enjoying, conveying, transmitting, and devising such interest, providing his title, or that of some person under whom he claims, shall be derived, by descent or devise, from some person who was at the time of his death a citizen of the United States.

North Carolina.

In *Rutherford v. Wolfe*, 3 Hawks, 272 (1824), it was held that the North Carolina act of 1801, under which the nearest descendant or relation, not an alien, was entitled to inherit where there were nearer relations who were aliens, was not repealed by the act of 1806, which provided for a general system of descents, the latter act only providing for such a system so far as the question of consanguinity was concerned.

By § 40 of the Constitution of North Carolina every foreigner who came to settle in that state, having first taken the oath of allegiance to the state, might purchase, or by any other just means acquire, hold, and transfer, land or other real estate, and after one year's residence was deemed a free citizen; and in the case of *Rouche v. Williamson*, 3

or children, is the second, and it is there provided that in such case the estate shall descend to the parents, brothers and sisters and their descendants, and no mention whatever is made of collaterals. The only clause which appears to give any right of inheritance to collaterals, as we have already said, is the fifth, and it is there given to them only where there is no survivor of any of the classes there named, a widow and surviving husband being of the number. And there being here a surviving widow, it is difficult to see how, under that or either of the other clauses of the section, the complainant is entitled to inherit.

But without expressing any decided opin-

ion upon this question, we prefer to place our decision upon another ground, and that is, that the complainant must trace his kinship to the deceased through several nonresident aliens, who, if themselves living, could not have succeeded to the estate as next of kin.

If the well-known rules of the common law applicable to this question are in force in this state, it is very clear that the complainant did not inherit from the intestate. The common-law rule is, and always has been, that a citizen cannot take by representation from an alien, because the alien has no inheritable blood through which the title can be deduced. 2 Kent, Com. 54.

Ired. L. 141 (1842), the act was held to be then in force although the latter part, which declares when such a person shall become a citizen, was repealed by the Constitution of the United States.

Under the North Carolina statute (Rev. Code, chap. 38, rule 9 of the chapter on *Descents*), the naturalized children of a sister, who was an alien and unnaturalized and alive, were held to take their mother's share in real estate. *Campbell v. Campbell*, 5 Jones, Eq. 246 (1859).

In *Kane v. McCarthy*, 68 N. C. 290 (1869), it was held that the phrase contained in the act of Congress of the 10th of February, 1865, relating to naturalization, "any woman who might lawfully be naturalized under the existing laws," meant only any woman who was a free white person, and not an alien enemy, and that therefore where the descent was cast, in the year 1863, upon a woman who, several years prior thereto, married in a foreign country a naturalized citizen of the United States, she was entitled to inherit, although she had always resided in a foreign country and continued so to do until after the descent was cast.

And in the same case it was also held that the expression, "married or who shall be married to a citizen of the United States," cast the descent upon a woman who was born an alien in the year 1851, and married an alien who, subsequent to such marriage, declared his intention and became a naturalized citizen.

Ohio.

* Under the Ohio laws of February, 1824, the estate of an intestate, who died leaving a widow a resident, and brothers and sisters, nonresident, aliens, his only heirs, it was held that the estate passed to the widow if his only next of kin or heirs of his blood were aliens, unless they appeared and presented their claim within fifteen years from the passing of the act, and if none made such appearance or claim within the prescribed time, they could not subsequently set up a claim to the land. *Kay v. Watson*, 17 Ohio, 27 (1848).

Pennsylvania.

In *Jackson v. Burns*, 3 Binn. 75 (1810), it was stated that the *ante nati* of America might continue to inherit in Great Britain, for the reason that America once owed allegiance to the Crown of Great Britain, but that the same rule did not extend to the *ante nati* of Great Britain, because they never owed allegiance to the American government.

In *Jackson v. Burns*, *supra*, deceased died in Pennsylvania in 1784, intestate, and without issue, and the question was whether plaintiff, his eldest brother, born in Ireland before the Revolution and never in the United States, was capable of inheriting. The court held that he was not, as by the Declaration of Independence all political connections between Great Britain and the United States were dissolved, and therefore the claimant owed

no allegiance to the United States and was in all respects an alien.

Rhode Island.

Chapter 709 of the Rhode Island statute (Rev. Stat. chap. 160), which provides that in case of the death of an alien his estate shall be transmitted to his heirs, does not affect the case of an alien dying prior to the passing of that act. *Haigh v. Haigh*, 9 R. I. 26 (1868).

South Carolina.

In *Megrath v. Robertson*, 1 Desauss. Eq. 445, 449 (1796), it was held that the alien mother of a citizen was entitled, under the laws of South Carolina, to the personal estate of her daughter who died intestate without husband, child or father, and also by virtue of the treaty between the United States and Great Britain of November 19, 1794, to the real estate of which such daughter died seised.

In *Love v. Hadden*, 8 Brev. 1 (1811), lands descended to the brother of the grantee as heir at law, such brother being in South Carolina at the time of the war and looked upon as an American citizen, but who went to foreign parts and was not heard of afterwards, the presumption being that he was dead at the time of action brought, in which case the plaintiff was next of kin, to whom the lands would descend as an inheritance provided he was capable of inheriting, the contention being that he was an alien and therefore incapable, the evidence showing that such plaintiff was the only son of a sister of the brother and was born in Ireland prior to the Revolution, and was not a citizen of the state at the date of the death of the intestate; and a nonsuit was ordered on the ground that he had not shown title by descent, the court affirming the decision.

In *Clifton v. Haig*, 4 Desauss. Eq. 330 (1812), it was held that a British subject, even though born before the Declaration of Independence, was an alien and not entitled to hold lands in South Carolina.

It has been held that the special act of the legislature of South Carolina of 1803, together with the general act of 1807, had for its object the removal of the disabilities imposed on aliens by the common law to take and transmit real property, and if the latter act was taken with, and regarded as a continuance of, the former, although one was a special and the other a general law, a system perfect in its symmetry, and reasonable in its operation was established, and it was unreasonable to believe that the legislature intended by the act of 1807 to make provision for a whole class to the exclusion of the few provided for in the act of 1803. *Richards v. McDaniel*, 2 Mill, Const. 18 (1818).

The South Carolina act of 1799 (5 S. C. Stat. 355) provides that "all free white persons, alien enemies, fugitives from justice, and persons banished from either of the United States excepted, who are now, or hereafter shall become, residents in this state,

An alien is not regarded as having sufficient inheritable blood to transmit the inheritance to collateral heirs, who are citizens. *Tiedeman, Real Prop.* § 675. In England this rule was changed by the statute of 11 & 12 Wm. III., which provided, in substance, that a natural-born subject might inherit, notwithstanding the fact that his father and mother, or other ancestor through whom he derived his pedigree, were born out of the King's allegiance.

The case of *Lacy v. M'Cartee*, 31 U. S. 6 Pet. 102, 8 L. ed. 334, furnishes a very elaborate and learned discussion of the whole question. In that case both the intestate and the claimants were citizens of the United

States, the former being a resident of the state of New York and the latter of the state of South Carolina. The claimants were grandchildren of the maternal uncle of the intestate, the uncle being an alien. The state of New York had adopted both the common and statute law of Great Britain, but had afterwards passed a statute declaring that none of the statutes of Great Britain should be considered as laws in that state. The Supreme Court of the United States, after reaching the conclusion that the statute of Wm. III. had thus been repealed so as to restore the common-law rule prior to the death of the intestate, held that a claimant who must make his pedigree through mediate alien ancestors

shall, on making and subscribing the oath or affirmation of allegiance, . . . be deemed denizens so as to enable such persons to purchase and hold real property within this state, and in all other respects to entitle such persons to the like protection from the laws of this state as citizens are entitled unto," withholding from them the right to vote for public offices, or of being eligible to such offices, the object of the act being to remove the disability of aliens who were willing to take the oath of allegiance and were desirous of settling in the state, and to place them upon the footing that the latter's patent *ex donatione regis*, put an alien in England, the legal effect of the act being to waive the state's right to escheat the lands during the lifetime of the alien, but not to remove the common-law disability barring him from inheriting. *McClenaghan v. McClenaghan*, 1 Strobb. Eq. 295, 321, 47 Am. Dec. 532 (1847).

With regard to the words "purchase and hold real estate," as used in the above statute, the court stated that such words had, at the time of the passing of the act, a well-defined meaning which it could not be presumed the legislature ever misapprehended or misapplied, and that if the object had been to remove all disabilities of alienage and to confer all the rights of citizenship, except those that were political, it was more than probable that it would have been explicitly expressed; and further, that the denizen claimed the right in derogation of the common law under terms that qualified and restricted the privilege merely "to purchase and hold real estate," and that it would be a violation of the rules of construction to infer that the act intended to confer upon him the right to inherit by descent, as such was an entirely different mode of acquiring title, the granting of one privilege to an alien not destroying all the other privileges of a citizen upon him. *Ibid.*

Tennessee.

In *Polk v. Ralston*, 2 Humph. 537 (1841), it was held that Tenn. act 1809, chap. 53, by the expression of the term "alien" as used therein, meant foreigners by residence as well as birth, and that therefore an alien resident in that state but not naturalized had power to take and inherit personal but not real estate.

The Tennessee Code provides, §§ 2804, 2807: "An alien resident may take and hold property, real and personal, in this state either by purchase, descent, or devise, and dispose of and transmit the same by sale, descent, or devise as a native citizen, and in all cases where aliens, resident or nonresident, have heretofore acquired title to property, real or personal, in this state in a lawful manner, said aliens, their assigns, heirs, devisees, or representatives, shall hold and dispose of the same in the same manner as native citizens," the above provision being substantially the act of 1875. The Code also provides that the heir or heirs of an alien, whether resident or nonresident of the

United States, may take any land so held by descent or otherwise as citizens of the United States. *Emmentt v. Emmett*, 14 Lea, 260, 371 (1884).

Texas.

After the adoption of the Constitution of the republic of Texas, heirs who were citizens did not exclude those who were aliens in the inheritance. *Cryer v. Andrews*, 11 Tex. 170 (1853).

The Constitution and laws of the republic of Texas in relation to the alien heirs of a deceased citizen provide, in effect, that if any citizen shall die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession and dispose of the same in the manner thereafter to be pointed out by law, and under the statute of 1841, article 585 of Hart's Digest, every alien to whom land may be devised or may descend shall have nine years in which to become a citizen of the republic, and take possession of such land, or shall have nine years to sell the same before it shall be declared to be forfeited or shall escheat to the government. Under the construction placed upon such constitutional provision and statute, it was held that the acts of others could not affect the rights of alien heirs, whether favorably or unfavorably, and that notwithstanding a disability of coverture, infancy, or any other disability, he must assert his rights within the time specified. *Ibid.*

In *Warnell v. Finch*, 15 Tex. 163 (1855), it was held that the above provisions of the Constitution of the republic of Texas were prospective merely, and had no operation in favor of aliens, heirs of persons who had previously died.

The Constitution of Texas of 1836, which provided for the transmission of estates of citizens to their children or heirs being citizens, and that Congress should legislate to give to aliens a reasonable time to take possession and dispose of their inheritance, did not provide that an alien could transmit land in Texas by descent to an alien heir, and the subsequent statute of that state provided that the heir must sell or become naturalized within a given time. *McKinney v. Saviego*, 59 U. S. 13 How. 235, 15 L. ed. 365 (1855).

And in the case of *Hornsby v. Bacon*, 20 Tex. 556 (1857), the above provisions of the Constitution of the republic of Texas were held not to cover alien heirs of persons who died prior to the organization of the republic.

Where the plaintiffs derived their title by descent from their ancestor, and such title related back to the time of descent cast, at which time, by the laws then in force, aliens could not inherit, the plaintiffs failed in their action to recover real estate to which they claimed heirship. *Blythe v. Easterling*, 20 Tex. 535 (1857).

In *Middleton v. McGrew*, 64 U. S. 23 How. 45, 16 L. ed. 403 (1859), it was held that by the laws of Mexico alien heirs could not inherit, and that such law was applicable to real estate in Texas.

could not in that state inherit collaterally from a citizen.

After discussing the English authorities, and especially the leading case of *Collingwood v. Pace*, reported in 1 Vent. 413, 1 Keb. 671, and in various other reports, the court reached the conclusion that, if the pedigree must be traced through a mediate alien ancestor, the party cannot take by descent, for the inheritable blood is stopped, and there is a flat bar to the assertion of any title derived through the alien. The only exception to this rule, as settled in *Collingwood v. Pace*, is that brothers who are citizens may inherit from each other, although their father is an alien, but this is upon the theory that

brothers inherit from each other immediately and not mediately, and therefore that they are not obliged to derive their pedigree through their alien father. To the same effect, see *Jackson, Doran, v. Green*, 7 Wend. 333; *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 24 Am. Dec. 198; *Redpath v. Rich*, 3 Sandf. 79.

The question then arises whether the rule of the common law on this subject must be deemed to be in force in this state. There can be no doubt that the statute by which the common law was adopted in this state is comprehensive enough to include it. By that statute the common law of England, so far as the same is applicable and of a general

In that case action was instituted to recover land in two colonies in Texas, then in the possession of the defendant and claimed by the plaintiffs through a conveyance by the brothers of a deceased colonist who died in 1835 intestate and without issue. The brothers were citizens of the United States, and assumed to be the heirs at law of the decedent, the question being whether the brothers were capable of taking by inheritance within the limits of Mexico, or were disabled by their condition as aliens; the question being founded upon the jurisprudence of Mexico, which was applied to cases arising within the state of Texas.

The effect of the general provisions of the Constitution of Texas, § 10, and the statute of 1840, Hart's Digest, art. 586, was to enable aliens to acquire the title to real estate by descent equally with citizens. *Barclay v. Cameron*, 25 Tex. 233 (1890).

In the above case the lands were held to descend to the alien sisters of the intestate under the provisions of the above laws of the state to the exclusion of the deceased's uncle.

The rule of the common law excluding aliens from the inheritance was changed by the Constitution of the republic of Texas, so as to enable aliens to take by descent from a citizen a defeasible title. *Ibid.*

In *Clay v. Clay*, 26 Tex. 24 (1861), it was held that by the laws of the republic of Mexico an unnaturalized alien could not acquire title to real estate. To the same effect, *Lacoste v. Odam*, 28 Tex. 459 (1863).

The rule of the common law disabling aliens from casting descent on an alien, does not, according to the 14th section of the Texas acts of January, 1840, and of March, 1848, regulating descents, appear to have been in force in Texas. *Settegast v. Schrimpf*, 36 Tex. 323 (1872).

In the above case the intestate declared his intention to become a citizen, but died before the full period of his naturalization had elapsed, and the court stated that the intestate could not be considered an alien at the time of his death, as he was permitted, under the laws of the state, to exercise most of the rights of citizenship.

By the laws of Mexico, in force in Texas from March, 1836, to January, 1840, aliens were prohibited from holding lands except the title was taken directly from the government. *Hammekin v. Clayton*, 2 Woods, C. C. 338 (1874).

In *Hammekin v. Clayton*, *supra*, it was stated that the rule of the common law was the same as the civil law of Mexico and Texas.

So, in *Andrews v. Spear*, 48 Tex. 567 (1878), the court stated with respect to the common-law doctrine being in force in the state of Texas, that there was no decision under the 14th section of the act of 1740, re-enacted in the 9th section of the act of 1848, regulating descents, which showed that it had been actually enforced, and the claims

of the heirs denied because the ancestor was an alien.

The Texas act of February 13, 1854, which defined the civil rights of aliens, provides, § 1: "Any alien being a free white person shall have and enjoy, in the state of Texas, such rights as are or shall be accorded to American citizens by the laws of the nation to which such alien shall belong, or by treaties of such nations with the United States;" and § 2 enables aliens to take and hold real and personal property by devise or descent from any alien or citizen in the same manner in which citizens of the United States take and hold the same by devise or descent within the country of such alien; and by § 3 any alien, a free white person, becoming a resident of the state and declaring his intention to become a citizen, in conformity with the naturalization laws of the United States, has the right to acquire and hold real estate in that state in the same manner as if he were a citizen of the United States. *Hanrick v. Hanrick*, 54 Tex. 113 (1890).

In *Hanrick v. Hanrick*, 54 Tex. 101 (1890), 61 Tex. 506 (1894), a native of Ireland, and a naturalized citizen of the United States, died in 1865, seised of real estate, intestate, unmarried, and without issue. One of the defendants, a nephew of the intestate, was a native-born subject of the United States, whose father, a brother of the intestate, died in Alabama in 1852, and such nephew claimed as sole heir to his uncle. The intestate also left two brothers and a sister, a widow, all British subjects residing abroad, him surviving. One of such brothers died in 1871, intestate, unmarried, and without issue, never having been in the United States, the other brother died a nonresident alien in 1875, intestate, leaving children and grandchildren, plaintiffs in the suit, and the sister of the intestate, a nonresident alien, still survived. One of the plaintiffs came to the United States in 1852, and was a resident of New York. After due consideration of the Constitution and laws of the state of Texas, the court held that the real estate vested as follows, one fourth in the defendant nephew the native-born citizen, by an indefeasible title; one fourth in the intestate's brother who died in 1875, by defeasible title, which was rendered indefeasible by operation of law upon the passage of the English naturalization act of 1870; one fourth in the brother who died in 1871, in like manner; and one fourth in the sister in like manner. With respect to the one-fourth share of the brother who died in 1871, the court held that it went as follows: One third to his brother, who died in 1875; one third to the sister, and the remaining third to the nephew; and further, that upon the death of the brother in 1875 his real estate vested in the same manner as if he had been a citizen, in his children and their descendants.

With all due deference to the court in the above case, the writer submits that a different conclusion

nature, and all statutes or acts of the British Parliament made in aid of, or to supply, the defects of the common law prior to the fourth year of James I. (with the exception of certain statutes not material here), and which are of a general nature and not local to that kingdom, shall be considered as of full force until repealed by legislative authority. Rev. Stat. chap. 28, § 1.

It cannot be justly claimed that there is anything in the rule under consideration so repugnant to the nature of our institutions, or so unsuitable to the condition of things existing in this country, that it can be pronounced by the courts not to be in force because inapplicable. It existed in England,

not as a part of the feudal system, as counsel seem to suppose, but was based upon general principles of public policy, having in view the protection of the kingdom from foreign influence and foreign domination,—principles not altogether unlike those which have given rise to our recent legislation re-imposing upon aliens the common-law disabilities in relation to taking and holding real estate in this state. True, during most of our history as a state, those disabilities have been removed, but that has been done by express legislation changing the common-law rule, and not by any attempt on the part of the courts to hold the rule not in force because inapplicable.

might have been arrived at had it considered the two English cases of *Sharp v. St. Sauveur*, L. R. 7 Ch. 342 (1871); and *De Geer v. Stone*, L. R. 22 Ch. Div. 243, 52 L. J. Ch. N. S. 57, 47 L. T. N. S. 434, 36 Week. Rep. 241 (1862), both of which hold that the English statute had no retrospective effect.

Article 1658 of the Revised Statutes of Texas provides, in making title to land by descent it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or has been an alien, and every alien to whom any land may be devised or descend shall have nine years to become a citizen of the state, and take possession of such land, or shall have nine years to sell the same before it shall be declared forfeited, and shall escheat to the government; provided, that the treaties of the United States with the nation to which such alien may belong do not otherwise direct; and provided, further, that aliens may take and hold any property, real or personal, in this state, by devise or descent from any alien or citizen in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien. *Hanrick v. Hanrick*, 54 Tex. 101, 111 (1890).

In *Hanrick v. Hanrick*, *supra*, the above statute was considered as an affirmative one, and as additional to the then existing section 9 of the act of 1848, which was not repealed by it, either in express terms or by necessary implication, neither was the act of 1854, directly or irreconcilably opposed to such section of the act of 1848.

With respect to the English act, passed in the year 1870, it was held in the above case of *Hanrick v. Hanrick* that to the extent that it conferred benefits to citizens of the United States it was by virtue of the provisions of the Texas statute of 1854 immediately engrafted upon it and became the law, defining the rights of alien citizens of Great Britain and Ireland to real estate in Texas, and section 9 of the act of 1848 was, as to such aliens, so far modified as to change their previous defeasible estate thereby given into an indefeasible estate.

The effect of the provisions of the Constitution of the republic of Texas, and of the statutes of 1840 and 1848, upon the subject of alienage, was to vest a defeasible title to real estate in Texas, in the alien children and heirs of a citizen of the United States who had died intestate leaving such property, which title was valid both against individuals and also against the state, not only for the period of nine years, but for such further time until the state by some proper proceedings in the nature of office found had declared a forfeiture. *Hanrick v. Hanrick*, 54 Tex. 113 (1890). To the same effect are the following cases: *Sabreigo v. White*, 30 Tex. 576 (1866); *Settegast v. Schrimpf*, 35 Tex. 323 (1872); *Andrews v. Spear*, 48 Tex. 567 (1878); *Osterman v. Bald-* 31 L. R. A.

win, 73 U. S. 6 Wall. 116, 18 L. ed. 730 (1867); *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 213 (1879); *Phillips v. Moore*, 100 U. S. 208, 25 L. ed. 603 (1879).

The court further considered that the position of aliens in Great Britain and in that state (Texas) being reciprocal, by virtue of the English naturalization act of 1870, and the Texas act of 1854, and the nine years given by the latter act not having elapsed since the death of the intestate in 1835 and the passing of the English statute, no forfeiture could have been declared, the latter act upon its passage calling into active operation the Texas statute, the joint influence of the acts converting the defeasible into an indefeasible title. *Hanrick v. Hanrick*, 61 Tex. 596, 606 (1884).

The court considered that the act enlarged rather than restricted the rights of aliens to take and hold land in that state, being cumulative rather than restrictive in its operations, and that, after the passage of the act, as before, an alien could take a defeasible title by inheritance without regard to the law upon that subject in force in his government, but where by the laws of his government an alien took an indefeasible title by inheritance, so by virtue of that enactment he could here take and hold "in the same manner." *Ibid*.

The Texas statute upon which the court based its decision was § 2 of the act of February 13, 1854, "An Act to Define the Civil Rights of Aliens," which provides: "Aliens may take and hold any property, real or personal, in this state, by devise or descent, from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien."

The Texas act of 1854, defining the rights of aliens, did not repeal the provisions of the act of 1848, providing that alien heirs of real property should be entitled to nine years in which to dispose of it or become citizens and take possession, and, under the act of 1854, the English act of 1870 changed the defeasible title of alien heirs of the owner of lands situated in Texas who died in 1835 into a defeasible title. *Hanrick v. Partick*, *Branch v. Partick*, 119 U. S. 153, 30 L. ed. 396 (1886).

In *Ortiz v. De Benavides*, 61 Tex. 60 (1884), the plaintiff, an alien, claimed title through a Mexican citizen who died in 1816. The court held that it was settled law in that state that aliens so claiming might maintain actions for the recovery of such real estate.

It has been held that under the laws of Texas aliens could acquire title to real property in the same manner as citizens, by inheritance from a citizen. *Wiederanders v. State*, 64 Tex. 133, 139 (1885).

And further, that immediately upon the death of the ancestor real estate will vest in the alien heir, subject only to be defeated by his not complying with the provisions of the Texas statute, which require him to become a citizen, or give him a certain

The statute in relation to the rights of aliens in force prior to the act of June 16, 1887, was the act of February 17, 1851,—an act which seems to have superseded the chapter of the Revised Statutes of 1845 relating to aliens. The act of 1851 provided that all aliens might take, by deed, will, or otherwise, lands and tenements and any interest therein, and alienate, sell, assign, and transmit the same to their heirs, or any other persons, whether such heirs or other persons were citizens of the United States or not, in the same manner as natural-born citizens of the United States or of this state might do; and that upon the decease of any person having title to or interest in any lands or tenements, such lands and tenements should pass and descend in the same manner as if such alien were a citizen of the United States; and that it should be no objection to any persons having an interest in such estate that they were

not citizens of the United States, but that all such persons should have the same rights and remedies, and in all things be placed upon the same footing, as natural-born citizens and actual residents of the United States. Gross's Stat. 1869, § 7.

There can be no doubt that this statute while it was in force operated as a complete removal of all the disabilities of alienage, so far as they affected the right of the alien to take, hold, and transmit real property in this state, and that it also superseded the common-law rule, that the interposition of an alien ancestor between an intestate and a collateral relative claiming to inherit was a barrier to the devolution of the estate by inheritance. But by the act of 1887 the common-law disabilities of alienage were in the main restored, and the act of 1851, as well as all other acts in conflict with the act of 1887, were expressly repealed.

period within which to dispose of the property, the proviso in such statute being a condition subsequent. *Ibid.*

In *Baker v. Westcott*, 73 Tex. 129 (1889), plaintiff sought to recover possession of real estate, part of a league survey granted to the original holder by title extended by special commissioner, and alleged that such original grantee conveyed the title to the purchaser whenever the latter should become a citizen of Texas; and further, that such purchaser did become a citizen of Texas, and subsequently died having by will devised the land to his son, who had since died leaving the plaintiff as his sole heir. Defendant claimed as the sole heir of such original grantee and sought to set aside the instrument under which the plaintiff claimed, as a cloud upon title, claiming that the conveyance was void because the grantee at the time of the execution was an alien, but the court held that by the Constitution of the republic of Texas, which contained a provision that "no alien shall hold land in Texas except by titles emanating directly from the government of this republic, but if any citizen shall die intestate or otherwise, his children or heirs shall inherit his estate, an alien shall have a reasonable time to take possession and dispose of the same in a manner hereafter to be pointed out by law," and that therefore, under the conveyance by such original grantee, the grantee took a title subject to be escheated at the suit of the republic, but that upon annexation his title became indefeasible, and such conveyance vested the perfect legal and equitable title of the lands in the purchaser, which title upon his death vested in his heir, who was entitled to recover. To the same effect is the case of *Williams v. Bennett*, 1 Tex. Civ. App. 498 (1892).

In *Gray v. Kauffman*, 82 Tex. 65 (1891), a resident of Germany brought suit in trespass to try title, and defendant contended that the action did not lie by reason of the plaintiff's alienage, but the court held that it was well settled in that state that aliens, under its laws, could acquire title by purchase, devise, or descent, and that therefore the action lay.

Vermont.

In *State v. Boston, C. & M. R. Co.* 25 Vt. 433 (1853), it was held that there was no express prohibition in the Constitution of the state of Vermont against aliens holding real estate, the Constitution, § 30, providing that every person of good character who came to settle in this state, having first taken oath or affirmation of allegiance to the same, purchase or by other just means acquire, and transfer, lands, and that the right of the

state to take such lands by escheat was a proceeding that was *strictissimi juris* and one which had always remained dormant notwithstanding frequent occasions for its legitimate exercise in that state.

Virginia.

In *Barziza v. Hopkins*, 2 Rand. (Va.) 276 (1824), it was held that persons born abroad, whose parents were also aliens, could not inherit lands in Virginia, not being citizens of that state, even though their grandmother was a native of that state who removed therefrom before the Revolution, and married and resided abroad until after the treaty of peace, when she returned to the state and resided there until her decease.

In *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348 (1876), an alien died seized of an estate of inheritance, intestate and unmarried, and a curator of his estate was appointed. Subsequently a creditor of such alien recovered a judgment against the curator, and in a subsequent suit by such creditor against the curator a decree appointing such curator a commissioner to sell the real estate, to receive the purchase money, and to pay off the judgment out of such proceeds, was made. An inquisition of escheat was held later in which the jury found the facts as above, and that there were then parties in possession claiming under the sale. The inquisition certificate was not returned to the register of the land office until a year after it was made, and the register then advertised the property as escheated. Subsequently the purchaser at the sale under the decree filed his petition setting up his claim to the property, pointing out irregularities in the proceedings to escheat, and insisting, the jury having found the sale of the property under the decree and the actual possession of the purchasers, that the inquisition was not in favor of the right of the commonwealth, and praying that the escheator and the register of the land office might be made parties to the suit and restrained from advertising the property as escheated. The court held that such estate vested in the state of Michigan even without office found, and further, that the sale under the decree was void; the state not having been made a party to the purchase, the purchaser was allowed, the creditor's claim being just, to be substituted to the latter's right, and to hold the estate subject to the payment of the debt.

III. Decisions under the English statutes.

In *Doe, Stansbury, v. Arkwright*, 5 Car. & P. 575 (1833), a resident of the state of Pennsylvania prior to the date of the Declaration of Independence had

It is a rule of the common law that where one statute is repealed by another the repeal of the repealing statute revives the statute repealed, and the same rule is held to extend to the common law, so that where an act which supersedes in any particular the common-law rule, previously applicable, is itself repealed, the rule is held to be revived. *Endlich*, Interpretation of Statutes, § 475; *State v. Rollins*, 8 N. H. 550; *Mathewson v. Phenix Iron Foundry*, 20 Fed. Rep. 281; *Gray v. Obeart*, 54 Ga. 231.

By § 8, chap. 181, of the Revised Statutes, it is provided that no act or part of an act repealed by the general assembly shall be deemed to be revived by the repeal of the repealing act, but we have no statute affecting the rule that the repeal of a statute superseding a common-law rule will have the effect of reviving the rule. It must accordingly be held that the repeal of the statute of 1851, by which the common-law rule which made it impossible for a collateral to inherit where he is obliged to trace his pedigree through an alien was changed, revived the common-law rule.

But it is claimed that the rule, even if in force in this state, can have no application in the present case, because, as the complainant insists, the next of kin under our statute takes immediately from the intestate, and not mediately through his alien ancestors. We find nothing in the language of the statute which necessarily leads to the conclusion contended for. It merely provides that the estate shall descend in equal parts to the next of kin of the intestate, leaving upon the party who claims the right to inherit the burden of deducing his pedigree through a line of ancestors up to the intestate. And it will not be questioned that, in this case, if any one of the ancestors, through whom the complainant deduces his pedigree, had been alive at the death of the intestate and capable of inheriting, the estate would have gone to him or her, and not to the complainant, thus showing that such ancestor is the *medium hereditatis*, and not merely the *medium sanguinis*.

Descents have long been distinguished as mediate and immediate, but as shown by Mr. Justice Story in *Levy v. M'Cartee*, 31 U. S. 6 Pet. 102, 8 L. ed. 334, these terms are sus-

a son born there before that date. In 1788 the father went to England to recover compensation for losses, returned in 1786, and subsequently died in that state. The son was never in England. The court held that they were both aliens, American subjects, and that a claim to lands in England could only be made through them under the statute 37 Geo. III., chap. 97, § 24.

The statute referred to in the above case, after reciting the 9th article of the treaty between Great Britain and the United States, enacted, § 24, "that all lands, tenements, and hereditaments in the kingdom of Great Britain, or the territories and dependencies thereto belonging, which, on the said 28th day of October, 1786 (being the day of the exchange of the ratification of the said treaty between his Majesty and the United States), were held by American citizens, shall be held and enjoyed, granted, sold, and devised according to the stipulations and agreements contained in the said article, any law, custom, or usage to the contrary notwithstanding."

Section 25 of the same provides "that nothing herein contained shall extend, or be construed to extend, to give any right, title, or privilege to any person, not being a natural-born subject of the realm, which such person would not have been entitled to if this act had not been made, other than and except such rights, titles, and privileges as shall be necessary for the true and faithful performance of the stipulations in the said article contained, according to the true intent and meaning thereof, or to give to any person, not being a natural-born subject of this realm, or a citizen of the said United States, any right, title, or privilege to which such person would not have been entitled if this act had not been made."

By the statutes 7 Anne, chap. 5, 4 Geo. II., chap. 21, and 13 Geo. III., chap. 21, all children born out of the King's allegiance, whose fathers or grandfathers by the father's side were natural-born subjects, are to be deemed natural-born subjects themselves, unless their said ancestors were attainted or banished beyond sea for high treason, or were at the time of the births of such children in the service of a prince at enmity with Great Britain. But the grandchildren of such ancestors are not to be privileged in respect of the alien's duty, unless they be within the realm and take an oath, etc., nor are they enabled to claim any estate 31 L. R. A.

or interest, unless the claim be made within five years after the same shall accrue.

In *Doe, Auchmuty. v. Mulcaster*, 8 Dowl. & R. 593, 5 Barn. & C. 771 (1826), it was held that the children of an American loyalist, who continued his allegiance to the Crown of Great Britain after the colonies were separated from the mother country, and settled in America, were entitled to take lands by descent in England within the operation of the statute of 4 Geo. II., chap. 21, as natural-born subjects of the Crown of Great Britain.

The words of the English statute of 13 Geo. III., chap. 21, § 8, are to be read "aliens, duties, customs, and impositions" and not "alien's duties, customs, and impositions," and therefore the grandchild of a natural-born subject, born out of the King's allegiance, is entitled to the benefit of that statute in regard to holding lands as a natural-born subject, although he has not complied with the formalities specified in the 3d section. *Barrow v. Wadkins*, 24 Beav. 327, 27 L. J. Ch. 129 (1867).

The English statute, 13 Geo. III., chap. 21, §§ 8, 4, annexed certain provisions to the time within which a claim is to be made, and to enable grandchildren to claim or demand any estate in pursuance of the right given them by § 1, and it was held that these provisions applied to Ireland as qualifying the status of the English subject which the act of union transferred. *Davies v. Lynch*, 16 Week. Rep. 1207 (1868).

The children of a British subject born abroad of an alien mother are capable of inheriting. *De Geer v. Stone*, L. R. 22 Ch. Div. 248, 252, 52 L. J. Ch. N. S. 51, 60, 36 Week. Rep. 241, 47 L. T. N. S. 434 (1882).

A grandchild born abroad, whose father was also born abroad, being respectively grandchild and son of one who at common law was a natural-born British subject, would be himself a natural-born British subject, but his children, if born abroad, would be aliens. *Ibid.*

In the above case the great-grandson, whose father and grandfather were both born abroad, sought to inherit real estate from his great-grandfather, but the court held that he was not so entitled, and that his right having accrued upon the death of his father in 1840, thirty years prior to the passing of the English naturalization act of 1870, was not affected by that statute which had no retrospective effect.

E. W.

ceptible of different interpretations, whence some confusion has been introduced into their legal discussion, since different judges have used them in different senses. But, as said by Lord Hale, as quoted in *Collingwood v. Pace*, *supra*, "in immediate descents there can be no impediment but what ariseth in the parties themselves, but in mediate descents it is agreed, the disability of being an alien or attainted, in him that is the *medius antecessor* will disable the other, though he have no such disability."

In *Collingwood v. Pace*, which was argued before all the judges of England, the question was whether the inheritance by a brother from his brother, the father being an alien, was mediate or immediate, and it was decided, after much discussion, by seven judges against three, that the inheritance was immediate, so as not to be affected by the alienage of the father. It was held that, in tracing the line of inheritance between brothers, or their descendants it was not necessary to name the father as their common ancestor, and that alienism in any ancestor whom it was not necessary to name in tracing such inheritance or descent could not have the effect to impede it. In *McGregor v. Comstock*, 3 N. Y. 408, the same rule was applied to an inheritance between first cousins, their fathers being citizens, but whose grandfather was an alien.

Thus, in *Jackson, Doran, v. Green*, 7 Wend. 333, the intestate was a naturalized citizen, and the claimants were the heirs at law of a cousin of the intestate, who was also a naturalized citizen. It was claimed that the descent between cousins was immediate, notwithstanding the circuitry of the line of sanguinity, and that the alienage of their intervening relatives was no bar to the inheritance, but this claim was disallowed, it being held that, while the descent from brother to brother was considered immediate, that from cousin to cousin was not; and that no one who was obliged to trace his descent through an alien can inherit real estate, the intestate having died at a time when the statute of 11 & 12 Wm. III. was not incorporated into the New York law of descent.

The same rule was applied in *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 24 Am. Dec. 198, where the intestate was a naturalized citizen, and the claimant his nephew, but whose father, a brother of the intestate, was an alien. So in *Redpath v. Rich*, 3 Sandf. 79, it was held that a nephew, who was obliged to trace his descent through an alien mother, could not inherit from his uncle. In *McCarthy v. Marsh*, 5 N. Y. 265, the intestate and the claimant were second cousins, and were both citizens, all their ancestors, up to their common great-grandfather being aliens. It was held that under the New York statute, which provided that no person capable of inheriting should be precluded from the inheritance by reason of the alienage of any ancestor of such person, the claimant was entitled to the estate, but it was admitted that at common law, and in the absence of such statute, he could not inherit, because he was obliged to trace the

descent of the estate through aliens who had no inheritable blood.

In *People v. Irvin*, 21 Wend. 128, where the same statute was in force, it was held that the nephew of a person dying intestate, although naturalized, was not capable of inheriting from his uncle if his father was an alien and still living at the time of the death of the intestate, as the statute did not enable a person to deduce title through an alien ancestor still living. If in such case, however, the descent from the uncle to the nephew was immediate, as is claimed in the case at bar, it is difficult to see how the fact that an intermediate alien ancestor was living could have the effect of barring the inheritance.

McLean v. Swanton, 13 N. Y. 535, involved substantially the same question as the case last cited. There the decedent left him surviving a sister and a niece, the former being an alien and the latter a citizen, and it was held that the niece could not take the real estate of the decedent by inheritance, so long as her mother was living at the date of her uncle's death. It was urged on behalf of the niece that the existence of her mother might be disregarded upon the doctrine laid down by Chancellor Kent, viz.: "If a citizen dies, and his next heir be an alien, who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed." 2 Kent, Com. 56. This contention was disallowed and the doctrine announced by Chancellor Kent held inapplicable, the court saying: "The difficulty of this position is, that if the name of the mother be stricken from the plaintiff's genealogical chart, it will not appear that she has any connection with Robert Swanton, whose heir she claims to be."

The cases to which the doctrine referred to in the commentaries applies, are those in which the claimant does not make title through the alien, but where she can deduce her pedigree from the person dying seised, by leaving out or passing by the alien." And again: "All the cases decided in this country, where an alien would have taken the estate but for his alienage, and in which a more remote heir was preferred, were cases of the same character, the successful claimant making out his descent independent of and not through the alien. Upon the plaintiff's theory, the statute under consideration would have been quite unnecessary; for if she can be allowed to strike out her alien ancestors, intervening between the person dying seised, and herself, whether living or dead, and make title to the land of the person so dying seised, as his immediate heir, the defect of heritable blood in such ancestors would be a matter of no moment." The same construction of the language of Chancellor Kent is adopted in *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84.

We have examined the cases cited by counsel for the complainant, where a citizen who has been compelled to trace his relationship to the intestate through an alien has been held entitled to inherit, and we find them in most

(if not every) instances, to be cases arising under a statute expressly giving the right to inherit in such cases. The decisions of this character in the state of New York all seem to have arisen while the statute of 11 & 12 Wm. III., or the section of the Revised Statutes of the state substantially re-enacting that statute, was in force. The case of *Jackson v. Sanders*, 2 Leigh, 109, was decided under a statute of the state of Virginia, which provided that "in making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is or hath been an alien." Similar statutes are found in several of the other states. It is scarcely necessary to remark that in this state no such statute exists.

We are of the opinion, then, that, as the complainant is compelled to trace his descent from the intestate through nonresident aliens, he is barred and incapacitated from taking any interest in the real estate by inheritance.

The decree of the Superior Court dismissing his bill for want of equity must therefore be affirmed.

Craig, J., dissents.

Baker, J.:

I do not feel satisfied with the conclusion reached, and am inclined to the opinion that the law well could be, and should be, held otherwise.

George D. BARRETT *et al.*, Appls.,

v.

MT. GREENWOOD CEMETERY ASSOCIATION *et al.*

(150 Ill. 385.)

1. The connection of a sewer under-draining a cemetery with a spring brook, water from which is used for domestic purposes, watering animals, and making ice for domestic use, may be enjoined, at the instance of riparian owners who will be injured by it.
2. An injunction to prevent the connection of a sewer with a spring brook the water of which is used for domestic purposes will not be refused because the water is already polluted to some extent from other sources.

(January 20, 1896.)

APPEAL by complainants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of defendants in an action brought to enjoin the connecting of a sewer with a stream of water flowing through complainant's premises. *Reversed.*

The facts are stated in the opinion.

Note.—For nuisance by pollution of stream, see also *Chapman v. Rochester* (N. Y.) 1 L. R. A. 296, and note; *Barton v. Union Cattle Co.* (Neb.) 7 L. R. A. 457, and note; *Heifrich v. Catonsville Water Co.* (Md.) 13 L. R. A. 117, and note.

For pollution by mining operations, see *Drake v. Lady Ensley Coal, I. & R. Co.* (Ala.) 24 L. R. A. 64, and note.

31 L. R. A.

Messrs. Holden & Buzzell and Whitehead & Stoker, for appellants:

A court of chancery may grant preventative, as well as remedial, relief, and this may be done where the act threatened would be punishable under the criminal laws as a nuisance.

People v. St. Louis, 10 Ill. 351; *Laney v. Jasper*, 39 Ill. 52; *Wahle v. Reinbach*, 76 Ill. 322; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 68; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Rand v. Wilber*, 19 Ill. App. 395.

To constitute a nuisance it is not necessary that the noxious trade or business should endanger the health of a neighborhood. It is sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life and property uncomfortable.

Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567.

Parties, although separate owners of premises charged to be injured, and threatened with the injury, might join in an action to abate the nuisance.

Gillespie v. Forrest, 18 Hun, 112; *Belknap v. Trimble*, 3 Paige, 577; *Catlin v. Valentine*, 9 Paige, 575, note, 38 Am. Dec. 567; *Lyon v. McLaughlin*, 32 Vt. 423; *Wood, Nuisances*, § 119; *High, Inj.* p. 508, § 794.

Messrs. Runyan & Runyan for appellees.

Carter, J., delivered the opinion of the court:

This was a bill in equity filed in the circuit court of Cook county by certain land-owners, who are appellants here, to enjoin appellees, two cemetery corporations, from constructing a certain sewer so as to drain their cemeteries, and especially to underdrain certain wet and swampy portions thereof, used and to be used in burying the dead, into a running stream of water flowing through appellants' lands. The sewer empties into the brook where it crosses Morgan avenue, above appellants' lands, and is being constructed eastward along said avenue, between said cemeteries, with lateral extensions or spurs extending into the cemeteries for drainage, and especially designed to drain certain swampy portions thereof, as appear unfit for burial purposes unless underdrained. The sewer is being constructed under a contract between the two cemetery companies of the one part, and the commissioners of highways of the town of Worth, of the other part, whereby the former are to construct the sewer at their own expense, and to pay all damages to private property, and the town is to keep the same open and in repair for the use of the cemetery companies, and the adjoining property owners are to have the right to connect. There is but little dispute as to the law of the case, the controversy relating chiefly to matters of fact. The testimony was taken by the master, to whom the cause was referred. Many witnesses were examined, and the evidence is too voluminous to be set out to any considerable extent here. The testimony shows, however, that said brook is a small, shallow stream, which rises north of Morgan avenue or 111th street, in the town of Worth, and flows southerly, fed by springs along its course, across said avenue, through the 60 acres of land owned by

complainant G. D. Barrett; thence south through a 100-acre tract owned by complainant W. B. Brayton, and across Raymond avenue, or 115th street, and through land owned by complainant Saxton; and thence through an 80-acre tract owned and occupied by complainant Ira. S. Brayton, and 80 acres owned and occupied by Friederich Joehnke; thence across Lyon avenue, or 119th street, over a 40-acre tract owned by complainants John T. Dale and George D. Robinson. South of Morgan avenue $2\frac{1}{2}$ miles in a direct line, but 4 miles by the brook, complainant August Croever occupies a block of ground on which he has constructed ice houses, and where he conducts an ice business of \$5,000 or \$6,000 a year. The brook that runs through the lands of other complainants, north of his premises, empties into Stoney creek, about $\frac{1}{4}$ of a mile above his place. He has harvested ice from Stoney creek, and sold the same in Chicago and vicinity, for fourteen years past, for refrigerator and domestic purposes. The lands of the other complainants are used for pasturage and for farming purposes, and the water of the brook is used for stock, and, to some extent, is used in the homes of the occupants of the land for domestic purposes. This brook running through said lands receives the washings of the streets, and from manured lands used for raising cabbages, adjoining it, north of the land of complainants; and in times of freshets the brook is muddy, but it is clear in its natural condition. Ditches have been constructed along Morgan avenue, and surface water coming south on Johnson avenue, which intersects Morgan avenue, is carried along these ditches into the brook. Dr. Bayard Holmes testified as an expert bacteriologist, that bodies buried in boxes of wood would sooner or later be so liquified as to be practically incorporated with the soil in which they were buried, and that the subterranean drainage of a cemetery draining into a sewer of brick and mortar, as ordinarily built, if drained into a spring brook, would carry contamination, and pollute such a brook for 5 miles or more, and that brook, being dammed for ice-making within 4 miles from the cemetery, would result in a pond from which ice of a very pernicious quality would be harvested; that the water from a brook into which such sewerage drained would be unhealthy for cows, and unfit for drinking purposes or for cooking water, for domestic use. The testimony of other witnesses showed that the lands through which the brook runs, into which the drainage from the cemeteries emptied, would be unfitted for dairy purposes and stock-raising, by reason of the contamination of the water by the sewage.

We have read and considered all the evidence with care, and are of the opinion that it sustains the conclusions reached by the master. In his report the master found "that injurious products of decomposition do emanate from animal bodies buried in the earth; that these emanations do enter into the soil in which said bodies are buried; that the surface water, percolating through the soil, takes up these emanations; that if the sewer referred to is constructed, with the lateral

drains extending into the said cemeteries referred to in the bill of complaint filed in this cause, these unwholesome products of decomposition will percolate through the soil and penetrate the sewer, and will be carried by the said sewer and emptied into the spring brook, and that the contents of the said sewer will contaminate the waters of the spring brook to a greater extent than they are now contaminated from any cause shown to exist, and will contaminate the waters of the said spring brook to a greater extent than they would be contaminated from any natural cause, or from any conditions existing prior to the construction of the proposed sewer;" that the preponderance of the evidence on the main issue was in favor of the complainants, and that the material allegations of their bill were sustained. The circuit court sustained exceptions to this report and dismissed the bill, and its decree has been affirmed by the appellate court. We think there was error in affirming the decree. The very purpose of the sewer was to furnish underdrainage, as well as surface drainage, to these cemeteries. Some portions of their grounds were so wet and swampy that water would rise in openings for graves, when dug, to such an extent as to compel their abandonment, and the selection of more elevated ground in their stead. It is true, it was shown that some of the highways of the town would be drained and benefited; but the chief purpose and object in view were to furnish cemetery drainage, and to accomplish this the cemetery companies were willing, and agreed, to pay the whole expense. Experienced bacteriologists testified that, if the sewer were constructed and finished as contemplated, poisonous exudations would be carried from decomposing human bodies by the percolating waters into the sewer, and from thence into the spring brook, polluting and contaminating its waters, and rendering them unfit for use for man or beast, and dangerous to the health of those who should use the water for drinking or domestic purposes, or who should use the milk of cows that drank from the brook, and that ice which should be harvested from ponds formed by the brook upon the lands of complainant Roeder would be of a very pernicious quality. There was some conflict in the evidence on the question as to whether or not the stream would be thus polluted by the sewer, but we think the clear preponderance of the evidence sustains the finding of the master that it would be. It would also seem to accord with the common opinion of mankind that underdrains in wet and marshy land filled with decaying bodies, leading into a running brook flowing within a mile of such land, would pollute the waters of the brook. The evidence does not show, nor does experience or science appear to teach, just how far this pollution would continue in the flowing waters. One witness testified that it might continue from 5 to 50 miles before the purification would become complete, but we think it clearly appears that the waters would probably be contaminated by this sewer while flowing through the lands of all the complainants. Some of these lands were im-

mediately below the mouth of the sewer, and the furthest within 4 miles. The brook is small, but perennial. It is fed along its course below the mouth of the sewer by small springs of pure water rising from the bed of the stream. It flows through the private property of complainants. They used its waters for stock, for cows kept for dairy purposes, for making ice, and at times for domestic use.

The defendants attempted to break the force of the case made by complainants, by showing that the waters of the brook, and the springs along its course, were already polluted by the washings from manured lands used in gardening, and from decaying vegetables and other refuse matter, and were successful in showing that in wet weather the waters of this stream were rendered impure from these causes. They also showed that another drain, of a somewhat similar kind, from Mt. Hope Cemetery, discharged its waters into a ravine which in wet weather carried such waters into the brook in question at a point below the land of some of the complainants, and above that of others. But we know of no rule of law that sanctions one wrong because another has preceded it. It is doubtless true that streams of water cannot be kept as pure when flowing through lands occupied by populous communities as when flowing through sparsely settled lands; but these effects, that unavoidably arise from the occupation and cultivation of the soil by man do not justify the deliberate pollution of a stream of water flowing through private property, in order that the interests of private persons, or even of the public, may be enhanced thereby. There are very few streams of water flowing through a densely populated country which are not more or less polluted from general causes arising from the occupation and cultivation of the adjacent lands. The courts have no power to prevent pollution so occurring. 28 Am. & Eng. Enc. Law, p. 971, note; *Baltimore v. Warren Mfg. Co.* 59 Md. 96. But it is a well-recognized branch of equity jurisdiction to restrain by injunction the fouling of running streams that pass over the lands of others, by connecting sewers therewith, or by other means, so as to endanger the comfort and health of others, or to cause irreparable injury to their property rights. 2 High, Inj. p. 508, §§ 794, 795; *People v. St. Louis*, 10 Ill. 351; *Wahle v. Reinbach*, 76 Ill. 322; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63; *Cutlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 587; *Lyon v. McLaughlin*, 32 Vt. 423; *Dwight v. Hayes*, 150 Ill. 273. And the mere fact that in the case at bar the waters of this stream may to some extent have been rendered unwholesome when flooded by the washings from manured lands, or by the connection of other drains, is no excuse for the threatened pollution by the cemetery companies. 28 Am. & Eng. Enc. Law, pp. 968, 974. It is declared by section 221 of the Criminal Code to be a public nuisance "to corrupt or render unwholesome or impure the water of any spring, river, stream, pond, or lake, to the injury or prejudice of others," and the

offense is punishable by indictment; but the "bare fact that the statute gives a remedy by indictment does not deprive the court of its equitable powers." *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63. In *Wahle v. Reinbach*, 76 Ill. 322, it was held that a bill would lie to enjoin the erection of a privy so near to complainant's dwelling and well of water as that it would become injurious to the health and comfort of himself and family, and, after citing previous decisions of this court, it was said: "These cases, however, recognize the doctrine, which is supported by all the authorities on this branch of equity jurisdiction, that where the injury resulting from the nuisance is in its nature irreparable, as, when loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property will ensue from the wrongful act or erection, courts of equity will interfere by injunction, in furtherance of justice and the violated rights of property." Injunctive relief will be granted to prevent one proprietor from causing filthy or contaminated water to percolate from his soil into adjoining lands to the injury of his neighbor. 27 Am. & Eng. Enc. Law, p. 487. The evidence does not sustain appellants' contention that the purpose of the sewer is mere surface drainage, or the carrying off more rapidly of waters from the surface of the cemetery grounds, which, by the slower processes of percolation and natural drainage, would eventually find their way to the same stream, and in a more impure condition. The contract shows that the sewer was to be at all times kept open, and to be used by the two cemeteries for carrying away all surface water, and as a drain for said cemeteries, and the plan and purpose of construction show that one of its principal objects was the underdraining of the wet and swampy portions of the cemeteries; and much the larger portion of the evidence relates to the effect the decaying bodies buried in the cemetery would have on the percolating waters which it is intended the sewer should carry off into this brook. In *Robb v. La Grange*, 158 Ill. 21, it was said "under the ruling of this court, which we believe to be in harmony with the current of authority bearing on the question, a village or city cannot run its sewage beyond the incorporated limits and empty it on the adjoining premises of some landowner, where a stench is created and the sewage is detrimental to the health of the neighborhood. Nor will a village or incorporated town be permitted to empty its sewage into a stream of water where the result is the pollution of the stream. In other words, if a nuisance is established by carrying the sewage of a village, incorporated town, or city in a drain or sewer beyond the limits of the incorporation, a bill in equity will lie on behalf of any person injured." The real question in this case then is, whether the evidence is sufficient to establish a nuisance." And in view of the fact that the witnesses were examined in open court in that case when the cause was heard, and that the trial judge, at the request of the parties, went upon the *locus in quo*, and personally viewed the premises, and found, as a matter of fact,

that no nuisance was created, this court declined to reverse such finding, but did hold that in view of the fact that the bill was filed before the sewer was completed, and the trial was had before it could be satisfactorily determined whether the final result of the sewer would be to create a nuisance or not, the bill should have been dismissed without prejudice. Under the facts proved in the case at bar, we are satisfied, as found by the master, that a nuisance would be created, and that the decree should have been for the complainants.

The town of Worth filed a cross bill to set aside the contract on the ground that the commissioners had no power to make it, and because it was not made or authorized at any meeting of the commissioners. It is plain

that neither party had any right by contract to authorize the pollution of the stream in question. But we see no occasion for setting aside the contract. It will be time enough to consider how far the town is bound when its liability under the contract is asserted or denied in some proceeding making such consideration necessary. We hold, therefore, that the circuit court erred in dismissing the bill of complaint, but did not err in dismissing the cross-bill.

The judgment of the Appellate Court and the decree of the Circuit Court, except as to the dismissal of the cross bill, are reversed, and the cause is remanded to the latter court, with directions to enter a decree in accordance with the prayer of the bill of complaint.

WISCONSIN SUPREME COURT.

Thomas F. DOWLING *et al.*, *Respts.*,
v.
LANCASHIRE INSURANCE COMPANY,
Appt.

(.....Wis.....)

1. A statute providing that the insurance commissioner shall prepare, approve, and adopt a printed form of a policy of fire insurance to conform as near as can be made applicable to that used in a certain other state is an unconstitutional attempt to delegate to him legislative power.
2. Issuing an insurance policy when the insurance agent has full knowledge of the existence of encumbrances is a waiver of conditions in the policy against such encumbrances.
3. A copy of proofs of loss mailed to an insurance company, and a postal card acknowledging their receipt, are admissible in evidence to show that the proofs were seasonably furnished, although the proofs will not be competent evidence of the facts therein contained.

(January 7, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Eau Claire County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by Pinney, J.:

This is an action upon a policy of insurance issued by the defendant to the plaintiff Dowling in the sum of \$500, \$250 of which was on his stock of wines, liquors, and merchandise, and \$250 upon his furniture and fixtures, in a certain saloon in Eau Claire. The policy contained an indorsement thereon as follows, to wit: "Loss, if any, payable to P. J. Bowlin & Co., mortgagee, as their interest may ap-

pear,"—under which name, it appears, P. J. Bowlin conducted business. While the insurance was in force, namely, December 9, 1893, the said property was destroyed, in part, and damaged, by fire, and the total loss upon each subject of insurance exceeded the amount of the total insurance upon the property; the total concurrent insurance being \$2,500, \$1,250 of which was on the furniture and fixtures, and \$1,250 upon the stock of wines, liquors, and saloon merchandise. The policy in suit was the Wisconsin standard policy, in use under chapter 195, Laws 1891. It appeared that there was a chattel mortgage on the insured property, for \$300, to Ann Dowling, the existence of which was not noticed or indorsed upon the policy. On behalf of the plaintiffs, evidence was given tending to show that the plaintiff Dowling informed the defendant's agent fully of the existence of said mortgage, as well as the \$1,000 mortgage to P. J. Bowlin & Co., at the time the policy was issued, but such evidence was objected to by the defendant. Evidence was given tending to show that proofs of loss were made and delivered to the defendant in due season, and also the amount of the plaintiff's damages. The court instructed the jury that, if the plaintiff Dowling had stated to the defendant's agent fully the existence of these encumbrances, they would find in favor of the plaintiffs upon that issue, otherwise they would find for the defendant, and gave the jury appropriate instructions in respect to the question of damages. There was a verdict for the plaintiffs for \$500, for which amount, with costs, judgment was given against the defendant, and from which the defendant appealed.

Messrs. VanDyke & VanDyke, with *Messrs. Doolittle & Shoemaker*, for appellant:

The standard policy law is not unconstitutional as an unreasonable abridging of the right to make contracts in matters of insurance.

Chapter 195, Laws of 1891, does not conflict with the Constitution of the United States, 14th

NOTE.—For similar decisions as to delegation of power to insurance commissioner, see *O'Neil v. American F. Ins. Co. (Pa.)* 28 L. R. A. 715; *Anderson v. Manchester F. Assur. Co. (Minn.)* 28 L. R. A. 609; 31 L. R. A.

amendment, nor with article 1 of the Constitution of Wisconsin, because such act is a proper exercise of the police power of the state.

Com. v. Vrooman, 164 Pa. 806, 25 L. R. A. 250; *Dugger v. Mechanic's & T. Ins. Co.* (Tenn.) 28 L. R. A. 796; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715.

The valued policy law (Rev. Stat. § 1943) is a restraint upon the right to contract in respect to insurance, but has been held constitutional as resting upon public policy.

Reilly v. Franklin Ins. Co. 43 Wis. 449, 28 Am. Rep. 552; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45.

The Wisconsin standard policy law is not unconstitutional as an unlawful delegation of legislative power to make laws.

The power delegated has respect to two separate subject-matters, *viz.*: (1) the policy form; and (2) riders.

In respect to the policy form, the Wisconsin act expressly limits and restricts the authority conferred upon the state officers.

The power delegated was not power to make a law for the law was complete when adopted.

Whether in what was done the public officers complied with the duty imposed or exceeded the power delegated is a judicial question, and in no way affects the constitutionality of the act.

Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 8 Inters. Com. Rep. 209.

The New York form was by reference as effectually adopted as if it had been inserted at length in the act.

Flanders v. Merrimack, 48 Wis. 567; *Kollock v. Madison*, 84 Wis. 458; *Jenkins v. Morning*, 38 Wis. 197; *Sutherland*, Stat. Constr. § 257; Rev. Stat. § 1221.

Retaliatory acts adopt the statutes of other states by mere reference thereto, and are uniformly held unobjectionable on that account.

Home Ins. Co. v. Suigert, 104 Ill. 653; *People v. Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 880; *State v. Insurance Co. of N. A.* 115 Ind. 257; *Phenix Ins. Co. v. Welch*, 29 Kan. 672.

The power delegated by the act was administrative rather than legislative.

Chicago & N. W. R. Co. v. Dey, *supra*.

An act which confers an authority or discretion as to the execution of a law to be exercised under and in pursuance of it is not an unconstitutional delegation of power.

Chicago, M. & St. P. R. Co. v. Minnesota, *supra*; *State v. Young*, 29 Minn. 474; *Cooley*, Const. Lim. 114; *Wayman v. Southard*, 23 U. S. 10 Wheat. 1-40, 6 L. ed. 253-262; *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77; *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 281; *Marshall, Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294.

But the power delegated by § 1 of the act, to the commissioner to prepare "riders," is not unlimited, but is expressly confined and restricted by § 4 of the act.

The legislature may pass general laws giving to other departments, expressly or by necessary implication, discretion to employ the proper means to fill up and regulate the 31 L. R. A.

details for themselves and subordinates, though the exercise of that discretion be quasi legislative.

Sutherland, Stat. Constr. § 67; *Re Oliver*, 17 Wis. 682; *Bryant v. Robbins*, 70 Wis. 258; *State v. Stewart*, 74 Wis. 620, 6 L. R. A. 394; *Muskego v. Drainage Comrs.* 78 Wis. 44; *Martin v. Witherspoon*, 135 Mass. 175; *People v. Kelly*, 5 Abb. N. C. 383.

The creation of a railroad commission, and authorizing such commission to fix reasonable rates of transportation, have been held not to be a delegation of legislative powers.

Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Inters. Com. Rep. 325; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 281.

Messrs. George C. Teall and Fred A. Teall, for respondents:

Chapter 195 of the Laws of 1891, which provides for the Wisconsin standard policy, is unconstitutional, for the reason that the act in question amounts to an unlawful delegation of legislative power.

Cooley, Const. Lim. p. 116; *Cooley*, Taxn. 61; *Dill. Mun. Corp.* § 60.

Legislative power cannot be delegated.

Thorne v. Cramer, 15 Barb. 112; *Bradley v. Baxter*, Id. 122; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *People v. Stout*, 23 Barb. 349; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715; *Anderson v. Manchester F. Assur. Co.* (Minn.) 28 L. R. A. 610.

Pinney, J., delivered the opinion of the court:

The action is upon a "Wisconsin standard policy of fire insurance," prepared, approved, and adopted by the insurance commissioner under chapter 195, Wis. Laws 1891, p. 224, which contains the condition that the policy shall be void "if the subject of insurance be personal property, or be or become encumbered by a chattel mortgage," and also the stipulation that "no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The only waiver relied on in respect to the chattel mortgage to Ann Dowling was by parol, and the question was whether, under such policy and the act under which it was adopted, such waiver was ineffectual, so that by the breach of the condition in relation to chattel mortgages the policy was rendered void. The circuit court having ruled that the parol waiver relied on was valid, the plaintiffs obtained a verdict; and it is contended in support of it that chapter 195, Laws 1891, is unconstitutional and void, as a delegation to the insurance commissioner of legislative power, which the Constitution (art. 4, § 1) declares "shall be vested in a senate and assembly," and that such parol waiver was effectual and valid

under the law as it existed before the passage of said act. That no part of the legislative power can be delegated by the legislature to any other department of the government,—executive or judicial,—is a fundamental principle in constitutional law, essential to the integrity and maintenance of the system of government established by the Constitution. The difficulty experienced by courts in distinguishing between legislative power, which cannot be delegated, and discretionary powers of an executive or administrative character, which may be intrusted to other departments or officers, in the conduct of public affairs, has been frequently experienced and acknowledged; and it arises, in a great measure, from the fact that powers of the most important character, not essentially legislative, but which the legislature might properly, in the first instance, exercise or determine by its own judgment, are frequently devolved by the legislature upon other departments, officers, or bodies. In *Moers v. Reading*, 21 Pa. 202, it was said that “half the statutes on our books are in the alternative, depending upon the discretion of some person or persons, to whom is confided the duty of determining whether the occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.” This must be understood, we think, as applicable only to cases where the discretion is not essentially a legislative one. In *People v. Burr*, 13 Cal. 358, Field, J., said: “Such acts are constantly passed, and yet no one has ever questioned their validity as laws because dependent in their operation upon occasions which may never arise. . . . The legislature may determine absolutely what may be done, or it may authorize the same thing to be done upon the consent of third parties. It may command, or it may only permit; and in the latter case, as in the former, its acts have the efficacy of laws.” Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act. In all such cases it is upon the occurrence of the fact or event that the act becomes operative, or its suspension is accomplished. In *Locke's Appeal*, 72 Pa. 491, 498, 18 Am. Rep. 716, it was declared that “to assert that a law is less than a law, because it is made to depend upon a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future, or impossible to know;” and it was said that the proper distinction is this: “The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action to depend.” And accordingly the time when the act shall take effect may be made

1 L. R. A.

to depend upon the majority of a popular vote being cast in its favor under a submission to the electors, for that purpose, provided in the act. *State v. O'Neill*, 24 Wis. 149; *Smith v. Janesville*, 26 Wis. 291. In considering the true test as to whether a power is strictly legislative, or whether it is administrative, and merely relates to the execution of the law, Ranney, J., in *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio. St. 88, said: “The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.” Substantially the same conclusion was reached in *Marshall, Field & Co. v. Clark*, 143 U. S. 650, 681-694, 36 L. ed. 294, 306-310, in respect to the provisions of the tariff of October 1, 1890 (26 Stat. at L. 612, chap. 1244, § 3), in respect to reciprocity of commerce, by which authority was conferred upon the president to suspend by proclamation the free introduction of sugar, molasses, coffee, tea, and hides when satisfied that any country producing such articles imposes duties or other exactions upon the agricultural or other products of the United States which he might deem reciprocally unequal or unreasonable, and it was held that this provision was not open to the objection that it was an unconstitutional transfer of legislative power to the president. The reasoning of the court in this case goes upon the ground that, upon a proper construction of the act, it provided for the ascertainment of an event or state of affairs in view of which the provision for reciprocity of trade should cease to exist.

The application of the distinction so well established and clearly pointed out in these cases is, we think, decisive of the validity of the act in question. Its object was to provide for a uniform policy of fire insurance, to be made and issued by all companies taking such risks, so that no other than the standard policy, prepared, approved, and adopted by the insurance commissioner, could be lawfully issued or used within the state. Indeed, to issue or deliver any other than the standard policy was made a misdemeanor, and punishable by a fine. *Bourgeois v. Northwestern Nat. Ins. Co.* 86 Wis. 609. Although the act provided for “a printed form in blank, of a contract or policy of fire insurance, together with such provisions,” etc., it provides also that they were to form a part of such contract or policy, so that the essential substance of the contract required to be embraced in such form should have the sanction, force, and effect of a legal enactment; and, as applicable to the present case, the stipulations of such policy would operate, under the act, to change the law as it had previously existed in relation to parol waiver of forfeitures by the conditions of fire insurance policies. The act, in our judgment, wholly fails to provide definitely and clearly what the standard policy should contain, so that it could be put in use as a uniform policy, required to take the place of all others, without the determination

of the insurance commissioner in respect to matters involving the exercise of a legislative discretion that could not be delegated, and without which the act could not possibly be put in use, as an act in conformity to which all fire insurance policies were required to be issued. Giving full effect to all the language of the act, as we must do, it provides that the insurance commissioner shall, within sixty days of the passage of this act, "prepare, approve, and adopt a printed form in blank of a contract or policy of fire insurance together with such provisions, agreements, or conditions as may be indorsed thereon or added thereto, and form a part of such contract or policy; and such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known; provided, however, that five days' notice of cancellation by the company shall be given, and provided, that proof of loss shall be made within sixty days after a fire." The insurance commissioner was authorized to call upon the attorney general "for such assistance as shall seem necessary in the preparation" of such policy, and it was the duty of the attorney general to perform such service. The insurance commissioner was required, on or before September 1, 1891, to file in his office the printed form, in blank, of such contract or policy, and immediately thereafter he was to have 500 copies of the same, with this act, printed, and to mail to each company doing a fire insurance business in the state copies of the same. The 4th section provides that after September 1, 1891, no such insurance company shall use any other form of policy, and "no other or different provision, agreement, condition, or clause shall, in any manner, be made a part of said contract or policy or be indorsed thereon or delivered therewith, except" that certain "riders" may be used, which are in no case to be "inconsistent with or a waiver of the conditions of the standard policy" therein provided for. It was impossible to adopt the New York standard policy without repealing certain statutes of this state on the subject of fire insurance, directly contravening the provisions of such policy, *viz.*, the valued policy law and the insurance agency law. Rev. Stat. §§ 1943, 1947. The act did not contain any repealing clause, but its evident intention was that the various statutory provisions existing upon the subject of cancellation of policies, and under the by-laws, rules, and regulations of companies made pursuant to their charters, and in respect to proof of loss, should be repealed; for it was provided that five days' notice of cancellation should be given, and proof of loss should be furnished within sixty days after the fire.

The New York standard policy provides that proof of loss shall be furnished within sixty days after the fire, "unless such time is extended in writing by the company,"—a provision omitted from the Wisconsin policy, as approved and adopted, as well as the provision of the New York policy that "no suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the insured with all the

foregoing requirements, or unless commenced within twelve months next after the fire," to avoid, it is said, conflict with sections 4219, 4222, Rev. Stat., or the general statutes of limitation. As the legislature could not, for reasons thus indicated, adopt the New York standard policy, the power was so delegated by the act to the insurance commissioner, to prepare, approve, and adopt a printed form, in blank, of a contract or policy of fire insurance, etc., which would, "as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy." The result was that, until the discretion vested in the commissioner should be exercised, and such form was so approved and adopted, no business of insurance could be transacted under the act. Until then the act was ineffectual, for want of certainty. Evidently, the conformity to "type and form" of the New York standard policy, had reference to the form of that policy as embracing the substance of the provisions of the contract, and as to the size and kind of type to be used in printing the policy to be adopted. Had the commissioner wholly declined to prepare, approve, and adopt any form whatever, it would not have been possible to have carried into effect so imperfect or uncertain an enactment, or to transact business under it. Within the lines indicated, a discretion was reposed in the commissioner as to the form of the policy which embodied the substance of the contract, and which was to have the sanction and force of law. The effect, clearly, was to transfer to him bodily the legislative power of the state on that subject. Within the limits prescribed, he was to prepare just such a policy or contract as, in his judgment and discretion, would meet the legal exigencies of the case, and no one could certainly predict what the result of his action might be. It was not to be published, as laws are required to be, or to be approved by the governor. It was to be filed in the office of the insurance commissioner, instead of being deposited in the office of the secretary of state, and its use was to be enforced by the penal sanction of the act. He was not required by the act to perform any mere administrative or executive duty, or to determine any matter of fact for the purpose of executing or carrying the act into effect.

The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors or other appointee or delegate of the legislature, so that, in form and substance, it is a law, in all its details, *in presenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event. Instead of preparing a form of standard policy, and adjusting it to the existing legislation, or modifying such legislation, if necessary, by virtue of its constitutional functions, the legislature delivered over this task wholly to the insurance commissioner, to accomplish it as nearly as might be; and this depended wholly upon his discretion and judgment as to what the

law should be in this respect, for the act had not specifically declared it. Conceding that the legislature might have adopted the New York form as an entirety, by the use of general language, it is evident that the proposed form, to conform "as near as can be to the form adopted in New York," involved a duty equivalent to that of revision, which it cannot be contended could be delegated, except subject to legislative approval. While the commissioner, within the discretion intrusted to him, might have approximated, in a great degree, to the policy which the legislature may have intended, the objection, in view of the consideration stated, that it has not received the legislative sanction, is necessarily fatal to it. The cases of *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 298, and *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 874, 1 L. R. A. 744, 2 Intern. Com. Rep. 325, are not in conflict, but in harmony, with the conclusion we have reached, as to what is and what is not an unconstitutional delegation of the legislative power. For these reasons, we hold that the provision authorizing the insurance commissioner to prepare, approve, and adopt a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed thereon or added thereto, and form a part of such contract or policy, and that such form shall, as near as the same can be made applicable, conform to the type and form of the New York standard fire insurance policy, so called and known, is unconstitutional and void. Conclusions in accord with these views, in somewhat similar cases, have been reached in other states. *Anderson v. Manchester F. Assur. Co.* (Minn.) 28 L. R. A. 610; *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L. R. A. 715. The instruction of the court to the jury that if the plaintiff Dowling, at the time

the policy was issued, stated to defendant's agent fully the existence of the encumbrances, they would find in favor of the plaintiffs, was correct, and in conformity with previous decisions of this court on the subject of waiver of conditions of forfeitures in the policy against encumbrances. *Renier v. Dwelling House Ins. Co.* 74 Wis. 94, and cases there cited; *Bourgeois v. Mutual F. Ins. Co.* 86 Wis. 402.

2. Evidence was given tending to show that proofs of loss under the policy were prepared and mailed to the company at their principal office, and that a postal card had been received from the defendant acknowledging receipt of the same. A copy of the proofs was delivered to the local agent of the defendant, and a copy retained by the plaintiffs' attorney, which, with such postal card, were offered in evidence, against the defendant's objection, it being conceded that notice had been given to produce the original proofs. It was competent to show in this manner that proofs of loss had been seasonably furnished to the company, although such proofs were not competent evidence of the facts therein contained. We therefore see no objection to the admission in evidence of the copy of proofs and the postal card in question. It does not appear that any objection had been made to the proofs, and we do not think that the defendant has any just ground of complaint on account of the ruling.

It is urged as ground for reversal that the evidence showing the amount of the plaintiffs' damages was insufficient to warrant the amount of the verdict. Without recapitulating the evidence, we will content ourselves with saying that we think it was sufficient to warrant the finding of the jury. It does not appear that any ground exists for a reversal of the judgment.

The judgment of the Circuit Court is affirmed.

MAINE SUPREME JUDICIAL COURT.

Frank E. BROWN

v.

Dana P. FOSTER.

(.....Me.....)

1. A practical interpretation of a statute accepted as correct for nearly three quarters of a century is entitled to respectful consideration by the courts.

2. A mayor can vote only to break a tie, and not to make one, in the election of a city officer "by joint convention of the city council," under a charter which provides "that the mayor shall preside in the board of aldermen and joint meetings of the two boards but shall have only a casting vote," although another provision declares that "the mayor, board of alder-

men, and common council shall constitute the city council."

(May 29, 1885.)

EXCEPTIONS by respondent to rulings of the Supreme Judicial Court for Kennebec County made during a trial of a mandamus proceeding to compel the surrender of the books, papers, and records belonging to the office of a clerk of the city of Waterville, which resulted in the issuance of the writ. *Overruled.*

The facts are stated in the opinion.

Messrs. Reuben Foster, Dana P. Foster, and Warren C. Philbrook, for respondent:

Where the presiding officer is a member of the body, he can vote in elections even though limited to "only the casting vote."

Cushing, §§ 309, 310.

Waterville's mayor is a member of the city council, and if limited by section 3 of the char-

NOTE.—As to casting vote in a representative body, see note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 308; also *Magenan v. Fremont* (Neb.) 9 L. R. A. 786; *State v. Plinkerman* (Conn.) 22 L. R. A. 653; *Wooster v. Mullins* (Conn.) 25 L. R. A. 694. 21 L. R. A.

ter to "only a casting vote," then according to parliamentary law he can vote in elections in the first instance like other members.

Mr. S. S. Brown for petitioner.

Peters, Ch. J., delivered the opinion of the court:

The only question sought to be settled by this proceeding of mandamus is whether the mayor of the city of Waterville is entitled by the provisions of the charter of that city (Priv. & Sp. Laws 1887, chap. 195) to vote with the aldermen and councilmen in joint convention in the election of subordinate city officers (in the present case, in the election of a city clerk), besides having the casting vote in such election in case of a tie.

The case comes to us upon exceptions to the ruling of the justice of this court who tried the action, and who decided that the mayor had no such right as was claimed and exercised by him, the learned justice making at the time the following oral observations in support of his conclusion:

"It appears that eleven members of the city council in joint convention voted for the petitioner for city clerk, and ten for the respondent. Thereupon the mayor claimed the right to vote, and did vote, for the respondent, who now claims that no person received a majority of all the votes, and hence there was no election for city clerk.

"In determining the mayor's right to vote under these circumstances, recourse must first be had to the city charter of Waterville. It is provided in § 2 of this act of incorporation that the 'mayor, board of aldermen, and common council shall constitute the city council.'

"Section 3 provides that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote.' It is further provided in the same section that the 'city council may elect the mayor to any city office and allow him a reasonable compensation for service rendered in such office;' while by section 17 the aldermen and common council are declared to be ineligible to any office of profit or emolument the salary of which is payable by the city.

"Section 6 provides that 'all officers of the police and health departments shall be appointed by nomination by the mayor and confirmed by the aldermen. . . . All other subordinate officers shall be elected by joint convention of the city council.'

"These provisions of the charter must be construed with reference to the general policy of our law respecting municipal government, and in the light of the familiar rule of construction that, as the different parts of a law reflect light upon each other, it should be so expounded, if practicable, as to avoid any contradiction or inconsistency, and give some effect to every part of it.

"The provision that the mayor 'shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote,' is found in precisely the same language in every city charter in the state from its early history to the present time; and, with the exception of the express

mention of the mayor as one of those constituting the 'city council' of Waterville, all the other provisions relating to the point under consideration are essentially the same in all other charters as in the Waterville charter. It has been the obvious policy of the state to provide in their charters for annual city elections, and to give effect to the free voice of the people, and insure the orderly continuance of the city governments, by facilitating rather than obstructing the annual elections of officers; and it is understood to have been the uniform practice, under all these charters, for the mayor to exercise the right in joint convention to give only a casting vote for the purpose of breaking a tie, and not for the purpose of making one. Such a practical interpretation, which has been accepted as correct for nearly three fourths of a century, is entitled to respectful consideration in the decision of such a question.

"This view of the construction to be given the right to give 'only a casting vote' is strengthened by § 34 of chap. 3 of the Revised Statutes, which declares that, in the 'election of any city officers by ballot in the . . . convention of the aldermen and common council in which the mayor has a right to give a casting vote if two or more candidates have each half of the ballots cast, he shall determine and declare which of them is elected.' Here is a plain implication that the term 'casting vote,' as used in this connection, is restricted to a vote thrown by the mayor as a presiding officer when the votes cast by the members are equally divided. It seems clear that, if it had been the purpose of the legislature to make such an important distinction between the Waterville charter and all others as the respondent contends for, more explicit and unequivocal language would have been used than any found in this act. The mere mention of the mayor in connection with the aldermen and common council as of those constituting the city council is not sufficient to show such intention.

"It is plain, also, that no distinction was intended between the 'joint meetings of the two boards,' in which the mayor has 'only a casting vote,' and the 'joint convention of the city council,' for the election of officers; for it has not been suggested that 'joint meetings of the two boards' are held for the transaction of any business worthy of mention, other than the election of subordinate officers.

"For these reasons it seems to be my duty to grant the petition and order the writ of mandamus to issue."

In the views expressed in this statement we fully concur.

The force of the argument in favor of this pretended prerogative of the mayor rests in an introductory clause in the city charter, which declares that "the mayor, board of aldermen, and common council shall constitute the city council;" it being further provided in a subsequent section of the charter that certain subordinate city officers "shall be elected by joint convention of the city council."

But while the first clause, in very general terms, describes the mayor as a part of the

city, council, the meaning of that declaration is found in other and subsequent clauses and sections, which define with particularity just what part of the city council he shall be considered to be. Such subsequent provisions of the charter declare exactly what the powers of the mayor shall be, and in what manner the same shall be exercised. Nor does the clause in section 2, which embraces aldermen and common councilmen within the composition of the city council, as well as it does the mayor, attempt to define or limit their powers or duties, but those also are left to be enumerated afterwards.

The charter confers various special powers on the mayor, among which is the power of appointment in many instances. He is so far a part of the city government that no legislative act can be passed by the other branches without his approval, unless by a vote of two thirds of the members in each of such other branches of the government. It is in this sense, and to the extent of such powers as are specially committed to him, and no further, that he is a part of the city council. No other construction of the charter as a whole will make a consistent and sensible instrument of it.

In another respect may the mayor, in a general, if not a strict and technical, sense, be denominated some part of the city council, and that is because he presides over the meetings of the aldermen, and over "the joint convention of the city council." But the section granting him that privilege expressly provides that in the business of such meetings he shall have, not a casting vote, but "only" a casting vote. This is a wise recognition of the parliamentary principle which allows a presiding officer the authority of holding a balance of power between equally divided votes of a deliberative body, in order to facilitate, but not to block, legislation; or, as the justice presiding in this case expressed it, for breaking, but not for making, a tie vote.

It will be seen on an examination of the charter in question that the phrase "city council" is employed in several instances as evidently including the two boards, and excluding the mayor. This idea pulsates throughout most of the provisions of the charter.

Exceptions overruled.

Peter DOYLE *et al.*

v.

Patrick WHALEN *et al.*

(87 Me. 414.)

1. A fund contributed for the relief of sufferers from a fire, by persons whose identity is lost so that a surplus cannot be returned to them, must be expended for the benefit of such sufferers, and cannot be capitalized for the support of the town poor generally.

NOTE.—For a case somewhat similar to the above in respect to a trust in funds donated to sufferers from some calamity, see Supreme Lodge K. & L. of H. v. Owens (Ky.) 20 L. R. A. 847.

31 L. R. A.

2. Sufferers from a fire for whose benefit a fund has been donated by individuals unknown may maintain a bill to compel the trustees to expend the fund for their benefit, if the trustees have undertaken to capitalize the fund for the general benefit of the poor of the town.

(April 13, 1895.)

R EPORT by the Supreme Judicial Court for Washington County for the opinion of the full bench of a suit brought to compel defendants as trustees of a fund for the relief of sufferers from a fire in Eastport to distribute the fund among such sufferers. *Decree for plaintiffs.*

The bill alleged that defendants were a finance committee appointed to receive and distribute a fund which had been contributed to the sufferers from the Eastport fire in 1886; and it sought an account from them of what they had done with the money, and prayed that the fund remaining in their hands and the proceeds of a building which they had erected from such funds called the "Relief Building" should be distributed among the sufferers of the Eastport fire and not applied to the general relief of the poor of the town. Defendants answered admitting that a large amount of property in Eastport was destroyed by fire; but denied that any of plaintiffs were in a condition of suffering or distress caused by the fire. They admitted that contributions of clothing, money, and supplies had been sent, but denied that such contributions were ever intended by their donors for the purpose of making good to persons not in suffering or distress losses sustained by reason of the fire. That a relief committee was chosen who received the contributions and distributed a large part thereof among those entitled to receive them; that the committee gave their time without compensation to the work of distribution, held regular meetings, considered every case and relieved every instance of distress existing, and that there then remained in the relief fund the sum of \$20,000 which was invested in Eastport 4 per cent bonds, the income of which was used in the relief of actual destitution and distress existing in the town. That many people in Eastport were left without homes by reason of the fire, and it became necessary to erect a relief building for their accommodation. That by reason of cold the erection of the building was delayed for some time, but it was finally completed and used for the benefit of sufferers by the fire so long as any actual destitution or distress resulting therefrom existed, but since that time had been used to furnish apartments free of rent to worthy poor persons of said town, and a portion of the building during a part of the time had been used as a place for keeping a primary school. That the funds were therefore being used so far as practicable directly for the purposes for which they were given or for purposes which approximate as closely to such purposes as is reasonable or practicable to do. They prayed that the bill be dismissed with costs.

Further facts appear in the opinion.

Messrs. A. MacNichol and G. A. Curran for plaintiffs.

Messrs. J. W. Symonds, D. W. Snow, and C. S. Cook for defendants.

Whitehouse, J., delivered the opinion of the court:

On the 14th day of October, 1886, the town of Eastport, in this state, was the scene of a destructive conflagration, which caused temporary destitution and distress among the inhabitants. News of the disaster awakened a widespread feeling of sympathy, and a spirit of active benevolence, which resulted in generous contributions of money and various articles of supplies from nearly all parts of New England, and many points beyond, "for the relief of the sufferers by the fire." The total amount of the money thus contributed exceeded \$38,000. A relief committee of twenty was promptly organized at Eastport, with appropriate officers and subcommittees, for the purpose of making these voluntary offerings of the people at once available in relieving suffering and distress. During the fall and winter following the fire, the committee received applications, and systematically dispensed the supplies and disbursed the funds thus received to those who appeared to be in need of immediate relief in consequence of the fire. A relief building was also erected, at an expense of about \$5,000, taken from the relief fund, for the accommodation of those who were left homeless and shelterless by the fire.

But on the 3d day of March, 1887, the following resolution was adopted by the full committee: "Resolved, that the reduced condition of the relief fund, together with the distressed condition of over fifty families, comprising more than two hundred persons, for which the committee is obliged to provide food, fuel, and clothing for an indefinite period, forbid the appropriation of large sums of money aid in the future." It appears, however, that at this time only \$3,000 in money had been disbursed, and that there was then in the hands of the finance committee an unexpended balance amounting to \$35,000, of which the sum of \$20,000 was soon after invested in the 4 per cent bonds of the town of Eastport; and on the 31st day of March it was voted by the committee that the \$20,000 so invested "be made a permanent fund, the interest of which to be used in aiding towards the support of the town poor." On the 21st day of April, 1889, it was voted that the finance committee of the relief committee (the individual defendants in this proceeding), in connection with the treasurer of the relief committee, be authorized to act as trustees, and to hold all bonds, property, money, etc., and thereupon the committee "adjourned *sine die*."

It is not in controversy that since that date the treasurer of the relief committee has been the custodian of the bonds in which this fund of \$20,000 was invested; that the income thereof has been regularly collected by him, and turned over to the town treasurer; and that it has then been disbursed and distributed, through the agency of the successive overseers of the poor, for the purpose of relieving actual destitution and distress in the town, without special reference to the inquiry whether the necessity for such relief was occasioned by the fire, or otherwise. The relief building, since that date, has been used to furnish apartments and tenements, free from rent, to the worthy poor, some of whom met with losses by the fire;

and a portion of the building has been used as a schoolhouse, for a public school.

The plaintiffs represent that they suffered great loss by the fire, and complain, on their own behalf, and in behalf of all others of like interest with themselves, that they are aggrieved by the refusal of the committee to distribute this generous fund among the sufferers by the fire in accordance with the intention of the donors. They contend that it should have been used to repair the losses, as well as to relieve the destitution and distress, of the sufferers by the fire, and that the appropriation of it as a supplement to the pauper fund of the town is wholly unauthorized, for the reason that it aids the rich as well as the poor, without distinguishing the sufferers by the fire, by relieving all, alike, of a part of the burden of taxation, and thus diverts these charitable donations from the purposes and uses for which they were designed.

The defendants say that these benevolent contributions came properly and rightfully into custody of the relief committee, with an express or implied request that they should be distributed, in the sound discretion of the committee, for the relief of actual suffering and distress caused by the fire; that they labored faithfully and gratuitously to discharge the responsibility imposed upon them, and distributed the supplies and disbursed the funds, according to their best judgment, for the real purpose for which they were donated; and that, "in so far as they were not required and could not be used specifically for the primary purpose for which they were intended, they had been used and are being used by the inhabitants of Eastport for purposes which approximate as closely, and are as nearly akin, to the purpose for which they were designed, as it is reasonable or practicable to do." They further say that it was never the intention of the committee that the income of the \$20,000 should be used as a part of the pauper funds of Eastport, or as a substitute therefor, or that the receipt or any part of it should affect the persons in whose favor it was applied with pauper disabilities. They accordingly contend that the mere fact that the plaintiffs' applications for more of the funds than they have received have not been approved by the committee does not give them the right to appeal from this domestic tribunal, and call on the court to administer the fund.

The situation presents some novel inquiries, which are not entirely free from difficulty. These prompt and liberal donations were acts of benevolence, primarily designed, undoubtedly, for the immediate relief of the needy and distressed among the sufferers by the fire. The existence of a large surplus, after suitable relief had been afforded in all cases of actual distress, was probably a contingency not anticipated by the charitable donors. But, in all the letters and telegrams received from them, it is either directly expressed or clearly implied that all contributions of money and supplies were to be applied "for the benefit of the sufferers by that fire." There is nowhere any intention of a purpose to bestow these gifts upon all the worthy poor of Eastport, and it may fairly be assumed that it was never in their contemplation to create a permanent fund for

such public charitable use in that town. The result of these gratuities was to create a private charity for the benefit of a designated class of persons, who were already well-known, or who were capable of being readily ascertained. "A good charitable use is 'public,' not in the sense that it must be executed openly and in public, but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit.

It is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected." *Saltonstall v. Sanders*, 11 Allen, 456. The essential elements of a public charity are that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite, unrestricted quality that gives it its public character. *Donohugh's Appeal*, 86 Pa. 306; *Bangor v. Rising Virtue Lodge No. 10, F. & A. M.* 73 Me. 428 40 Am. Rep. 369. "Private trusts," says Mr. Pomeroy, "are . . . for the benefit of certain and designated individuals in which the *cestui que trust* is a known person or class of persons. Public, or, as they are frequently termed, charitable, trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the *cestui que trust* may be a portion or class of a public community,—as, for example, the poor or the children of a particular town or parish." 2 Pom. Eq. Jur. § 987. "In private trusts," says Mr. Perry, "the beneficial interest is vested absolutely in some individual or individuals who are, or within a certain time may be, definitely ascertained; and to whom, therefore, collectively, unless under some disability, it is, or within the allowed limit will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity. . . . But a trust created for charitable or public purposes is not subject to similar limitations, but it may continue for a permanent or indefinite time." 1 Perry, Tr. § 384. In *Atty. Gen. v. Price*, 17 Ves. Jr. 371, Lord Hardwicke draws this distinction between the creation of permanent trusts and the exercise of present benevolence, observing of the former, "It is to have perpetual continuance, in favor of a particular description of the poor, and is not like an immediate bequest of a sum to be distributed among poor relations."

The defendants, then, with other members of the committee of twenty, became trustees for the execution of a private trust for the benefit of the sufferers by the fire. The administration of the trust was, in the first instance, committed to their discretion; and having reference to the primary purpose of the contributions, after all cases of actual distress and need had, according to their best judgment, been amply relieved by them, the committee would doubtless have been justified, if such a course had been practicable, in restoring to the donors the unexpended balance. This would have been the obvious equity of the situation, but its observance was not possible, since by far the larger part of the contribution in money was received, through the agency of municipal officers, from very small donations made by numerous persons, whose names are

now as unknown as the contributor of the "widow's mite."

In the administration of trusts under the general equity jurisdiction of the court, it is an old and familiar principle that if the original purpose of a public charity fail, and there are no objects to which, under the specific terms of the trust, the funds can be applied, the court may determine whether in the event that has happened, it was not the probable intention of the donor that his gift should be applied to some kindred charity, as nearly like the original purpose as possible. This is commonly known as the "doctrine of *cy pres*," which, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain, and carry out as nearly as may be, the true intention of the donor. *Jackson v. Phillips*, 14 Allen, 539; 2 Perry, Tr. §§ 717-720, and cases cited. But if it appears that the gift was for a particular purpose only, and that there was no general charitable intention, the court cannot, by construction, apply the gift *cy pres* the original purpose. "There is a class of cases," says Mr. Perry, "where the gift is distinctly limited to particular persons or establishments, and upon a change of circumstances the doctrine of *cy pres* does not apply." *Id.* § 725, note, and section 726, and cases cited. It is not applicable to private trusts to the extent of authorizing the court to convert the funds donated for a private and particular purpose into a permanent fund for a public charitable use of a different character. *Coe v. Washington Mills*, 149 Mass. 549; 2 Pom. Eq. Jur. § 1027.

In the case at bar there is no evidence of *mala fides* on the part of the defendants, or any member of the relief committee, in their management of the funds intrusted to their charge. As suggested by the learned counsel for the defendants, the apparently unwarranted resolution of March 3, above quoted, was doubtless designed to discourage the more persistent and less meritorious applications. But a careful examination of the evidence reported leads to the conclusion that the committee managed the fund under the influence of a too rigid construction of its primary purpose, and not in the spirit of helpful beneficence and liberality contemplated by the charitable donors.

It is clear, then, that the donors did not expect or intend that any part of their contribution should be returned to them, or, if so, that it is not practicable to effectuate such intention. It is equally clear that they had no purpose to create a permanent fund for a public and general charity in Eastport. Their bounty was distinctly limited to a specified class of persons then in being. As stated in some of the letters, it was "for the benefit of the sufferers by the fire." These sufferers, or their legal representatives, may still be found; and, if the privilege is granted, it may safely be assumed that they will promptly apply for their respective shares of the fund under any new scheme devised for its distribution. The trust has not failed. The application of a rule of construction analogous to the doctrine of *cy pres* discovers a probable intention on the part of the donors that, when the primary purpose of their contribution should be accomplished,

the surplus, if any, should be used to repair the losses, as well as to relieve the immediate distress of the sufferers by the fire. As the value of the property destroyed is estimated to reach an aggregate of \$750,000, and \$400,000 above all insurance, it would seem that the entire relief fund might have been distributed among the sufferers under a scheme not greatly at variance with the probable intention and wishes of the donors.

It may be true, as claimed, that there has been no definite purpose to employ this fund as a substitute for municipal taxation in the support of the town poor, but such a perversion of the charity will be the inevitable result, if the course adopted after the fund was capitalized shall be pursued in the future. Such a course is contrary to sound public policy, as tending to discourage the prompt exercise or similar acts of humanity and Christian benevolence in like exigencies in the future.

The situation, therefore, requires the court to assume jurisdiction of the matter, and to appoint special masters in chancery, who, after due notice of the times and places appointed therefor, shall receive applications from all sufferers by the fire, hear evidence in regard to the nature and extent of their respective sufferings and losses, and thereupon devise a scheme for the distribution among such sufferers of the entire relief fund now available, and which may be available for that purpose at the time of final decree. In determining the proportional part of the fund which each should receive, the masters may be justified in considering, not only the actual distress and amount of loss suffered by each, but the difference in the degree of suffering entailed upon the rich and upon the poor by the same amount of loss, and such other cognate matters as, in their good judgment and discretion, will aid in reaching conclusions most in harmony with the probable wishes and purposes of the donors under these circumstances; such conclusions to be reported to the court for acceptance and approval. The fund for distribution will consist of the 4 per cent bonds of the town of Eastport, in which the sum of \$20,000 was invested, with all income thereof not expended by the defendants prior to the service of this

bill, and all interest which has accrued therein since the service of this bill, and also of the proceeds from the sale of the Relief Building. Such sale is to be effected by the defendants in conjunction with E. E. Shead, treasurer of the committee, who is to be made a party to this bill, under the direction of a single justice. The proceeds thereof, and also the bonds and income above named, will be held by the defendants and E. E. Shead, treasurer, until further order of the court.

Lemuel G. Downes, of Calais, Benj. B. Murray of Pembroke, and Reuel Small, of Deering, are to be appointed masters.

Bill sustained. Decree in accordance with opinion.

Haskell, J.:

I consider the donation an express, public, charitable trust. Express, because applied to a specific object. Public and charitable because given for the relief of suffering visited upon an undetermined portion of a community, the result of conflagration. It was the generous outpouring of money to relieve suffering humanity from misfortune that had befallen a city, and made hundreds of its inhabitants houseless, homeless, idle, and sick, in late autumn, with the frosts of a northern winter hard by.

To these purposes it should have been promptly applied, not with stingy hand, but with such broad and generous spirit as moved the donation. It was not indemnity, but relief. Relief for suffering, whether occasioned by loss of property, or of health, or of employment that earned bread, albeit a result from the conflagration that worked a distress to incite the donation.

The proofs show that suffering entailed by the calamity still remains. The donors intended that it should long ago have been relieved. That intent must now be put in execution. I concur, therefore, in sending the cause to masters for an account of individuals still suffering from the effects of the fire, and to devise such equitable methods of distribution as seem best suited to carry out the purposes of the donation.

ARKANSAS SUPREME COURT.

H. M. RECTOR, *Appt.*,

v.

MCCARTHY & JOYCE.

(.....Ark.....)

A guaranty of the payment of interest
on a note runs only until the maturity of the note.

(January 4, 1896.)

NOTE.—The exact point of the above case seems to have been very rarely before the courts. The present case is therefore important and the opinion and briefs believed to present the substance of the law on the subject.

31 L. R. A.

A PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County in his favor for a less sum than he demanded in an action upon a contract guaranteeing payment of interest on a note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Rose, Hemingway, & Rose for appellant.

Messrs. S. R. Cockrill and Ashley Cockrill, for appellees:

A guaranty is construed strictly in favor of the grantor, and must be construed so as to give effect to the intention of the parties as gathered from the surrounding circumstances.

State v. Churchill, 48 Ark. 442; *Brandt, Suretyship & Guaranty*, § 93; *Bell v. Bruen*,

42 U. S. 1 How. 169, 11 L. ed. 89; *Lee v. Dick*, 35 U. S. 10 Pet. 493, 9 L. ed. 507; *Mauran v. Bullua*, 41 U. S. 16 Pet. 528, 10 L. ed. 1056; *Baylies, Sureties & Guarantors*, pp. 6, 124; *White's Bank v. Myles*, 73 N. Y. 335.

If the guaranty extends beyond the date of the maturity of the notes, it extends forever. The guarantors would not have even the poor privilege of discharging their obligation by the payment of the principal, for they are not parties to the note, and a creditor is not bound to accept his debt from a stranger to the contract. Can it be possible that the parties contemplated that interest should thus run on forever?

Robson v. Tomlinson, 54 Ark. 229; 1 Brandt, *Suretyship & Guaranty*, §§ 167-179.

The legal presumption was that the maker would discharge the notes when they became due. The guarantors contracted with reference to that fact.

Hamilton v. VanRensselaer, 43 N. Y. 244; 1 Brandt, *Suretyship & Guaranty*, §§ 166-175; *Roberts v. Miles*, 12 Mich. 297.

Every person is supposed to have some regard for his own interest; and it is not reasonable to presume that any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms or by clear implication.

Whitney v. Groot, 24 Wend. 82; *Anderson v. Blakely*, 2 Watts & S. 237; *Baker v. Rand*, 13 Barb. 158; *Knowlton v. Hersey*, 76 Me. 345; *Frost v. Weathershee*, 32 S. C. 354; *Birdall v. Hancock*, 32 Ohio St. 324, 30 Am. Rep. 572; *Morgan v. Boyer*, 39 Ohio St. 324, 48 Am. Rep. 454; *Schwartz v. Hyman*, 107 N. Y. 565.

Bunn, Ch. J., delivered the opinion of the court:

Sam J. Churchill executed to appellant his two promissory notes, in the following form:

(\$1,083.33)

Little Rock, Ark., Jan. 1, 1890.

On or before the 1st day of January, 1892, for value received, I promise to pay H. M. Rector one thousand and eighty-three dollars and thirty-three cents, with interest at the rate of ten per cent per annum from date until paid; interest payable annually. As witness my hand, the date above written.

Sam J. Churchill.

Upon this note the appellees made the following guaranty:

We guarantee the payment of the interest on the above note.

[Signed]

McCarthy & Joyce.

It is further agreed that the said two notes were given by the said Sam J. Churchill for a lot of stock and farming implements on what was known as the plaintiff's farm, in Pulaski county, Ark., which he had leased from the plaintiff for three years from date of notes; and that the said Sam J. Churchill also executed a mortgage on said stock and property to secure the said notes; that the said Sam J. Churchill abandoned the Rector farm, which he had leased, and failed to pay the first note

due for said stock; and thereupon the plaintiff H. M. Rector, through the trustee in the deed of trust securing said notes, took possession of the said stock and farm property, and sold it and appropriated the proceeds in part payment of the mortgage debt. This sale was had in February, 1891, and by said sale \$173.78 was paid on the note in suit first maturing, such payment being credited as of February 17, 1891. "It is further agreed that the guaranty of interest, as written upon said notes, was written by the defendants in due course of their business as merchants, and for the purpose of enabling Sam J. Churchill to obtain the stock and farm implements for the purpose of farming, in order that he might have an opportunity thereby to pay certain prior indebtedness which he owed the guarantors. It is further agreed that no action has been taken by the plaintiff H. M. Rector to enforce the collection by law of the said notes against Sam J. Churchill since their maturity, and that the said Churchill has been entirely insolvent, and without visible property, since the maturity of said notes and since said mortgage sale."

Appellant sued the appellees for instalments of interest accruing before and after the maturity of the notes, and on the trial before the court, sitting as a jury, asked the following declarations of law: "The guaranty in suit is a continuing guaranty, and running until the notes are paid." The court refused this, and declared that the guaranty ran only until the maturity of the notes, and gave judgment only for the interest accruing before maturity. The plaintiff saved proper exceptions to the ruling, filed a motion for a new trial, saving all points, and, this being overruled, excepted, filed his bill of exceptions, and appealed.

Thus it will appear that the only controversy in this case is whether or not one who guarantees the payment of the interest on a promissory note is bound for the payment of the interest that may accrue after the maturity of the note. There are few cases in the books that bear directly upon this point, although there is no want of authorities that indirectly influence the discussion of it. And from these we gather that the courts have adopted certain rules by which the contracts of sureties and guarantors are to be construed, and some of these rules, briefly stated, are that a surety or guarantor is, first of all, a favored suitor; that the obligation of his contract will not be extended beyond its plain and obvious meaning; and when there are doubt and uncertainty as to the meaning, growing out of an ambiguity of language, that makes construction necessary, the doubt will be resolved in favor of the surety or guarantor, for the reason that he is not, and can never be, the full recipient of the consideration which has accrued or may accrue to the principal debtor, and, further because his situation is comparatively a dependent one, since he does not enjoy the opportunity of protecting himself that belongs to the other parties to the contract. We take it, therefore, that courts are to construe the contracts of these favored suitors not exactly by the same rule as they would construe the contracts of the principal parties to the contracts. Thus while, as between these principals, the contract

is to be construed so as to express the meaning and intention of both parties to it, in the case of the surety or guarantor that construction is to be given to his contract which will cause it to express his meaning and intention, and this intention to be such as the guaranteed party should have reasonably attributed to the guarantor in making the contract, judging from the circumstances surrounding and the object to be attained. 1 Brandt, Suretyship & Guaranty, §§ 122, 123, 156. The principle announced is more readily understood by illustration than by mere general definition of the obligation. It would lengthen out this opinion too much, of course, to pursue the argument by that method. Cases wherein the contracts were held to be continuing are cited and commented upon in 1 Brandt on Suretyship & Guaranty, §§ 157-161, inclusive; and, when not continuing, from sections 161-165. In section 166 of the same book this general principle is announced: "When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified." Thus it is said that when an officer lawfully holds beyond the term for which he was elected or appointed, the surety on his official bond will not be bound for his acts or defaults after the expiration of the term for which he was elected or appointed. Of course, the recitals of the bond itself might be made to cover the additional time. In *Hamilton v. Van Rensselaer*, 43 N. Y. 244, where, Waddington and two others being indebted to the plaintiff's assignor in the sum of \$10,000, it was agreed in July, 1854, that he would be released from this joint obligation upon executing and delivering his bond for one third of said amount, payable in January, 1861, with semi-annual interest, and defendant's guaranty of payment of the interest, which was done. The guaranty by defendant was as follows, indorsed on the bond given: "For value received, I guarantee the punctual payment of the interest on demand in default of its payment by Mr. Waddington." The question was whether defendant was bound for the interest beyond the date of the maturity of the bond. Held, that he was not. After adverting to the strict legal doctrine that it is only interest accruing before maturity of the obligation that is denominated interest in the true sense, and that that which accrues afterwards is, strictly speaking, damages for breach of the contract of payment, and also to the contention of plaintiff "that in construing the contract it is not to be supposed that the parties had knowledge of or reference to these legal distinctions when the contract was made, and that business men regard the sum recoverable after the principal is due, in their dealings with each other, as interest in the ordinary sense of the term, and not as compensation by way of damages." Chief Justice Church, in delivering the opinion of the court, said: "Conceding the soundness of this position [of plaintiff's counsel], these recognized distinctions may be resorted to by the defendant to prevent a technical or arbitrary

31 L. R. A.

construction against him. The true rule of construction undoubtedly is, that the intent of the parties, to be gathered from the language and surrounding circumstances, is to prevail. The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only, but when the plaintiff urges that the defendant has employed general words guaranteeing the payment of interest upon the bond without limitation, and that these words include interest after as well as before default, and claims to enforce the rigid rule of liability therefor, it is pertinent to answer that, by strict legal rules, interest as such cannot be recovered after default in the payment of the principal, and that such interest is not, therefore, within the language of the contract." The learned judge continues: "We do not place the decision upon this narrow ground, but prefer to rest it upon the proposition, that by the plain and ordinary meaning of language used in the contract, when applied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract or as damages for its nonperformance, was not in the contemplation of the parties at the time, and was not the interest specified and provided for in the defendant's contract. The construction contended for by the plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The defendant might never be able to discharge the obligation, except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which, it is conceded, he never entered into." The same argument, we think, is applicable to the case now under consideration. We cannot conceive the idea that if, at the time of making the guaranty, the appellee had ever had an intimation that his obligation would be sought to be extended in the end, he would ever have entered into it. It follows, therefore, that, if bound at all, it is not because he so intended when he entered into the contract, but because of a contingency which some technical rule required him to anticipate and provide against.

It seems to us that a guarantor of the payment of interest only,—a mere incident of the debt,—as in this case, is entitled to even greater consideration at the hands of the creditor than one who has guaranteed the whole debt; and the reason is not far to seek. Such a guarantor cannot (if the theory of plaintiff be correct) protect himself by the usual statutory provisions, and is at the mercy of both creditor and debtor; wholly subjected to the consequences of the neglect of the one, and the failure of the other. The principle announced in the case of *Hamilton v. Van Rensselaer* *supra*, was reasserted in *Melick v. Knox*, 44 N. Y. 676, except that in the latter case the theory that interest accruing after maturity is not in fact interest, but damages, which seems to have been in effect discarded as a vital principle in *Hamilton v. Van Rensselaer*, is maintained. If that theory be true, of course it is an additional ground of the affirmance of the judgment in the case now under consideration. However, as we understand it, to break the force of this theory, ap-

pellant's counsel call our attention to the fact that, as a settlement of a controversy once pending here this court has in several cases declared it settled law with us that, where the conventional rate of interest is merely stipulated, and no words employed to indicate the co-existence of the rate of interest with the debt, the conventional rate ceases at the maturity of the debt, and the legal rate then begins; but that, on the contrary, when words are employed indicating the intention of the parties to have been that the conventional should be the rate until the debt should be paid, the interest accruing after maturity is in fact interest, and not damages, because it is so declared by express contract. There is force in this argument, but we are inclined, after all, to the opinion, in view of the peculiar language of our Constitution, and the object sought to be attained in the cases referred to, that the decisions of this court therein were

intended to extend no further than to determine what should be the percentage before and after maturity in any given case; and that the court in none of these cases had in contemplation the distinction between the name and meaning of this percentage before and the same after maturity of the debt; and consequently the theory existing before the decisions as to this distinction remains the same with us, whatever that may have been. But this is only one of the grounds suggested by the courts as a basis for the rule contended for by appellees.

The case is not altogether free from doubt, but from all the authorities directly in point we are able to present on the subject, and from reason, equally as cogent for the position of the court below if not more so than for the opposite one, we are of opinion that *there is no error in the judgment of the court below, and the same is therefore affirmed.*

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania
v.

Benjamin F. JUNKIN *et al.*, *Appts.*

(170 Pa. 194.)

A banker who receives money, knowing that he is insolvent, but puts it into a

special envelope with intent to return it to the depositor, which is afterwards done, without making the money at any time part of the funds of the bank, is not guilty of receiving money from a depositor with knowledge that the bank is insolvent, which under Laws 1889, § 1, is declared to be embezzlement.

(July 18, 1895.)

NOTE.—Criminal liability for receiving deposit in bank knowing of its insolvency.

The legislation making the receiving of deposits by an insolvent banker criminal seems to be of recent origin. But it seems to be extending into new jurisdictions with some rapidity.

The court in *Baker v. State*, 54 Wis. 368, mentions as the states which have adopted statutes for the punishment of bankers who receive deposits when insolvent, the following: Illinois, Iowa, Kansas, Louisiana, California, Missouri, South Carolina, and Michigan. Wisconsin had adopted such a statute which was being construed by the court at the time this list was compiled, and to the list must be added New York, and possibly other states.

The statutes while similar are not so far identical that the construction of one will necessarily control in the construction of others. In Missouri the Constitution establishes the liability. But it has been held that the provisions of the Missouri Constitution are not self-enforcing. *Fusz v. Spaunhorst*, 67 Mo. 256, *Overruling Cummings v. Spaunhorst*, 5 Mo. App. 21.

It is held that if the Constitution states that certain acts shall be a crime, "the nature and punishment of which shall be prescribed by law" there will be no offense until the legislature has defined the crime. *State v. Sattley* (Mo.) 33 S. W. 41.

And also that the provision of the Missouri Constitution for the punishment of managers of banks, who receive deposits when the bank is insolvent, does not apply to a private banker but is confined to incorporated banking institutions. *State v. Kelsey*, 89 Mo. 623.

Although private bankers are included in the amendment to the law passed in 1887. *State v. Buck*, 108 Mo. 622, 120 Mo. 479.

Constitutionality of statutes.

The statutes have been attacked as unconstitutional in several instances. In Alabama the attack 31 L. R. A.

was successful. It was there held that a statute which imposes a fine upon a banker who takes deposits when insolvent of double the amount of the deposits, one half to go to the depositor, and provides for imprisonment in default of payment, but which also provides that repayment of the amount of the deposit shall be a bar to the prosecution, is in violation of the constitutional provision against imprisonment for debt. *Carr v. State* (Ala.) 17 So. 350. But in other states having somewhat different statutes the attacks have failed.

Such an act is not class legislation within the prohibition of constitutional provisions. Nor is it contrary to a constitutional provision against imprisonment for debt. *Robertson v. People*, 20 Colo. 279.

In *Com. v. Smith*, 11 Lanc. L. Rev. 350, the Pennsylvania act of May 9, 1889, was attacked as unconstitutional, but the court without directly passing upon the question upheld the indictment, thereby implying that the statute was constitutional.

Such acts are not unconstitutional. *Baker v. State*, 54 Wis. 368.

Effect of adopting existing nomenclature in defining the offense.

Some effort has been made to defeat the effect of the statutes on the ground that the acts did not come within the class covered by the name applied by the statute. But it has been held that it is immaterial that the statute describes the offense as embezzlement, it cannot be nullified by a construction which reads into its provisions the definition of embezzlement. *Com. v. Rockfellow*, 163 Pa. 139.

So, the fact that the statutory definition of larceny is repugant to common-law definition does not make the statute invalid. *State v. Sattley* (Mo.) 33 S. W. 41.

But unless the legislature expressly denominates the offense as a felony, it will be considered to be

APPEAL by defendants from a judgment of the Court of Quarter Sessions for Perry County convicting them of embezzlement under the statute against the taking by bankers of money from depositors when they know the bank to be insolvent. *Reversed.*

The facts are stated in the opinion.

Messrs. J. C. Bucher, Louis E. Atkinson, Charles A. Barnett, and C. H. Berguer for appellants.

Messrs. Luke Baker, District Attorney, George Kunkel, Albert Millar, and W. H. Woods, for appellee:

Appellants' receipt of Rice's money is within the act even as construed by appellants. Rice was a depositor; he gave his money to them as a deposit; they received it. Is it any the less a receiving as a deposit because it appears they received it intending to return a like amount?

If this were a civil proceeding they would be estopped from setting up the defense that their receipt of the money was not a receipt as a deposit.

Wharton, Contr. §§ 6, 707.

The interpretation of the act by introducing into it the phrase "as a deposit" so that the receipt of money must be such as will create a contractual relation between the person giving and the person receiving, is false and absurd.

This interpretation would amount to a nullification of the act. It violates the principles of strict construction as laid down in *Endlich on Interpretation of Statutes*, p. 453.

If the legislature had intended that a contractual relation should exist between the bank and its depositor, and that without it no conviction should be had, it could have readily so declared.

The technical meaning is rejected as soon as the judicial mind is satisfied that another is more agreeable to the object and intention.

Endlich, Interpretation of Statutes, p. 101.

Dean, J., delivered the opinion of the court:

In September, 1866, the defendants entered into copartnership in the banking business at Bloomfield, Perry county, with three others,

and be a misdemeanor. *Com. v. Schall*, 12 Pa. Co. Ct. 564.

Liability in the absence of statute.

The mere failure of a banker to disclose his insolvent condition on receiving a deposit does not amount to a false representation or pretense within the meaning of the section of the New York Penal Code for the punishment of persons obtaining property by such means. *People v. Moore*, 3 N. Y. Crim. Rep. 458.

In the absence of express statutes the mere failure of the banker to repay money deposited with him cannot be embezzlement. *People v. Wadsworth*, 63 Mich. 500.

So, the mere fact that the banker subjects himself to prosecution under the statute does not necessarily make him guilty of fraud which will render him subject to attachment. *Hughes v. Lake*, 63 Miss. 532.

Who liable.

The banker is liable if the money is received by the cashier. *State v. Cadwell*, 79 Iowa, 432.

Although deposits are received contrary to the orders of the manager of a bank, if, after learning of that fact he does not repudiate the act and return them, he will be guilty under the statute. *State v. Eifert* (Iowa) 65 N. W. 302.

The mere fact that the manager of the banks is away from the city where the business is carried on at the time the money is taken by the teller, will not relieve him from prosecution under the Alabama statute. *Carr v. State* (Ala.) 16 So. 150.

The managing officers of the bank can be convicted upon receipt of the deposit by a subordinate, if he acted under their authority. *State v. Sattley* (Mo.) 33 S. W. 41.

The Wisconsin act applies to persons who are themselves engaged in the business of banking, and not merely to employees of banks or banking corporations. *Baker v. State*, 54 Wis. 368.

Liability of partnership.

A partnership cannot be found guilty of the crime, upon proof merely that the individual partners were insolvent when the deposits were received. *People v. Meadowcroft*, 27 Chicago Legal News, 251.

Insolvency of the partnership must be charged if the attempt is to render the partnership liable. *Com. v. Delamater*, 2 Pa. Dist. R. 121.

31 L. R. A.

Sufficiency of proof.

The burden of proof is upon the commonwealth. *Com. v. Schall*, 12 Pa. Co. Ct. 206.

The legislature may make failure within thirty days after receipt of the deposit *prima facie* evidence of knowledge on the part of the banker that the bank was insolvent at the time of the reception of the deposit. *Robertson v. People*, 20 Colo. 279.

It must be shown that the money is lost by being received by the bank, or mere receipt of a deposit from a customer who is indebted to the bank for more than the amount of the deposit is not sufficient. *Com. v. Delamater*, 2 Pa. Dist. R. 121.

So, under the Illinois act the depositor must be shown to have actually lost money by the act of the banker before a conviction can be had. Therefore if the money is brought into court there is an end of the prosecution. *People v. Meadowcroft*, 27 Chicago Legal News, 251.

But under the Kansas act the information need not allege that loss occurred to any one by reason of the act of defendant. *State v. Myers*, 54 Kan. 206.

Other rulings.

The Iowa act applies to national as well as state banks, and is not void when applied to them on the ground that it is an attempt to control and regulate the business operations of national banks, and to prescribe a condition upon which deposits may not be received. *State v. Fields* (Iowa) 62 N. W. 658.

A trust company is not within the provisions of the Missouri statute making it a felony for the officers of an insolvent bank to receive deposits. *State v. Reid*, 125 Mo. 43.

The cause of the failure is immaterial. And it is also immaterial whether the insolvency consists in inability to pay depositors only, or to pay other liabilities. *Carr v. State* (Ala.) 16 So. 150.

Under Pennsylvania act an indictment is sufficient which charges that defendant being a banker and knowing that he was insolvent received money from a depositor. *Com. v. Rockafellow*, 168 Pa. 139.

Money received on a certificate of deposit is a deposit within the meaning of the statute. *State v. Cadwell*, 79 Iowa, 432; *State v. Sattley* (Mo.) 33 S. W. 41.

A bank is insolvent within the meaning of the statute when it is unable to meet its liabilities as they become due in the ordinary course of business. *State v. Cadwell*, *supra*. H. F. F.

under the name of "Perry County Bank," capital, \$30,000. In the year 1876, by death and retirement, the number of partners was so reduced as to leave but these two defendants, who continued the business down to March 24, 1894, when the bank closed its doors because of undisputed insolvency. The defendants, from the time the bank opened until it closed, were lawyers, actively engaged in the practice of their profession in Perry and adjoining counties, so that the personal attention they gave the bank's affairs during that period was only such as men in their situation could give. While often in the bank, they were not there in daily supervision, exercising that watchfulness the nature of the business demanded. Sponsler, it is true, was president, and inspected and passed upon much of the paper discounted, but he did not watch the daily balances of customers, and guard the resources of the bank from depletion by bad banking. This was intrusted to the cashier. When it was organized, William Willis was chosen cashier, and he remained in this position until his death in 1891, when his son, James, who had been an assistant to his father for some years before the latter's death, was chosen to his place. He then continued as cashier until the bank closed. Most of the important details of the management were intrusted to the father and son while cashiers. In the interval of two or three weeks between the death of the father and the selection of the son, Sponsler, one of defendants, acted as cashier. Whether defendants realized the fact is not clear, but the evidence now makes it clear that at this time, when James Willis succeeded to the cashiership, the bank practically was insolvent, because a large part, if not all, of its original capital had been sunk, and no new capital had been contributed. The bank, under the new cashier, as is usual with lame institutions of that character, went limping along, in hopes of bettering its condition, which, however, continued to grow worse, until the end, on Saturday, the 24th of March, 1894. Some days before its close, Junkin without doubt, and Sponsler probably, knew the bank was very seriously embarrassed for money. Their expectation of relief from this condition is not material; their knowledge of the fact is. On Saturday, the 24th, about a quarter to 3 o'clock and just before the bank finally closed, Josiah Rice handed over the counter, as a deposit, \$20. The money was received by Harry E. Bonsall, a clerk, acting under Willis, the cashier, and although afterwards returned to Rice, nevertheless, at the time, the money was mingled with the general funds of the bank. After the bank closed, Rice instituted this criminal prosecution against Junkin and Sponsler, bankers, under the act of May 9, 1889, for receiving a deposit, knowing at the time the bank was insolvent. Being convicted and sentenced to fine and imprisonment, we have before us this appeal.

Appellants prefer sixteen assignments of error to the charge of the court and answers to points. With the exception of the eighth, it would be a waste of time to discuss and pass judgment on these multiplied complaints of error. While the gravity of the consequences of this judgment to their clients doubtless impelled counsel to press them upon our consid-

eration, they are so destitute of merit that an elaborate review is not called for by any duty on our part to the commonwealth or the defendants. The case was most carefully and ably tried. The learned judge of the court below in all his rulings displayed unassailable impartiality, and certainly defendants, unless as to the assignment noted, have no ground whatever of complaint. All assignments except the eighth are therefore formally overruled.

The eighth involves an interpretation of the act of 1889. That act being very short, we quote it in full, thus: "Sec. 1. Be it enacted," etc., "that any banker, broker, or officer of any trust or savings institution, national, state, or private bank, who shall take and receive money from a depositor, with the knowledge that he, they, or the bank, is at the time insolvent, shall be guilty of embezzlement, and shall be punished by a fine in double the amount so received, and imprisoned from one to three years in the penitentiary." The title of the act is "An Act Relating to the Receiving of Deposits by Insolvent Bankers," etc., and the title is part of the act, to be resorted to in interpreting it. There are three essential elements which the commonwealth must prove beyond a reasonable doubt before the jury can find the guilt which the act makes punishable: (1) Actual insolvency at the time the money is received; (2) knowledge of the insolvency; (3) the receipt of the money as a bank deposit. As to the first two elements, there was much evidence tending to establish the fact of insolvency on and long prior to March 23, 1894, and knowledge of such insolvency by both Junkin and Sponsler; and the verdict of the jury on competent evidence, under proper instructions, has established both in favor of the commonwealth. But did the defendants, as bankers, in the face of the prohibition of the statute, receive Rice's money as a bank deposit on the 24th? The essential element of crime, unless otherwise declared by statute, is the intent to commit it, or the wilfulness of it. The legislature can declare an act a crime, and make it punishable, regardless of the intent; but this statute will not bear such interpretation. Its aim is to punish dishonesty; the moral guilt which prompts to falsehood and deception; for there is necessarily moral guilt on the part of a banker who, with knowledge of insolvency, receives as a bank deposit the money of a customer. By necessary implication, when he so receives it he says to the depositor: "My bank is solvent, and is able to repay this amount when called for." If such were not the implied representation, relied on, too, by the depositor, he would not leave his money. To constitute the criminal intent, it is not, however, necessary that the banker at the time intended to defraud the depositor. His intention to repay may have existed. It is the concealment of his present, to him known, inability to pay, and in that condition receiving, as part of the funds of the bank, the depositor's money, which he knows, without the false representation, he would not receive, that constitutes the criminal intent. Was Rice's money received as a deposit of the bank? The defendants, in their sixteenth point, the answer to which is the subject of the eighth assign-

ment of error, requested the court to instruct the jury "that if they believed from the evidence that Willis was ordered not to take deposits on the 24th of March, 1895,—the day the money of Rice was taken,—and, if money was taken, that it must be returned, and it was returned, the verdict must be, 'Not guilty.'" To this the court made answer: "This point is denied. We do not think the question as to whether the money deposited was to be returned, or the fact that it was afterwards returned, is material to the case." Is this rigid interpretation of the act warranted? It must be borne in mind that there was evidence to which the jury were to apply it in making up their verdict. The defendant had called to the stand B. F. Junkin, who had been ill, and confined to his room, from the 1st of February previous to the 24th of March, the day the bank closed. He stated he first learned of its alarming condition on the evening of the 23d of March. On the morning of the 24th he sent a messenger for Willis, the cashier, to come to his house. He came, and he said to him: "Jim, you must not open that bank this day. Absolutely you must not do it." He says: 'I will open it. I must open it.' 'No,' I said, 'Jim, it is closed now, and you can leave it closed, and leave it stand just as it is. This thing must stop.' He says: 'I can't close the bank in the daytime.' 'Why not?' I said. 'Well, I can't and won't close it in the daytime.' I said: 'Jim, if you won't close as I order you to do, and you open its doors, you must not take one deposit this day; not over its counter or anywhere else.' He says: 'I can't open the bank and not take deposits. That would not be banking.' And I says: 'I don't want banking to go on. I want it stopped.' He says: 'I will open the bank, and take deposits just as I have taken deposits.' I said: 'Jim, if you do that, you do it at your peril, and I warn you not to do it,' and I said: 'If you persist in doing this, if you persist in opening the bank against my order, and taking deposits against my order, then take care of yourself. And if you receive deposits, then make special deposits of them, put each up by itself, and put it by itself, and return it to the depositors;' and that he said he would do." This statement is corroborated by Mrs. Junkin, and is partially admitted by Willis, the cashier, the principal witness for the commonwealth. Willis opened the bank, as he declared he would. All the deposits except two or three taken in that day were marked special, and the money and checks put in special envelopes, and afterwards returned. They never entered into or formed part of the funds of the bank. Rice's deposit, as noticed, was taken over the counter by Bonsall, and, as defendants alleged, inadvertently mingled with the bank's funds; but they afterwards returned to him a like amount,—\$20. Putting aside for the present the question raised as to Junkin's answerability criminally for the acts of his agent, assume that he had himself been in the bank that day, and personally received this \$20 at the counter, and had put it in an envelope, marked with Rice's name, to be returned to him in case the bank closed, and then did return to him the same \$20, would that, within the meaning of act, have been the receipt by a banker, knowing the bank to be

insolvent, of money on deposit? The peril to and loss of the depositor's money arises from the concealed insolvency of the bank; but if it never mingles with or forms part of the bank's funds, which are assets for the payment of creditors generally, remains separate from all other funds, and is capable of absolute identification, so that it may be returned, and is actually returned, that does not constitute the criminal receipt of money as a bank deposit. The real deposit, whether on time or call, when passed over the counter, is thereafter the property of the bank absolutely. It is the intention of the depositor and the bank that the latter shall thereafter use it as its own by loaning it to others, and paying it out on checks drawn by others. The express or implied promise of the bank is that it will repay him, not that money, but that amount of money. In the case we are supposing the intention of the banker is to hand back the identical money received, and that intention is manifested, not by what he says, but by what he does, not only at the time, but afterwards. This method of not receiving money on deposit by a banker knowing his insolvency, as demonstrated by the event here, is not an open, unequivocal observance of the law. He subjects himself to the peril of misconstruction of his real intention, and invites criminal accusation. But, unwise as may be the conduct, if no intention in fact existed to appropriate in aid of his insolvent bank the depositor's money, and he did not in fact so appropriate it, he is not a criminal. If such a transaction is not a deposit by a depositor, if there be no contract to which the minds of both parties assented, then it is not within the terms of the act. Penal statutes which inflict punishment must be strictly construed. If Junkin himself would not have been guilty, had he, under such circumstances, personally received the money, he would not be answerable criminally if he instructed his agent to so receive it. Whatever may be the answerability of the principal for the wrongful act of his agent in civil actions, he is not answerable criminally when the act is in positive disobedience of his explicit instructions. Willis was the agent in control. Bonsall was his subordinate. Whether the neglect to specially mark Rice's deposit was wilful or inadvertent on their part, the act cannot be imputed to Junkin, whose orders were directly to the contrary; and if he is believed in his statement that he had been confined to his room by illness for months before and months afterwards, he cannot even be accused of neglect to personally attend in the bank on that day to see that his orders were executed.

As to the other defendant, William A. Sponsler, there is testimony that for a year before the bank closed he had been so ill as to be confined most of the time to his bed. On the day it closed he was in a very dangerous condition, and wholly unable to even converse on business affairs. Because of his disability, about a week before the bank closed, he had given his son power of attorney to take his place in the management. The son testifies that he came to Bloomfield from Newport on Saturday, the 24th, and about 11 o'clock in the forenoon went into the bank, and gave Willis this instruction: "James, I tell you what I want.

you to do. All the money that you take in today I want you to keep separate, each parcel by itself, and not to receive it as a deposit. Keep it by itself, and on Monday return it to each of the respective parties who deposited or left the money with you. He said: 'I will do so.' And he said: 'That is what Judge Junkin told me I should do this morning and that is what I am doing.' As Rice's deposit was made at a quarter to 3 o'clock in the afternoon, when, as alleged, according to both defendants' instructions, that or no other money was to be received as a bank deposit, it follows Sponsler's situation is the same as Junkin's.

Much of the testimony as to the instructions given Willis was contradictory in its character, but in passing on this assignment of error we must assume the defendants' averments to be the fact, because their sixteenth prayer for instruction only asked the court to say to the

jury: If they believed from the evidence Willis received such orders, then defendants were not guilty. The court's answer was, in effect, that it was immaterial what they believed from this evidence. This instruction may have operated to the conviction of defendants. We think the learned judge of the court below mistakenly gave too rigid an interpretation to the act of 1889 in favor of the commonwealth. Under that interpretation the negligent, incompetent, and unfortunate banker can be convicted of a serious crime, as well as the swindling and dishonest one. This was not the object of the act. If the legislature intend such result it must be accomplished by a law leaving no reasonable doubt of such intention.

The judgment is reversed, and a v. f. d. n. awarded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Oliver N. KOEN *et al.*

v.

F. W. BARTLETT *et al.*, Appts.

(..... W. Va.)

(December 11, 1896.)

1. An owner in fee simple makes an oil and gas lease for a term of five years, and as much longer as the premises are operated for oil and gas, or the rent for failure to commence operating is paid, for, among other things, one eighth part of all oil produced and saved, to be delivered in the pipe lines to the credit of the lessor. The lessor then sells and conveys one undivided moiety of the one sixteenth part of all the oil produced and saved. Afterwards, but before any oil is bored for or produced, the lessor sells, grants, and conveys the land in fee simple to his six children, to each one a part, by metes and bounds, in consideration of natural love and affection, by deed of general warranty, "except that the party of the second part takes the same subject to any lease for oil or gas made by the party of the first part or any sale of royalty for oil or gas made by him;" and, by the same deed, he retains full control of said land in all respects and for all purposes, during his lifetime. Soon thereafter oil wells are bored, and oil produced, saved, and put in the pipe lines in large quantities. *Held*, the one-eighth royalty goes of right to the tenant for life and his grantees, during the continuance of the estate for life, and not to the owners in fee of the estate expectant thereon.

2. The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during the existence of such estate.

*Headnotes by HOLT, P.

NOTE.—For nature of property in mineral oil, see *Williamson v. Jones* (W. Va.) 25 L. R. A. 222, and *note*.

For right of dower in mines, see *Seager v. McCabe* (Mich.) 16 L. R. A. 247.

31 L. R. A.

A PPEAL by defendants from a decree of the Circuit Court for Marion County affirming a decree of the trial court in favor of plaintiffs in an action brought to enjoin the delivery of certain oil or its proceeds to appellants who claimed under an assignment from the life tenant of the property. *Reversed*.

The facts are stated in the opinion.

Messrs. W. S. Meredith and John Bas- sel, for appellants:

Defendants Bartlett and Brand are entitled to the one half of the royalty, or the one sixteenth of all of the oil produced from said wells by virtue of being the assignees or grantees of said Kerns.

Hurst v. Hurst, 7 W. Va. 289; *Chandler v. Chandler*, 55 Cal. 267; 2 Devlin, Deeds, 961.

The life tenant, whether by curtesy in dower, or by the act of the parties, is entitled always to occupy, use, and control the land in all respects and for all purposes so as to derive the greatest benefit and profit therefrom, without committing waste.

Tiedeman, Real Prop. § 72.

A lease of land for the sole and only purpose of mining and excavating for oil vests a corporeal interest.

Barker v. Dale, 3 Pittsb. 190, 8 Mining Rep. 594.

Oil in place is realty, but it becomes personality by severance,—a thing the lessee under the Nay lease had a perfect right to do and is doing within the lifetime of Elijah Kerns.

Williamson v. Jones, 39 W. Va. 281, 25 L. R. A. 222.

When profits result from property in which there is an estate in reversion or remainder, and also an estate in possession, they follow the right of possession and go to the person who is entitled to the possession at the time when they accrued or became due.

Allen v. DeGroodt, 98 Mo. 159, 14 Am. St. Rep. 633, *note*.

It is not waste in a tenant in dower of coal lands to take coal to any extent from a mine already open, or to sink new shafts into the same veins of coal.

Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528; *Findlay v. Smith*, 6 Munf. 143, 8 Am. Dec. 733; *Macaulay v. Dismal Swamp Land Co.* 2 Rob. (Va.) 507; *Lefners v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

So far as the rights of the life tenant are concerned, there is no distinction between a mine open at the beginning of the estate, and the right to open one at that time, which right is or may be exercised at any time during the continuance of the life tenancy.

Priddy v. Griffith, 150 Ill. 560.

Messrs. Alfred Caldwell, W. P. Hubbard, Raphael Hayden, and Frank Hayden also for appellants.

Messrs. John A. Hutchinson, A. B. Flemming, U. N. Arnett, and Charles Powell for appellees.

Holt, P., delivered the opinion of the court:

F. W. Bartlett and H. P. Brand, appellants on appeal from a final decree entered by the circuit court of Marion county on the 26th day of May, 1894, giving Koen the oil in question, as against Bartlett and Brand, the adverse claimants. On the 19th day of September, 1892, defendant Elijah Kerns was the owner in fee simple and occupant of a tract of land of 75 acres situate in Marion county, on Whetstone run, within the productive part of the Mannington oil field, as shown by the event. On that day he executed to C. S. Nay a lease for that part north of the county road, to mine and operate for oil and gas for the term of five years, and as much longer as the premises might be operated for oil and gas, at a royalty of one eighth of the oil delivered in the pipe line. On the 4th day of March, 1893, Nay sold, transferred, and assigned his lease to plaintiff O. N. Koen. By deed dated 28th of September, 1892, Elijah Kerns had sold and conveyed to O. N. Koen the undivided moiety of the one-sixteenth part of all the oil and gas produced and saved from said land so leased. By deed dated 30th September, 1892, O. N. Koen sold and conveyed one undivided two thirds of his interests conveyed to him by Kerns to Thornton F. Koen and J. T. Koen. Oliver N. Koen, by deed dated October 5, 1893, sold and assigned the Nay oil lease to the South Penn Oil Company, who opened the mine, found oil, and are producing it in large quantities. Elijah Kerns, by six separate deeds, dated December 3, 1892, for natural love and affection, sold and conveyed in severalty, by metes and bounds, to his six several children, in fee simple, in expectancy on the grantor's life estate thereby retained and reserved to himself, the said tract of land leased as aforesaid. Whatever interests these expectant owners of the inheritance had came by various conveyances to the plaintiffs, O. N. Koen *et al.* These deeds to the children are all alike, and any one will answer our present purpose:

Elijah Kerns to Emeline Hays. Deed.

This deed, made this 3d day of December, in the year 1892, between Elijah Kerns, of

Marion county, West Virginia, grantor, of the first part, and Emeline Hays, of the same county and state, grantee, of the second part, witnesseth: That for and in consideration of the love and affection of the said Elijah Kerns for his said daughter, Emeline Hays, formerly Emeline Kerns, and other valuable considerations, the party of the first part does grant and convey unto the party of the second part the following described real estate, to wit: A tract or parcel of land lying on Whetstone run, in Mannington district of Marion county, adjoining lands of Rachel A. Jones, M. E. Holbert, C. C. Fox, and Nimrod Hays, and bounded as follows: 'Beginning at a stone by the road, and, with line of said Rachel A. Jones, S., 84 E., 38 poles, to pointers; thence, with Holbert's, S., 16 W., 36½ poles, to pointers, to C. C. Fox; and with his line, N., 71 W., 33½, to stone; and, with the road and Hays' line, N., 50 W., 18 poles, to stone; N., 68 E., 10 poles, to stone; N., 34 E., 16 poles, to the beginning,—containing nine (9) acres, more or less, with its appurtenances and privileges. And the party of the first part covenants with the party of the second part that he has good right and title to said property, and that they will warrant generally the same, except that the second party takes the same subject to any lease for oil or gas made by said first party, or any sale of royalty for oil or gas made by him, and that the said first party retains full control of said land in all respects and for all purposes during his lifetime, and the second party takes said land as her full share of said Elijah Kerns' real estate. Witness the following signature and seal.

his
Elijah X. Kerns. [Seal.]
mark.

Elijah Kerns, by deed dated 18th November, 1893, in consideration of \$2,400, sold, granted, and conveyed, by deed of general warranty, to F. W. Bartlett, H. P. Brand, and another the undivided one-sixteenth part of all oil and gas in and under said tract of land of 75 acres. This one sixteenth of the oil which the South Penn Oil Company has produced, and is now producing, and putting in the pipe line, is the matter now in controversy. The plaintiffs, O. N. Koen and others, claim it by virtue and effect of the deeds from Kerns to his children. F. W. Bartlett and H. P. Brand claim it by virtue of the above deed from Kerns, the life tenant, by reservation. Koen claims it as having passed to the children as owners in fee in expectancy by such deeds. Koen filed his bill to prohibit the pipe line from delivering it or its proceeds to Bartlett. Bartlett answered, setting up his title as the owner. The intermediate court, by decree of 3d March, 1894, put it in the hands of a receiver to sell, and holds the proceeds for the one who should be held to be entitled. The intermediate court, by decree of 26th May, 1894, held that Bartlett and Brand were not entitled to the said one sixteenth of said oil in the pipe lines, but that plaintiffs, O. N. Koen and others, were entitled thereto, and decreed accordingly. On appeal to the circuit court, by decree of December 4, 1894, the decree of the intermediate court was affirmed, and Bartlett and Brand

appealed. The point in dispute turns on the legal effect upon the right to the oil produced, and put in the pipe line, under the oil lease of the deeds from Kerns to his children.

It is conceded on both sides that Elijah Kerns gave a right to mine for oil and gas, and that the South Penn Oil Company has produced, and is producing it lawfully, and placing it in the pipe line, as profits produced and issuing from the mines of the freehold, not opened in fact until the — day of —, 1893, after the conveyance to the children. It is conceded on both sides that, by these deeds to his children, Kerns reduced himself to a tenant of a conventional life estate, seised of the present freehold estate in possession, subject to oil lease; while his children became the owners in fee in expectancy, vested in right of present ownership, but not having the right of present possession and enjoyment. See *Hurst v. Hurst*, 7 W. Va. 289, 339. Whether it is with or without impeachment for waste is, in the view here taken, immaterial. That a fee may well be granted with reservation of the usufruct for life, see *Cribb v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; *Waugh v. Waugh*, 84 Pa. 350, 24 Am. Rep. 191; *Doe, Smith, v. Grady*, 2 Dev. L. 395; *Hatch v. Thompson*, 3 Dev. L. 411; *Hodges v. Spicer*, 79 N. C. 223. Bearing on the question involved, we have, among others, the cases of *Findlay v. Smith* (1818) 6 Munf. 143, 8 Am. Dec. 783; *Crouch v. Puryear* (1822) 1 Rand. (Va.) 258, 10 Am. Dec. 528; *Macaulay v. Dismal Swamp Land Co.* (1843), 2 Rob. (Va.) 507, 525; and *Williamson v. Jones* (1894) 39 W. Va. 231, 25 L. R. A. 222.

Upon the strength of these cases, it is conceded by both parties that mines of oil and of gas in place are land, and, as such, go with the inheritance; and it must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the immediate freehold in his possession, which possession extends from top to bottom, to the subsurface as much as to the surface, — in other words, to the land as a whole, — or the tenant for life has a freehold, as well as tenant in fee (Co. Litt. 43b; 4 Comyns. Dig. 62); and that the owners of the inheritance, have no more right to approach by a tunnel and break and enter his superficial close, than they have to break and enter his close on the surface. Their estate of inheritance is vested in right of interest, but not in right of enjoyment. Their estate is expectant on the determination of the life estate. It is the duty of the life tenant to spare and preserve the corpus of the inheritance, and of the owners of the fee in expectancy to wait, for they have no present right of use and enjoyment, and cannot exercise any right by anticipation; and their respective duties point out their respective rights. It is further conceded, on the strength of these cases and of the books generally, that if these mines of oil and gas had been open when Kerns, by cutting down his fee, came in as tenant for life of the immediate freehold, then he would have a right to work them during the continuance of his estate, and take the issues and profits thence produced; for these two are derivative parts of one estate: each, in quantity of ownership and order of enjoyment, is measured and determined by time; and, though both are vested in right, the life

tenant has the hither segment, — the immediate freehold, — and therefore the sole right to hold, use, and enjoy. And, if the mine is "open" when he comes in, then we conclude that the one who had the right to say has, by his actions, which speak louder than words, manifested his intention that it may be worked. Hence the life tenant may lawfully mine, sever, and convert the mineral from land into personally; and this is something in which the owner of the expectant estate of inheritance has no right. He has a vested right in it as land, — nothing more, — and, if the severance is unlawful, may sue at law, enjoin in equity, and have an account. *University v. Tucker*, 31 W. Va. 621. But when, by lawful severance, it ceases to be land, his right ceases, and the owner of the immediate freehold takes the issues and profits; for, under the law, he has a right to the full enjoyment and use of the land and all its profits during his estate therein. 2 Bl. Com. 122; *Williams v. Pearson* (1862) 38 Ala. 299, 309; *Crouch v. Puryear*, 1 Rand. (Va.) 258, 10 Am. Dec. 528; 1 Minor, Inst. 54b; Wms. Real Prop. 17th ed. 127; 1 Crabb, Real Prop. § 100; Tiedeman, Real Prop. §§ 2-75; Kerr, Real Prop. § 682; *Jackson, Murphy, v. Van Hoesen*, 1 Sharswood & B. Lead. Cas. Real Prop. 191, 206; MacSwinney, Mines, pp. 46, 47; 2 Minor, Inst. 602; *Eley's Appeal* (1833) 103 Pa. 307. The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion; and it is settled law that the rents of an open mine are income and go to the tenant for life. *Rankin's Appeal* (Pa.) 2 L. R. A. 429. Lawfulness of severance and conversion into personally seem to be the reason of the doctrine of the life tenant's right to the rents and profits produced from open mines. A mine lawfully leased to be opened is an "open mine." within the reason of the rule as laid down in these cases; and when lawfully opened and worked, as in this case, during the time that the freehold estate of the life tenant continues, the profits issuing therefrom, thus lawfully severed and produced, belong of right to him; for the term "profit" in law, comprehends the produce of the soil, whether it arise above or below the surface, including product of mines, as well as the herbage growing on the surface.

In the latter part of the clause of general warranty the grantor, Elijah Kerns, in the deeds to his children, makes an exception requiring the grantees to take subject to the lease for oil and gas and his sale of royalty; and it is said that inasmuch as the grantor stops there, not excepting the unsold part of the royalty, therefore he meant it to go with the estate in fee in expectancy, granted to his children. But the answer is, that was the place to except what he had parted with, and what he reserved and retained found its proper place in the clause of reservation, retaining a life estate, and as an incident thereof.

This, in my view, decides the case in favor of Bartlett and Brand, and requires the two decrees they complain of to be reversed, for they are the grantees of the life tenant, and, as to the one sixteenth of the oil, have succeeded, by purchase to his rights.

Rehearing denied.

Joseph HAIGH

v.

John BELL, *Plff. in Err.*

(.....W. Va.....)

- *1. An act making it unlawful for the owner of hogs** to permit them to run at large is an exercise of the police power.
- 2. The county court is the police court** of the county, and to it the legislature may specially delegate the exercise of such power in specified cases.
- 3. The act of the legislature approved April 1, 1873** (see Acts 1872-73, p. 175), does not violate any constitutional right of the citizen, or contravene any requirement of such organic law.

(November 13, 1885.)

ERROR to the Circuit Court for Monongalia County to review a judgment in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by hogs belonging to defendant which were unlawfully permitted to run at large. *Writ dismissed.*

The facts are stated in the opinion.

Measrs. George C. Sturgiss and Joseph Moreland for plaintiff in error.

Mr. L. V. Keck for defendant in error.

Holt, P., delivered the opinion of the court:

An action of trespass before a justice of Monongalia County, taken by certiorari to the circuit court, judgment of the justice set aside, cause retained and tried, *de novo*, and brought here by defendant, Bell, on the ground of involving the constitutionality of the law on which the action is founded. Chapter 77 of the Acts of 1872-73, p. 175, provides (sec. 1) that it shall be unlawful for owners to permit their hogs to run at large in the county of Harrison; giving the owner of the property injured by hogs running at large double damages, and a lien on the hogs for the payment thereof, and the right to distrain, and, after notice, to sell, etc., as could be done at common law. The clause here brought in question is the following: "The provisions of this act shall extend to all the counties in the state, provided, that the county court may upon the petition of 100 voters of the county direct to have the same enforced in their said county or in any district or districts thereof." On the 11th day of November, 1881, the county court of Monongalia county, upon the petition of 100 voters of the county, by order entered of record, directed that the provisions of chapter 77 of the act of April 1, 1873, should be enforced in Clinton district, of said county. On the 27th day of February, 1885, taking effect March 2, the general law on the subject was passed as we now find it in Code 1891, p. 593, chap. 60, §§ 3a *et seq.* Is this law unconstitutional? That is the only question.

*Headnotes by **HOLT, P.**

NOTE.—For owner's liability for trespassing animals in general, see *note* to *Bulpet v. Matthews* (Ill.) 22 L. R. A. 55.

For delegation of legislative power to county boards, see *note* to *Dougherty v. Austin* (Cal.) 18 L. R. A. 161.

31 L. R. A.

In every case where one man has a right to exclude another from his land, the common law encircles it, if not inclosed already, with an imaginary fence. Doct. & Stud. dialogue 1, p. 80, chap. 8. And to break such imaginary fence, and enter the close of another, is a trespass, giving rise to the action of trespass *quare clausum fregit*. And the man is answerable for not only his own trespass, but for that of his cattle also; for if, by his negligent keeping, they stray upon the land of another,—and much more if he permits or drives them,—and they then tread down his neighbor's herbage and spoil his corn or trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus damage feasant (or doing damage) till the owner shall make him satisfaction, or else, by leaving him to the common remedy *in foro contentioso*, by action. 3 Bl. Com. 211. See *Holladay v. Marsh* (1829), 3 Wend. 142, 20 Am. Dec. 678. All chattels trespassing on land may be distrained damage feasant. 3 Comyns' Dig. 478. Blackstone uses the term "cattle" as a general one, comprehending sheep, oxen, swine, and horses. 1 Bl. Com. 298. It may comprehend any livestock kept for use or profit; animals useful for food or labor. Anderson, Law Dict. p. 155. The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven. In such case the owner is liable only on proof of negligence. See Pollock, Torts, 405. Cattle trespass is an old and well settled head,—perhaps the oldest. It is the nature of cattle and other livestock to stray, if not kept in, and to do damage if they stray; and the owner is bound to keep them from straying, at his peril. *Id.* 404. In brief, the common-law doctrine is that the owner of cattle must fence them in. He is not compelled to fence the cattle of others out. His imaginary close does that. Owing to change of circumstances, and the inadaptability due in part to the settling of a new country, in this state a different rule prevails. The owner of land must fence out the cattle of others. He need not fence in his own. He takes the risk of loss of them, or injury to them, from their running at large and wandering into danger. *Blaine v. Chesapeake & O. R. Co.* (1876) 9 W. Va. 252; *Baylor v. Baltimore & O. R. Co.* *Id.* 270. The common-law doctrine rests on public expediency, and was anciently guarded by strict rules. The converse rule in this state rests on the same foundation, and is now regulated by statute. The right of the possessor of land to distrain cattle doing damage there is placed by Blackstone among the class of private injuries redressed by the mere act of the parties: (1) Defense of oneself; (2) recapture or reprisal; (3) entry on lands and tenements; (4) abatement of nuisances; (5) the law allows a man to be his own avenger, or to administer redress to himself by distraining another's cattle doing damage or trespassing upon his land. 3 Bl. Com. p. 9, § 2; Pol. & M. Hist. Eng. Law, 572. The object of the common law was threefold: (1) To put a stop to further damage without injury to the cattle damage feasant, for the thing distrained must not be used, injured, or destroyed; (2) to enable the owner of the land to identify

the cattle, and ascertain the owner of them, for they must be taken in the very act; (8) to give a lien upon the cattle for the damage done, and the expenses incurred in putting a stop to its continuance, which is confined to the damage done at one time.

The law in question was introduced by the late Judge G. D. Camden, then the member of the state Senate from the county of Harrison,—a thickly settled farming county, which desired the passage of such a law. The object was to restore, by way of police regulation, the common-law doctrine of the close, and of distress damage feasant, so far as it related to the one species of livestock mentioned,—so annoying, destructive, and difficult to fence out,—especially while young and small. The propriety and necessity of a certain class of police regulations depend upon time, place, and circumstances. What is required in one district or town may not be in another. Here the court is given the power to exercise their discretion. They may or may not, as in their wisdom they may see fit, by order entered of record on petition of 100 voters of the county, direct this police regulation to apply to and be enforced in their respective counties, or in any district thereof. In this case it was made to apply to the thickly settled farming district of Clinton, and where it was needed, as we are to presume.

It is said that this law is unconstitutional, and therefore void, because it seeks to deprive the owner of the hogs of his property without due process of law. W. Va. Const. art. 3, § 10: "No person shall be deprived of life, liberty, or property without due process of law and the judgment of his peers." In *Jelly v. Dils*, 27 W. Va. 267, 275, it is said the word "and," as here used, must be interpreted to mean "or," as to the reading of Magna Charta. See 1 Pol. & M. Hist. Eng. Law, p. 15; 2 Bl. Law Tracts, p. 42. (2) It is said that this act is unconstitutional in two ways: First, it assumes or seeks to confer power not legislative; second, because it violates this specific provision of both state and Federal Constitutions; citing *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215. See also *Stewart v. Polk County Supers.* 30 Iowa, 9, 1 Am. Rep. 238, and cases cited.

The first volume of Blackstone's Commentaries was published November 2, 1765,—at a time when the thirteen American colonies were just beginning to have a sense of their essential unity and of the need of a common law. 1 Bl. Com. (Pref. of ed. by Dr. Hammond) p. 7. An American edition was published at Philadelphia in 1771-72. So that at the time they were drawing up and adopting the state Constitutions and the Federal Constitution, with their bills of rights, Blackstone's Commentaries was received and read as the one great book of the common law on all questions of private right. Coming as it did at such a conjuncture of affairs,—such a combination of legal and political circumstances,—it was received then, and for that reason, apart from its intrinsic merits, has continued to be received since, in a general way, as the common law of 1776, and has, as such, been cited and quoted in American decisions to be numbered by the thousands. See Dr. Hammond's edition of Blackstone, 31 L. R. A.

passim. From that day to this, so far as I know, it has not been held that the doctrine of self-help in preventing wrong to persons or property, as Blackstone lays it down, contravenes any of the constitutional guaranties of those fundamental private rights which are all contained in Magna Charta. So held by this court in *Burdett v. Allen*, 35 W. Va. 347, 14 L. R. A. 337. The common law of self-defense, defense of family, and of house and home, stands as it did 600 years ago, when this enactment is assailed on the ground that it deprives the owner of his property without due process of law. These constitutional guaranties, state and Federal, must be considered in connection with the police power of the state; for it is settled beyond further judicial controversy that these inhibitions do not limit, and were not designed to limit, the subjects upon which the police power of the state may be exerted. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 29, 32 L. ed. 586; *Mugler v. Kansas*, 123 U. S. 663, 31 L. ed. 211. On the other hand, it is equally certain that the legislature cannot, by assuming to exercise the police power, act upon subjects which do not and cannot fall within its dominion, nor impose restrictions or create or enforce discriminations which are not in the legitimate exercise of that power, and that, while the judgment of the legislature is accepted upon doubtful subjects, yet the courts must in others overrule it, and refuse to sustain, as exercises of the police power, enactments not sanctioned by it. See *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 25 Am. St. Rep. 863, note p. 862; *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250; *Black. Const. Lim.* § 64. For full discussion, see 4 Thomp. Corp. § 5470. However, it is much easier to perceive and realize the existence and sources (and necessity) of this power, than to mark its boundaries or prescribe a limit to its exercise. See *Com. v. Alger*, 7 Cush. 87; *Cooley, Const. Lim.* 572. Still it is universally recognized that its exercise may result as a necessary inference from the existence and due protection of these rights themselves; for, if they are the inviolable rights of the one, so they are of the other. Hence each must so use his own as not to injure those of the other. This law does not take away or limit any such right beyond what is necessary for the public welfare, and for the protection of the same rights of others. It only imposes such restraint in the given case as prevents their exercise from being injurious to the similar, equal rights of his neighbors. Such restraint is just. The public welfare may require it, the legislature has power to impose it, and the county court power to exercise it, when thus delegated to it. There are some police regulations which the public welfare may require in one town or district or county which would be ill-timed, out of place, and therefore inconvenient, in another. Hence, this law provides that the county court may or may not, as they, in their judgment, may think best and see fit, upon the petition of 100 voters of the county (the annoyance of three or more may constitute a public nuisance), by order entered of record (as was done here), direct that the law against permitting hogs to run at large shall apply to, and

be of force in, their respective counties, or in any district or districts thereof; and, as we must presume, the thickly settled district of Clinton needed such a regulation. Notwithstanding this, the law was general, and applied to every county and district in the state,—as much so as to the county of Harrison. It is said that in every state the keeping of livestock is under police regulation. Tiedeman, *Lim.* p. 506, § 141. I have never heard it questioned that towns can exercise such police power delegated by the legislature. Why not the county court, which has been the police court of the county, continuously, for more than 100 years? On this subject, see *Hellen v. Noe*, 3 Ired. L. 493; *Whitfield v. Longest*, 6 Ired. L. 271; *Tourne v. Lee*, 8 Mart. N. S. 548, 20 Am. Dec. 280; *Roberts v. Ogle*, 80 Ill. 459, 88 Am. Dec. 201; 1 Am. & Eng. Enc. Law (New ed.) pp. 90, 91, note.

The institution of the county court originated as early as 1623-24; and as it is the most ancient, so it has ever been one of the most important, of our institutions,—for a long time, in respect to the administration of justice, and always in matters of county police and economy. As early as 1645 they had matured into courts of general jurisdiction in law and in equity, and the most important duties in matters of police and economy were confided to them. Prior to 1661-62 the judges of the county courts were styled “commissioners of the monthly courts,” and afterwards “commissioners of the county courts;” but by that act they were required to take the oath of a justice of the peace, and be called “justices of the peace.” These tribunals now assumed a perfectly regular form, and their functions have ever since been so important that their institution was considered as a part of the Constitution both of the colonial and state governments. No material change was introduced by the Revolution in their jurisdiction, or in their general powers or duties, of any kind. Now, the members who compose it are no

longer justices, but have come back to their old name of “commissioners of the county courts,” which, though shorn of general judicial power, still have the superintendence and administration of the internal and fiscal affairs of their counties. See Code 1819, p. 244, note; W. Va. Const. art. 8, § 24; Code 1891, pp. 41, 42.

The county here in question (one of the successors of the memorable district and county of West Augusta, one of the oldest in time of formation, and one of the largest in territory comprehended) was created in October, 1776, holding its first county court, we may suppose, on the second Monday in December, 1776, extended by subsequent act to include part of the county of Augusta, and, thus extended, reached from the Pennsylvania state line, southward forty miles or more, into the watershed of the Great Kanawha river; and its county court has exercised police power from that day to this without question. The successive formation of new counties has very much curtailed the territorial jurisdiction of the court, but its power in matters of police remains the same,—without any material modification. See Wiley, *Hist. Monongalia Co.* p. 47 *et passim*; Lewis, *Hist. W. Va.* 506; 9 *Hen. Stat.* pp. 262, 420; 10 *Hen. Stat.* pp. 114, 351; 11 *Hen. Stat.* p. 366.

It may be that the legislature, by the act of 1885, now found in the Code of 1891, intending to review the legislation on this subject, covered the whole ground, making a full and complete provision touching the subject common to both, and thereby superseded this one by absorption. See *State v. Mines*, 38 W. Va. 125-130. But, so far as that question has any bearing, it is, in such a case as this, a question, not for this court, but for the circuit court, to decide, without the right of appeal.

We have endeavored to show that the statute complained of is not unconstitutional, and therefore *the writ of error must be dismissed* as improvidently awarded.

IOWA SUPREME COURT.

GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN of the State of Iowa

v.

W. R. GRAHAM *et al.*, *Appls.*

(.....Iowa.....)

1. The right to use the name “Grand Lodge of the Ancient Order of United Workmen of Iowa” cannot be claimed by a seceding body merely because it has become incorporated, to the exclusion of the body from which it seceded, which previously had used the name, and continued to do so without incorporation.

2. The certificate of the auditor as to the right of a corporation to a name is not binding upon another body claiming the right to the name.

3. The right of a corporation to the exclusive use of a name as against another organization using the same name does not follow from the fact that the latter is doing an unlawful business.

4. After an insurance organization has been allowed to proceed in its business with full knowledge and acquiescence of the insurance authorities of the state for a series of years, during which many of its members have by age and disability become unable to procure any other insurance, a rival organiza-

NOTE.—Some interesting questions decided in the above case are believed to be without direct precedent, but of great importance in the law of mutual benefit societies.

For tradename as part of good will of business, 31 L. R. A.

see note to *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462.

See also, as to corporate name, the case of *International Trust Co. v. International Loan & T. Co.* (Mass.) 10 L. R. A. 758.

tion, which has all the time had knowledge of the facts and failed to take action, is estopped from contesting the legality of such business.

5. Delay in procuring a certificate of the right to a corporate name will not enlarge the time for bringing an action to establish an exclusive right to it which accrued at the time of incorporation, when the certificate was not required.

6. Litigation as to the right to offices in an association will not suspend the running of the statute against a right of action by one rival body against the other to establish the exclusive right to a name.

(January 22, 1896.)

A PPEAL by defendants from a decree of the District Court for Dubuque County in favor of complainant in a suit brought to enjoin defendants from using or attempting to do business under the name which complainant claimed to own. *Reversed.*

Statement by **Deemer, J. :**

This is a suit in equity to enjoin the defendants, who are officers of an alleged unincorporated society or voluntary association, from using the name of the "Grand Lodge of the Ancient Order of United Workmen of Iowa," usually written and known as the "G. L. A. O. U. W. of Iowa;" to restrain them from transacting business, and from conducting a life insurance business upon the mutual assessment plan under that name; and for such other relief as may be equitable. The defendants demurred to the petition, and the demurrer was sustained. Thereupon the petition was amended, and a demurrer to the petition as amended was overruled. Thereafter defendants filed an answer to the petition, containing three counts and twenty-five divisions or paragraphs, and afterwards filed an amendment consisting of two divisions. Plaintiff moved to strike out certain parts of the answer as amended, and demurred to the remainder. The motion and demurrer were sustained, and defendants electing to stand on their pleadings, a decree was rendered against them as prayed. Defendants appeal.

Messrs. C. C. Nourse and C. L. Nourse, with **Messrs. W. H. Berry, Alphons Matthews, and J. W. Warrington,** for appellants;

As to the rights of third parties the certificate of the auditor could have no effect.

Where no appeal or writ of error lies from the determination of such tribunal or officer, the judgment is not conclusive upon third persons, and the same may be shown to be illegal or fraudulent whenever brought in question.

Birby v. Adams County, 49 Iowa, 507; *Vose v. Morton*, 4 Cush. 81, 50 Am. Dec. 750; *Leonard v. Bryant*, 11 Met. 870; *Griswold v. Stewart*, 4 Cow. 458; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104, 41 Am. Rep. 85; *Re National Indemnity Endowment Co.* 142 Pa. 450.

Plaintiff's right to maintain this suit must be made to depend upon its exclusive right to the name, for otherwise the plaintiff has no more right to be heard in this court than any other insurance company whose business may 31 L. R. A.

be incidentally affected by the operations of the defendant organization.

Beach, Inj. § 13; *McDonald v. English*, 85 Ill. 232; *Springer v. Walters*, 139 Ill. 419; *Statten v. Des Moines Valley R. Co.* 29 Iowa, 143, 4 Am. Rep. 205.

To entitle the plaintiff to this protection it must affirmatively appear: (1) that plaintiff originated the name, or (2) acquired the exclusive right to the use of the name from some one who might legally transfer such a right; and (3) that the name was such that a special property might be acquired in it by appropriation or purchase.

Ottoman Cakvey Co. v. Dane, 95 Ill. 205; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611; *Van Beil v. Prescott*, 82 N. Y. 630; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Delaware & H. Canal Co. v. Clark*, 50 U. S. 13 Wall. 311, 20 L. ed. 581; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 16 L. R. A. 458; *Black Rabbit Asso. v. Munday*, 21 Abb. N. C. 99; *Nebraska Loan & T. Co. v. Nine*, 27 Neb. 507; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535; *Koehler v. Sanders*, 122 N. Y. 65, 9 L. R. A. 578; *Leclanche Battery Co. v. Western Electric Co.* 23 Fed. Rep. 276.

The name "Iowa" being a geographical name is common property, and cannot be appropriated to trade or business by any one to the exclusion of others.

Columbia Mill Co. v. Alcorn, 150 U. S. 460, 37 L. ed. 1144; *Nebraska Loan & T. Co. v. Nine*, *supra*.

There never was any transfer by the supreme lodge of the order to the plaintiff in the nature of a contract by which plaintiff can claim an exclusive right to the use of the name "Ancient Order of United Workmen."

The sale or transfer of the good will of a business does not entitle the assignee to the exclusive use of the name.

Iowa Seed Co. v. Dorr, 70 Iowa, 482, 59 Am. Rep. 446; *Vonderbank v. Schmidt*, 44 La. Ann. 264, 15 L. R. A. 462.

Our legislature has recognized the fact that such fraternal and benevolent associations are not insurance companies, and can with safety and greater benefit to the public continue their fraternal and benevolent work without the supervision of the state.

Dickinson v. Ancient Order of U. W. 159 Pa. 263; *Com. v. Equitable Ben. Asso.* 137 Pa. 419; *Gorman v. O'Connor*, 155 Pa. 239; *Northwestern Masonic Aid Asso. v. Jones*, 154 Pa. 104; *Johnson v. Philadelphia & R. R. Co.* 163 Pa. 133; *State v. Taylor*, 56 N. J. L. 49.

Plaintiff cannot, as against the statute of limitations, indefinitely prolong the time in which he may sue by voluntarily failing to do the things required by law to be done before an action may be brought.

Hintrager v. Traut, 69 Iowa, 746; *Baker v. Johnson County*, 33 Iowa, 151; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 131, 30 L. ed. 569; *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605.

Even in law actions for damages on account of a continuing nuisance, this court has held that when the act of the defendant was complete before the period of limitation, and the

result only was within the statute, even a suit for damages was barred.

Powers v. Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792; *Baldwin v. Oskaloosa Gaslight Co.* 57 Iowa, 51; *Williams v. Mills County*, 71 Iowa, 367.

Reasonable diligence must be used in making application for relief against piracy of a trademark, and proceedings should be instituted promptly upon the discovery of the fact.

High, Inj. § 1100; *Estes v. Worthington*, 22 Fed. Rep. 822; *Gallisher v. Cadwell*, 145 U. S. 369, 38 L. ed. 798; *Harwood v. Chicago & C. Air Line R. Co.* 84 U. S. 17 Wall. 78, 21 L. ed. 558; *Ticin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 823; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. ed. 423; *Hayward v. Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 856; *Holgate v. Euton*, 116 U. S. 33, 29 L. ed. 538; *Davison v. Davis*, 125 U. S. 90, 31 L. ed. 635; *Société Foncière et Agricole v. Milliken*, 135 U. S. 804, 34 L. ed. 208.

Plaintiff claims that it has been organized only under the statute for the organization of charitable institutions, and yet it is here complaining to a court of equity that another organization is doing a charitable work. Such a proceeding as this is, certainly an anomaly, and finds a precedent only in the ancient case reported by St. Luke, in which one of the apostles complained to the Master that he had found certain persons performing miracles and doing good in His name, and that he forbade them.

Luke ix., 49. See also *Coffeen v. Brunton*, 5 McLean, 256; *Filley v. Child*, 16 Blatchf. 876.

Messrs. **Longueville & McCarthy and Lyon & Lenehan**, for appellee:

When the plaintiff was incorporated it obtained from the state of Iowa its franchises, the first and most important of which is its name.

The name of a corporation is a part of its franchise and therefore property, and will be protected in equity no matter what its objects or purposes are, as long as they are legal.

Waterman, Corp. § 31, High, Inj. § 1081; *Newby v. Oregon Cent. R. Co.* 1 Deady, 609; *Paulino v. Portuguese Ben. Asso.* 18 R. I. —, 20 L. R. A. 272; *Holmes, B. & H. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; Pom. Eq. Jur. § 1358; *International Trust Co. v. International Loan & T. Co.* 153 Mass. 271, 10 L. R. A. 758; *United States Mercantile Rep. Co. v. United States Reporting & C. Asso.* 21 Abb. N. C. 115; *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 402, 27 L. R. A. 42.

The natural consequence of the wrongful appropriation of a corporate name must be to injure business and rights of the corporation in some degree by destroying or confusing its identity. The act is an illegal one and must be presumed to have been done with an intent to cause results which naturally flow from it.

Waterman, Corp. § 31; *Paulino v. Portuguese Ben. Asso.* *supra*.

Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. *supra*, fully discusses the question, and denies the right of persons who allow the use of their names in forming the original corporation to use the same in another corporate name, and puts it on the ground of an estoppel.

31 L. R. A.

A corporation may by injunction prevent other persons from using its name to the injury of its trade.

Morawetz, Priv. Corp. § 184.

The case is analogous to, if not stronger than, that of a piracy upon an established trademark.

Bell v. Locke, 8 Paige, 75, 34 Am. Dec. 371; *Taylor v. Carpenter*, 11 Paige, 292, 42 Am. Dec. 114; *Partridge v. Menck*, 2 Barb. Ch. 102, 47 Am. Dec. 281; *Williams, Eq.* 402, 403.

A corporate name is regarded as a trademark, and as such it is entitled to the protection of a court of equity.

High, Inj. 3d ed. § 1081; *Paulino v. Portuguese Ben. Asso.* 18 R. I. —, 20 L. R. A. 272.

It is one of the duties of the supreme lodge to organize and establish grand lodges, and there can be but one grand lodge in a state.

Supreme Lodge Const. § 25.

Within this power the supreme lodge chartered the plaintiff in 1873 as the Grand Lodge of the Ancient Order of United Workmen of Iowa. That was the only name that it could have under section 26 of the Constitution of the Supreme Lodge. (Abst. 108.) That was the name given to it, and when it gave that name to plaintiff the supreme lodge had exhausted its power in this respect, and had devoted itself of all power to organize any other grand lodge in Iowa, as long, at least, as plaintiff existed.

District Grand Lodge No. 5, I. O. of B. B. v. Jedidjah Lodge No. 7, I. O. of B. B. 65 Md. 236; *Goodman v. Jedidjah Lodge No. 7, I. O. of B. B.* 67 Md. 117; *State v. Miller*, 66 Iowa, 26; *State v. Nichols*, 78 Iowa, 747.

The unlawful business of the defendants specially injures the plaintiff because the defendants use its names and methods. In fact, they claim to be the plaintiff. If the name used and business transacted are a colorable imitation or may cause confusion, injury to the plaintiff will be presumed and an injunction will lie.

Re United States Mercantile Reporting & C. Agency, 115 N. Y. 176; *Drummond Tobacco Co. v. Randle*, 114 Ill. 412; *United States Mercantile Rep. Co. v. United States Reporting & C. Co.* 21 Abb. N. C. 115.

The acts of the defendants are in the nature of a continuing trespass.

Pom. Eq. Jur. 1st ed. § 1358.

The party injured has the right to maintain an action in a case of continuing injury.

Wood, Lim. Act. § 180, notes; *United States Mercantile Rep. Co. v. United States Mercantile & C. Co.* *supra*.

If the matter in dispute between the parties has, during the time when the delay occurred, been the subject of litigation, the plaintiff's delay is sufficiently excused.

Pacific R. Co. v. Missouri P. R. Co. 111 U. S. 505, 28 L. ed. 498; *Comins v. Culver*, 35 N. J. Eq. 94; *Galloway v. Barr*, 12 Ohio, 354; *Cox v. Montgomery*, 43 Ill. 110; *Cotton v. Wood*, 25 Iowa, 43; *Denham v. Watson*, 24 Neb. 779; *Sanders v. Jacob*, 20 Mo. App. 96.

Mere lapse of time upon the part of the plaintiff after learning of the infringement of its rights will not deprive it of relief in equity.

High, Inj. 3d ed. § 1101.

Deemer, J., delivered the opinion of the court:

The pleadings in this case are very voluminous, covering more than 160 closely printed pages of the abstract. We cannot do more than set out the substance of the allegation which we deem material to a proper determination of the case, and must, of necessity, avoid even a reference to many matters which are pleaded and argued by the counsel, for the reason that they would obscure the real points at issue as we understand them. The plaintiff claims: That it is a mutual benefit association doing a life insurance business in this state under the name in which it brings this suit, under authority from the auditor of state. That it was originally incorporated under its present name in Scott county, in June, 1875; afterwards reincorporated in Blackhawk county in February, 1884, and received its certificate to do business from the auditor of state in July, 1898. That it does business through subordinate lodges organized in different parts of the state, and now consists of 217 lodges, with a membership of over 9,000. That the defendants are an unincorporated society, doing the same business as plaintiff, and under the same name, within the state of Iowa, and that it has lodges in different localities, with the same name and numbers as those organized by plaintiff. That it has heretofore been determined by this court, in the cases of *State v. Miller*, 66 Iowa, 26, and *State v. Nichols*, 78 Iowa, 747, that plaintiff is the Grand Lodge A. O. U. W. of Iowa, and that defendants are now falsely and fraudulently claiming to be the lawful grand lodge, and entitled to do business as such, and are unlawfully using and doing business under plaintiff's corporate name, in fraud of the rights of plaintiff, and to its great damage and detriment. The defendants, in answer, admitted that plaintiff's predecessors adopted articles of incorporation as alleged, but averred that they were not in accordance with chapter 65 of the Acts of the 21st General Assembly. Admitted that plaintiff received a certificate from the auditor of state, authorizing it to do business as a mutual benefit society; but averred that it was wrongfully issued, and that the articles of incorporation were never submitted to the attorney general as required by law. Alleged that the only question determined in the cases referred to by plaintiff was as to the right of certain persons to hold office in the association, and that no other question was adjudicated. Denied that the original corporation organized in Scott county is the same as plaintiff. Defendants averred that they are members of an unincorporated society doing business under the name of the Grand Lodge Ancient Order of United Workmen of Iowa, but denied that they are doing a life insurance business on the mutual assessment plan. Admitted that some of the defendants are officers of this unincorporated society. Admitted that it had subordinate lodges instituted at different places where plaintiff also had lodges; but averred that its lodges were first instituted, and existed at these places before those organized by plaintiff came into

31 L. R. A.

existence. And defendants denied each and every other claim of the plaintiff. Defendants further averred that the fraternal organization known as the "Ancient Order of United Workmen" was organized in the year 1868, in the state of Pennsylvania, under the same plan as the association of which defendants are members; that afterwards, in the year 1870, an organization was perfected in the same state, known as the "Grand Lodge of A. O. U. W. of Pennsylvania," and afterwards by authority of this grand lodge, subordinate lodges were instituted in Ohio, Kentucky, Iowa, and other states; and afterwards by authority of the grand lodge of Pennsylvania the subordinate lodges in the other states organized grand lodges in their respective states; and afterwards, on February 11, 1878, there was organized at Cincinnati, Ohio, by delegates from the several grand lodges, a supreme lodge, with supreme legislative power in all matters pertaining to the order throughout the United States and Canada; that said supreme lodge was authorized to institute new lodges within the several states, and in pursuance thereof, in the month of November, 1878, did charter and institute a number of lodges, and on the 27th day of November, 1878, issued a charter authorizing the Grand Lodge of the Ancient Order of United Workmen of Iowa; that said organization was instituted and chartered upon the express condition that it should be subordinate to, and recognize the authority of, and abide by the rules and decisions of, the supreme lodge. And defendants further averred that the name "Ancient Order of United Workmen," and the name "Grand Lodge Ancient Order of United Workmen of Iowa," originated and first became known to the public in the manner and by the means above set forth. They further averred that the Ancient Order of United Workmen was a fraternal organization, having for its objects the union into a fraternal brotherhood of male persons over twenty-one and under fifty years of age, regardless of nationality, political preferences, or denominational distinctions; the adoption of such steady work as would enable the members to make themselves known; to enhance and give equal consideration to all classes and kinds of labor; to improve the moral, intellectual, and social condition of its members; to hold lectures, read essays, discuss inventions and improvements, encourage research in art, science, and literature, and to establish and maintain libraries where practicable; to create funds in aid of the sick or disabled members, and to pledge to members the payment of a stipulated sum to such beneficiary as a deceased member may designate; to improve the moral, mental, and social condition of the members, and to create, hold, and manage and disburse a beneficiary fund for the relief of members of said organization and their families under such rules as are prescribed by the Supreme Lodge of the Ancient Order of United Workmen of the United States. Defendants further averred that the fraternal features of the organization are fully carried out by the supreme lodge and by the grand lodge to which defendants belong, and

that the payment of stated sums to the families of deceased members is only an incidental feature of the objects of the organization, and that the amount paid is solely by and out of the funds of the grand lodge of the state of Iowa from contributions made by members within its jurisdiction. Defendants further averred that the association with which they are connected is not an association for pecuniary profit; that it declares no dividends, employs no agents, and pays no commission for procuring its business; that only those who are actually employed in clerical work and in the work of organization of new lodges receive any compensation. The defendants further pleaded that prior to the time of the adoption of the articles of incorporation under and by virtue of which plaintiffs are exercising corporate powers, the persons adopting the same and those co-operating with them had revoked their connection with and subordination to the supreme lodge, and adopted certain resolutions of secession from the supreme lodge, and on account thereof the charter of the grand lodge was declared forfeited by the supreme lodge; and that ever since said time plaintiffs have falsely and without authority pretended to act as members of the Ancient Order of United Workmen and as a grand lodge, for the purpose of carrying on life insurance only, and as a corporation for pecuniary profit. Defendants further alleged that a number of lodges in this state at the time of the secession continued to recognize their submission to the supreme lodge, and at the time plaintiffs adopted their articles of incorporation and renounced allegiance to the supreme lodge these aforesaid subordinate lodges recognized their subordination to the supreme lodge, and are still acting under, and still retain the original charters granted them by authority of, the supreme lodge; and that at the time plaintiffs organized as an independent organization and renounced their subordination to and connection with the supreme lodge, the charter of the grand lodge was restored to those who recognized the authority of the supreme body; and the grand lodge constituted by delegates duly elected and chosen by those subordinate lodges was recognized by the supreme lodge as the rightful grand lodge of the order in the state of Iowa, and has ever since used and enjoyed the name and title of the "Grand Lodge of the Ancient Order of the United Workmen of Iowa."

In the third count of the answer defendants pleaded that they and their predecessors in office have used the name in controversy for ten years next before the commencement of this suit, to the knowledge and with the acquiescence of plaintiff during the entire time. They also averred that in the month of May, 1882, the organization of which they are members had subordinate lodges in the state, recognizing their allegiance to the supreme lodge, with only about 320 members, but that since that time and up to the date of the commencement of this suit the number has increased to about 9,500 members, belonging to 112 lodges, loyal to the supreme lodge. That the loyal grand lodge has endeared it-

self to the people by reason of the integrity and ability of its management, and that plaintiff is now seeking to take advantage of, appropriate, and monopolize the same; that plaintiff failed and neglected to assert any exclusive right to the name until the same became of value; and that it is now estopped, by reason of its laches, from instituting or prosecuting this suit. Defendants further averred that the method of doing business adopted by them has been officially recognized by the attorney general and auditor of state with full knowledge of all facts, and upon the faith of such recognition its members have increased, and thousands of persons have been paying money and contributing to death losses relying upon the loyal grand lodge paying \$2,000 to their beneficiaries in case of death; and that to now enjoin defendants from meeting their obligations and making assessments would be inequitable, and operate as a hardship and fraud upon these members. They further aver that many persons have become members of their organization during the past ten years who have during this lapse of time arrived at that age, and suffered such disabilities, as to render it impossible for them to procure benefits for their families in case of death, and many others cannot procure these benefits without large additional expense. In an amendment to the answer the defendants averred that the association to which they belong does not issue any contract of indemnity or insurance in the name of the grand lodge, nor issue any obligation on which an action can be maintained; that the fund provided to be paid on the death of a member, and known as the "Beneficiary Fund," is the proceeds of a voluntary payment made by each member of the order; that the grand lodge makes no call for contributions for the purpose of paying any particular beneficiary, nor can any such call be made; that, while it issues a benefit certificate, it contains no promise to pay, and no contract or obligation whatever, and the same is only issued for the purpose of identifying the members and their designated beneficiaries.

The plaintiff's motion was to strike out certain matters stated in the answer, because (1) they were legal conclusions, and the demurrer was for the reason that the matters stated in the answer constituted no defense to plaintiff's cause of action; (2) because it appears from the answer that plaintiff is entitled to the exclusive use of the name in question, and that defendants are using the same illegally; (3) because the answer shows that defendants are carrying on life insurance on the assessment plan, under plaintiff's name, in violation of its corporate rights. Plaintiff also demurred to the counts or divisions of the answer pleading the statute of limitations and laches on the part of the plaintiff. The lower court sustained plaintiff's motion and demurrer, and the appeal is from these rulings.

It is apparent that the principal question for determination is the right of the plaintiff to the exclusive use of the name "Grand Lodge Ancient Order of United Workmen of

Iowa," and of the letters more commonly used, "G. L. A. O. U. W. of Iowa." It is argued that by reason of the fact that it incorporated under this name, and was given a certificate by the auditor of state to do business thereunder, it became entitled to the exclusive use of the name; that its corporate name is property, which may be protected by injunction. It also insists that defendants are doing a life insurance business upon the mutual assessment plan, without authority and illegally, and that in so doing it is damaging the business and good will of the plaintiff. It is no doubt true that, except as limited by section 1768 of McClain's Code (Acts 21st Gen. Assem. chap. 65, § 3), a corporation may organize for the purpose of conducting a life insurance business under whatever name it may choose to adopt, provided it does not infringe on the established rights of some other organization or association already in existence under the same or a similar name. And it seems to be well settled that the name of a corporation, while not a part of its franchise, is, to a certain extent, property, and that it will be protected in a proper case on principles somewhat analogous to those applied to trademarks. *Holmes, B. & II. v. Holmes, B. & A. Mfg. Co.* 37 Conn. 278, 9 Am. Rep. 324; *High, Inf.* § 1081; *Cook, Stock & Stockholders*, 3d ed. § 699, and cases cited; 1 *Thomp. Corp.* §§ 284-296. The name of a corporation is not, in this state, a franchise, for the selection may be made at the pleasure of the incorporators, or it may be acquired by usage; and its right to the use of the name, it seems to us, can be no greater or different in principle than that of an individual. An individual may use his own name in his business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead. *Meneely v. Meneely*, 62 N. Y. 429, 20 Am. Rep. 489; *Ottoman Cakery Co. v. Dane*, 95 Ill. 203; *Upton, Trademarks*, 104, 105 et seq.; *Gilman v. Hunnewell*, 122 Mass. 139; *Rogers v. Taintor*, 97 Mass. 291; *Adams, Trademarks*, pp. 115, 116. The rule seems to be clearly stated in *Chas. S. Higgins Co. v. Higgins Soap Co.* 144 N. Y. 462, 27 L. R. A. 42, where Andrews, Ch. J., speaking for the court, among other things, said: "In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the later corporation to obtain, by reason of the similarity of names, the business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive." From the allegations of the defendants' answer it will be seen that the Ancient Order of United Workmen originated in the state of Pennsylvania in the year 1868; that a grand lodge was organized in that state

in the year 1870, and soon after grand lodges were organized in other states; that in February, 1873, these grand lodges organized a supreme lodge, and that this supreme lodge was authorized to institute lodges in any state, subordinate to its jurisdiction; and that when any ten lodges existed in a state it was the duty of the supreme lodge to charter a grand lodge in such state. Pursuant to these regulations a grand lodge was chartered in Iowa in 1873, and the officers of this grand lodge adopted articles of incorporation as a benevolent society in November, 1873, for the purpose of creating, holding, managing, and disbursing a beneficiary fund for the relief of members of the corporation and their families under such laws and rules and regulations as are now and shall hereafter be prescribed by the Supreme Lodge A. O. U. W. of the United States. In 1893 the schism took place, and plaintiff adopted certain resolutions of secession, and in 1884 it adopted the articles of incorporation under and by virtue of which it is now transacting business as a mutual benefit association. Those who remained loyal to the supreme lodge were recognized by it, and to this day have used and enjoyed the name of the "Grand Lodge Ancient Order of United Workmen of Iowa." From this it appears that the name was conferred by the supreme lodge of the United States upon an organization which was subordinate to and recognized its authority, and that the name is still used by the defendants under the original authority conferred upon the organization to which they retain allegiance. The question arises, What right, if any, has the plaintiff, a seceding body, by reason of its incorporation, to the exclusive use of the name? It seems to us it has no such right. The defendants have the prior right to the use of the name, as they had been using it by permission of the supreme lodge continuously from the time of the organization of the original grand lodge up to the present. The fact that they are not incorporated is wholly immaterial, for they have been doing business under this name with the implied assent of the state authorities during all these years. They have not adopted a name selected by the plaintiff for the purpose of defrauding, or to create the impression that they are identical with the plaintiff, nor have they done anything calculated to mislead or deceive the public. The facts appear to be that the plaintiffs, in amending their articles of incorporation and in procuring their certificate from the state auditor, have taken a name which was theretofore in use by the defendants, and of which they cannot be deprived simply because the plaintiff sees fit to use it as its corporate name. The question here is not whether defendant is doing an unlawful business, but whether it has the right to the use of the name, be its business lawful or unlawful; and this distinction should not be lost sight of. We do not think that a corporation can, under the statutes of this state, select a name which is then in use by some other person or persons, and, after recording its articles, insist that this person or persons must abandon the use of the name they have previously

selected and under which they are operating. If any damage results to a corporation which selects its name in this manner, it is due to its own folly and indiscretion in selecting a name which is already in existence, and which is used by another body, upon which the name was originally conferred.

In the case of *Ottoman Cahvey Co. v. Dane*, *supra*, defendant Dane had in 1875 organized a corporation under the laws of the state of Michigan known as the Ottoman Cahvey Company, and had carried on business as such corporation in the city of Chicago, Ill., from and after that date. On September 24, 1876, the plaintiff organized a corporation under the same name under the laws of the state of Illinois, and thereupon brought suit against the Michigan corporation to restrain it from doing business under the name by which it was organized, averring that the Michigan corporation had been dissolved by the supreme court of Michigan, and no longer had authority to act in the capacity of an incorporated company. The supreme court of Illinois held that, though the defendants had no right to act in their capacity as an incorporated company, yet they had a clear right to continue in business under the name Ottoman Cahvey Company, either as partners or otherwise; and that the plaintiff corporation had no right to assume a name under which defendants were carrying on their business, and invoke the aid of a court of equity to restrain defendants from the use of the same name. The court, among other things, said: "So far as the complainant was concerned, the defendants had the prior right to the use of the name, as they had conducted their business under the name assumed continuously from the date of the organization of the Michigan corporation; and that the defendants might use the name Ottoman Cahvey Company as well without a legal organization as they could had they been legally organized under the laws of Michigan." The case of *Black Rabbit Assn. v. Munday*, 21 Abb. N. C. 99, is also closely in point. The plaintiff was incorporated under the name of the Black Rabbit Association. Defendants were unincorporated, but used the same name. It appears that prior to the incorporation of plaintiff an unincorporated organization existed by the name in controversy, and that there had been a schism and division, and that the persons adhering to plaintiff had incorporated under the state laws. The court, in its opinion, among other things, said: "The organization sought to be enjoined is one that was in existence and known prior to the formation of plaintiff, and plaintiff, by incorporating itself by a name already in existence, and used prior to its organization, seeks to restrain the other party from its use." It refused the injunction asked by plaintiff, and held that plaintiff had not acquired the exclusive right to the name by the fact of incorporating under the statute. See also *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 16 L. R. A. 453; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611; *Van Beil v. Prescott*, 82 N. Y. 630; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 311, 20 L. ed. 581. This is the doctrine applied to trademarks. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Taylor v. Carpenter*, 11 Paige, 297, 42 Am. Dec. 114; *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401; *Rogers v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78. The right to protection of a trademark depends upon priority of selection or appropriation. *Gilloit v. Esterbrook*, 47 Barb. 463; *Beach, Inj.* §§ 748, 749; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144.

It is pertinent to inquire how plaintiff obtained the right to the exclusive use of the name. Surely not by reason of having coined or invented it. The terms "Grand Lodge" and "of Iowa" could not be exclusively appropriated, either as a firm name or as a trademark. One is merely geographical, and the other descriptive; and either could be used by any person without infringement upon the rights of others. The term "Ancient Order of United Workmen" did not originate with the plaintiff. It had a well-defined and recognized meaning long before plaintiff adopted it, and was applied, not only in this state, but in others, both to corporations and unincorporated societies, either fraternal or beneficial or both, from the time of the organization of the society in Pennsylvania, in the year 1868, up to the present. Plaintiff had no right, for the same reason, to exclusively appropriate a name which, prior to the time of its incorporation, had a well-defined meaning, and which was properly applied to societies already in existence. It did not obtain the right to use the word by assignment or transfer. In fact, it has renounced its allegiance to the body which originated the name, and which assumes to control and confer it. It is claimed, however, that the auditor of state gave plaintiff the right to use it under the provisions of McClain's Code, before cited, which are as follows:

Sec. 1763: "No corporation or association organized under this act shall take any name in use by any other organization, or so closely resembling such name as to mislead the public."

It is sufficient to say in answer to this claim that as to the defendants the determination of the auditor is not conclusive, even if it be conceded that he acted judicially in granting plaintiffs a certificate, and found that plaintiffs were entitled to use the name. Defendants were not advised of any attempt to wrest their name from them, and could not appeal from the judgment of the auditor; nor could they sue out a writ of error to test the legality of his conclusion. See *Birby v. Adams County*, 49 Iowa, 507; *Vose v. Morton*, 4 Cusin. 27, 50 Am. Dec. 750; *Griswold v. Stewart*, 4 Cow. 458. They are therefore not bound by the certificate of the auditor.

Further claim is made that plaintiff has exclusive right to its name under the decisions of this court in the cases referred to in plaintiff's petition. It is sufficient answer to this to say that no such question was made in either of these cases. Moreover, the corporation was not a party to either of these suits, and, if there had been a determination of this question, it would not be binding

upon the parties to this litigation. *Newby v. Oregon Cent. R. Co.* 1 Dedy, 610, Fed. Cas. No. 10,144; *People v. Murray*, 73 N. Y. 535; *Geekie v. Kirby Carpenter Co.* 106 U. S. 886, 27 L. ed. 160; *Smith v. State*, 21 Ark. 294. We think the defendants' answer pleads facts which clearly show that plaintiff was not entitled to the exclusive right to the use of the name, and that the demurrer to the second count of the defendants' answer should have been overruled.

It is argued on behalf of appellee, however, that the defendants are and were unlawfully engaged in business as a life insurance company under the mutual assessment plan without complying with the laws of the state, and that for this reason it is not entitled to the use of the name. The question as to the character and legality of the defendant's organization is argued with much skill and learning by counsel on either side of this controversy, but we do not find it necessary to determine whether defendant is an insurance company, or an insurance company and a secret society combined, or a fraternal society pure and simple; for, if it be conceded that it is an insurance company, and that it is doing business without complying with the laws of the state, it is doubtful, to say the least, whether plaintiff may bring a suit to wind it up, and enjoin it from doing business under a certain name. As a general rule, such an action must be brought by the state. *Beach, Inj.* § 13; *McDonald v. English*, 85 Ill. 232; *Springer v. Walters*, 139 Ill. 419. By the provisions of McClain's Code (sec. 1776) it seems to be made the duty of the auditor of state and attorney general to institute such suit. But let it be assumed that the plaintiff may bring such an action, it does not follow that this gives it the exclusive right to the use of the name. This depends upon other principles, which we have heretofore attempted to elucidate. Concede, however, that plaintiff may bring its suit to enjoin defendants from using the name and conducting their business because it is unlawful, yet it does not follow that plaintiff is entitled to relief. The plaintiff came into being as a separate organization at the time it seceded from the loyal body and adopted amended articles of incorporation, in the year 1884. Defendants were at that time doing business under the name originally conferred upon them by the supreme lodge, and they continued to carry on this same business up to the time of the institution of this suit, which was in December, 1893. They had a large increase of membership, paid many death claims to the families of their members, and have, under the allegations of their answer, been allowed to proceed with full knowledge and acquiescence of the insurance authorities of the state. Many of the members of the defendant, according to the allegations of the answer, would now be unable, on account of age or disability, to procure membership in any other association, and many others could not procure it without large additional expense. Plaintiff has had knowledge of these facts during all of these years, and yet has taken no action until the commencement of

31 L. R. A.

this suit. It seems to us that it is clearly barred and estopped by its laches from maintaining this suit. And we are inclined to the view, although it is not necessary to determine the question, that the suit is barred by the five-years statute of limitations.

Plaintiff's cause of action to enjoin the use of the name accrued at the time it was legally incorporated in the year 1884. It was not then required to have a certificate from the auditor of state authorizing it to do business, for the Acts of the 21st General Assembly did not take effect until the year 1886. It could have obtained its certificate from the auditor, if it were necessary to do so to authorize it to bring suit, in the year 1886, and thereupon could have immediately commenced its suit against the defendants. It could not, by delay in procuring its certificate, prolong the operation of the statute. *Baker v. Johnson County*, 33 Iowa, 151; *Hintrager v. Traut*, 69 Iowa, 746.

The fact that damage done to plaintiff is continuing—which must be conceded—is not controlling, for this is not an action to recover damages at law, but a suit in equity to enjoin and restrain the defendants from the use of a name. The cause fully accrued when the defendants proceeded with their business in violation of the plaintiff's rights. We have held in law actions for damages that when the act of the defendant was complete before the period of limitation, and the result only was within the statute, a suit for damages was barred. *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792. See also *Baldrin v. Oskaloosa Gaslight Co.* 57 Iowa, 51; *Williams v. Mills County*, 71 Iowa, 367. But, aside from all this, it would be most inequitable to allow plaintiff at this late day to destroy the business built up by the defendants. Many innocent persons would be compelled to suffer, and much confusion and inconvenience would result to all concerned.

If it should be conceded that the plaintiff had at one time the exclusive right to the use of its name, we think that it has, by its acquiescence and laches, closed the door to relief in equity. It is an undoubted rule with reference to trademarks that reasonable diligence must be used in making application for relief against piracy and proceedings should be instituted promptly upon discovery. *High, Inj.* § 1100; *Filley v. Child*, 16 Blatchf. 376, Fed. Cas. No. 4,787; *Galliter v. Cadwell*, 145 U. S. 368, 36 L. ed. 738; *Coffeen v. Bruntun*, 5 McLean, 256, Fed. Cas. No. 2,947; *Browne, Trademarks*, § 479; *McLean v. Fleming*, 96 U. S. 258, 24 L. ed. 833; *Amoskeag Mfg. Co. v. Garner*, 55 Barb. 151. Plaintiffs say, however, that the former litigation with reference to this association is a sufficient excuse for not bringing this suit promptly upon discovery of defendants' acts. We do not think this is true. The actions referred to were to determine who were entitled to the offices in the association. The first case was decided in the year 1885, and plaintiff could have then commenced its suit, if not before. But neither of these cases, in our judgment, operated to suspend the running of the statute. See McClain's

Code, § 3742. We are very clearly of the opinion that the demurrer to the third division of count of the defendants' answer, at least as to that part pleading laches, acquiescence, and estoppel, should have been overruled.

A great many other questions are discussed by counsel, but, as they are not regarded as controlling, we must decline to consider them.

Our conclusions are that under the allegations of the answer—First, plaintiff had no right to the exclusive use of the name; second, that, if it had such right, it has lost it by acquiescence and laches; third, that if it be conceded that defendant is doing business without authority, plaintiff is in no position to complain. For these reasons the demurrer to the second and third count of the defendants' answer should have been overruled.

Reversed.

Kinne, J., took no part.

R. J. PARK *et al.*, Appts.,
v.

Hiram CHAMPLIN *et al.*

(.....Iowa.....)

The majority of the members of a Free Will Baptist society cannot against the will of the minority transfer property obtained for the use and benefit of that denomination, which holds the doctrines of Arminius, to the Baptist denomination, which is Calvinistic, notwithstanding a provision in the manual of church government of the Free Baptist denomination to the effect that a church in good standing may have a letter of dismission and recommendation to another evangelical denomination, as this appears to refer to the church as an ecclesiastical, rather than as a purely legal, body.

(October 19, 1895.)

APPEAL by complainants from a decree of the District Court for Black Hawk County dissolving an injunction which had been granted to restrain defendants from withdrawing from the Free Baptist denomination and joining the Baptist denomination in such a way as to take certain church property with them. *Reversed.*

Statement by **Robinson, J. :**

Action in equity to enjoin the defendants from withdrawing the First Free Baptist Church of Waterloo, Iowa, from the Free Baptist, and uniting it with the Baptist, denomination. The plaintiffs filed a petition in which an injunction was asked. A temporary injunction was granted, and thereafter an answer was filed, and also a motion,

NOTE.—In connection with the above case, see also *Mt. Zion Baptist Church v. Whitmore* (Iowa) 13 L. R. A. 198, and *note*.

As to change of doctrine, see also *Krecker v. Shirey* (Pa.) 29 L. R. A. 476; *Philomath College v. Wyatt* (Or.) 26 L. R. A. 68, and *footnote* thereto.

31 L. R. A.

supported by affidavits, to dissolve the injunction. Affidavits in resistance were filed, and the cause was submitted on the motion, which was sustained. From that order the plaintiffs appeal.

Mr. F. C. Platt, for appellants:

Where a conveyance is merely to a religious corporation by its name, the corporate or denominational name, in connection with the contemporaneous acts of the corporators, will be a sufficient guide as to the nature and objects of the trust.

2 Potter, Corp. § 572; *Bear v. Heasley*, 98 Mich. 279, 24 L. R. A. 615; *Roshi's Appeal*, 69 Pa. 465, 8 Am. Rep. 275; *Harrison v. Hoyle*, 24 Ohio St. 263; *Wiswell v. First Cong. Church*, 14 Ohio St. 44; *App v. United Lutheran & G. Ref. Cong.* 6 Pa. 201; *Strong, Relations of Civil Law to Church Polity*, pp. 45-59; *Mannix v. Purcell*, 46 Ohio St. 102, 2 L. R. A. 758; *Curd v. Wallace*, 7 Dana, 190, 32 Am. Dec. 85.

The persons by whom this church was built solemnly covenanted before God to labor together for the building up of the Free Baptist Church and denomination.

The covenant is a part of the by-laws of the church and as such it is binding upon the corporators and the members as a part of the organic law of the corporation, as though a part of the certificate of incorporation.

Bear v. Heasley, 98 Mich. 279, 24 L. R. A. 615; *Dressen v. Brameier*, 56 Iowa, 756.

Property acquired by a church society or corporation while in connection with, or in subordination to, some ecclesiastical organization, denomination, or form of government, cannot be transferred to another denomination, even though a majority of the members of the society favor such transfer, nor may a religious society so endowed unite with some other denominational organization, or become literally independent, or renounce its faith and doctrine, and adopt others.

McGinnis v. Watson, 41 Pa. 14; *Schnorr's Appeal*, 67 Pa. 146, 5 Am. Rep. 415; *Roshi's Appeal*, 69 Pa. 466, 8 Am. Rep. 275; 2 Potter, Corp. §§ 566-578; 20 Am. & Eng. Enc. Law, pp. 781, 783, 797-799; *Avery v. Baker*, 27 Neb. 388; *Hendrickson v. Shotwell*, 2 N. J. Eq. 577; *Baker v. Ducker*, 79 Cal. 365; *Beach, Priv. Corp.* p. 583, § 358; *High, Inj.* § 314; *First Cong. Church v. Stewart*, 43 Ill. 81; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Hackney v. Vauter*, 39 Kan. 615; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Dressen v. Brameier*, 56 Iowa, 756; *Bear v. Heasley*, 98 Mich. 279, 24 L. R. A. 615; *Bird v. St. Mark's Church*, 62 Iowa, 567; *Rottmann v. Bartling*, 22 Neb. 376; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 13 L. R. A. 198.

Not only profession of the faith of the church, but submission to its government and discipline, is necessary to membership therein.

20 Am. & Eng. Enc. Law, p. 779.

Proof that the property is in an unprosperous condition is immaterial. The court will not decree a dissolution of the corporation against the will of the minority.

20 Am. & Eng. Enc. Law, p. 827.

And it is immaterial what amounts of money have been paid for church purposes by the

minority. Their rights do not depend upon that question.

Draesen v. Brameier, 56 Iowa, 761.

A fund given for the benefit of a voluntary religious society accrues to the use of the same society after incorporation.

20 Am. & Eng. Enc. Law, pp. 802, 804, note, 3; *Miller v. Chittenden*, 4 Iowa, 252.

The fact that defendants withdrew from the church and formed a new congregation amounted to a relinquishment of all their rights in regard to the church from which they withdrew.

Bouldin v. Alexander, 82 U. S. 15 Wall. 131, 21 L. ed. 69; *Methodist Episcopal Church v. Wood*, 5 Ohio, 288; *Harper v. Straus*, 14 B. Mon. 48; *Venable v. Coffman*, 2 W. Va. 310; *Atty. Gen. v. Dublin*, 38 N. H. 459; *Hadden v. Chorn*, 8 B. Mon. 70; *Beach, Priv. Corp.* p. 183, ¶ 99; 2 *Potter, Corp.* § 567.

On an attempt to divert the church property the parties cease to be trustees, and may be enjoined accordingly.

20 Am. & Eng. Enc. Law, p. 825; *Rottmann v. Bartling*, 22 Neb. 375.

The First Free Baptist Church of Waterloo, by its articles of incorporation, its by-laws, its membership in Cedar Valley Quarterly Meeting, and its connection through that with the Iowa Yearly Meeting, and the General Conference of Free Baptists, acknowledged the authority, doctrines, and practice of the Free Baptist denomination and became amenable thereto.

Bird v. St. Mark's Church, 62 Iowa, 567.

Where property interests are threatened or affected, a court of equity will extend its strongest arm in protection.

Beach, Priv. Corp. p. 124, ¶ 60, note, p. 183, ¶¶ 99, 100, p. 588, ¶ 358; 20 Am. & Eng. Enc. Law, pp. 795, 797, notes 3, 4, pp. 800, 825; 2 *Potter, Corp.* §§ 565, 569, 572, 581, 582, 591; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 188, 13 L. R. A. 198; 1 *High, Inj.* § 314. *Messrs. Alford & Gates* for appellees.

Robinson, J., delivered the opinion of the court:

The petition alleges and the answer admits the following facts: On the 27th day of April, 1868, the "Waterloo Free Will Baptist Society" was duly incorporated under the laws of this state as a religious association. The object of the association, as declared in the certificate of incorporation, was "the building and erection of a church or house of worship, and the diffusion of the gospel." In December, 1892, the certificate was so amended by a unanimous vote of the society as to change its name to the "First Free Baptist Church of Waterloo," and provide for five instead of three trustees. On the 4th of January, 1894, at a meeting held by members of the church, a resolution was adopted, a copy of which is as follows: "We, the members of the First Free Will Baptist Church of Waterloo, Iowa, resolve that the name of the said church be changed from the one by which it has formerly been known to the 'Free Baptist Church of Waterloo, Iowa,' by which name it shall hereafter be known, and that article 1st of its certificate of incorporation be amended accordingly." The 31 L. R. A.

article referred to was the one which gave the church its name. The petition also contains averments, some of which are not admitted by the answer, to the following effect: The amendment adopted in December, 1892, did not change the articles of faith or belief of the church. The church is under the patronage of the General Free Baptist Conference, and it is particularly under the patronage and is a member of the Cedar Valley Quarterly Meeting, a regularly constituted body, comprised of nine churches. The vote on the adoption of the resolution of January 4, 1894, was twenty-five for, and five against, it. At the same meeting the following was adopted: "Resolved, that we, the members of the Second Baptist Church, of Waterloo, Iowa, appoint the trustees of said church a committee to inform the Baptist denomination that we, as a church, desire membership in their denomination, measures having been adopted by us which we trust will bring about such a union." This was voted against by the same persons who opposed the other resolution. The religious belief and the articles of faith of the Baptist Church or denomination are radically different from those of the Free Baptist Church, and each has a separate and distinct organization, and is governed by its own officers, laws, and rules. The petition further alleges that, by the adoption of the two resolutions set out, the persons voting therefor declared their secession from the First Free Baptist Church of Waterloo, and from the General Free Baptist Conference, and from the Cedar Valley Quarterly Meeting, and thereby abandoned the religious belief and creed of the First Free Baptist Church of Waterloo, and then and there withdrew from that church; that the property of the church was acquired for the purpose of advancing Christianity according to the religious belief, principles, and creed of the Free Baptist Church, to which the plaintiffs still adhere; that the property has been dedicated to the uses and purposes consistent with the religious belief and creed of that body; that the defendants are attempting to alienate the property of the Free Baptist Church of Waterloo, and to prevent the plaintiffs and others from enjoying those rights which have been assured them by the acquisition and dedication of that property to the purposes and uses of that church; that neither the General Free Baptist Conference nor the Cedar Valley Quarterly Meeting has, by vote or otherwise, expressed their consent to the proposed change in the certificate of incorporation of the First Free Baptist Church of Waterloo, and has not been applied to for such consent; that, if the instructions contained in the resolutions are carried out, a cloud will be cast upon the title of that church as to its real property in Waterloo, which is particularly described, and that the plaintiff and other members of the church who adhere to its religious belief will be threatened with the loss of the rights and privileges to which they are entitled as members of the church, if they are not actually deprived of them; that, if the proposed amendment is adopted, the rights of the said persons will be unlawfully infringed and in-

vaded, and the standing of the church as a Free Baptist organization and its influence in the community for the promotion of the doctrines of the Free Baptist Church will be irreparably injured; and that the defendant trustees threaten to carry the resolutions into effect, and will do so unless restrained. The plaintiffs are two of the members of the First Free Baptist Church of Waterloo, and as such, are in good standing. That church and its trustees are made parties defendant.

The defendants contend that the First Free Baptist Church of Waterloo is an independent body, not subject to the control of any superior body; that it is at liberty to form its own creed, and does now and has always regulated its own affairs without any right of interference or control on the part of any superior or other body; that there is now no radical difference between the belief and articles of faith of that church and the Baptist Church; "that several years ago there was a very substantial difference in the articles of faith and religious beliefs of the two churches, but that for many years the two denominations have been gradually drawing nearer to each other in creed, belief, and articles of faith, the regular Baptist denomination having dropped from its creed, belief, and articles of faith the portions thereof, or the most of the portions thereof, which were repugnant to the early founders of the denomination of Free Will Baptists or Free Baptists, with which denomination the defendant church was heretofore affiliated, and at the same time the latter denomination has dropped from its creed, belief, and articles of faith, or modified, some of the tenets thereof which were originally repugnant to or materially different from the religious faith and belief of the regular Baptist denomination; that the tenets of belief of said denominations have changed, and can but change; that any attempt to anchor the beliefs of denominations immovably in the stream of time is beyond human power, opposed to progress and advancement, and an effort to halt on the great onward march of thought." The defendants further allege that the defendant church is weak in numbers; that few of them are possessed of large means; that in consequence it is impossible for the church to employ a regular or permanent pastor; that it has been without a pastor a portion of the time for several years; that in consequence many of its members have gone away, and now affiliate with other churches and that, if the resolutions are not carried into effect, other members will also attach themselves to other churches; that if the resolutions are carried out, and the Baptist denomination receives the church, its membership and revenue will be greatly increased, it will be enabled to employ a pastor permanently, and members will be prevented thereby from going to and affiliating with other churches; that it will not be necessary for any members to subscribe to the articles of faith of the Baptist denomination, because the articles of faith of the two churches are substantially the same; that, if then unable to employ a pastor, assistance will be received from the Baptist denomination, which is the larger

and stronger of the two; that the only effect of carrying out the resolutions will be to change the name of the church, and place it in the Baptist denomination; that the property of the church described in the petition was conveyed to it without qualification or limitation, and without dedication to any particular use or purpose; that it is held subject to the will of a majority of the church members, and that the cause of Christianity will be advanced by the making of the proposed change; that, if it is made, the church, if received into the Baptist denomination, will continue to be a separate and independent body, with a perfect right to formulate and change its own creed or religious belief. The defendants further aver that the property of the defendant church is held without dedication to any special use; that no trust is expressed in its deed or results from its ownership; and that this court has no jurisdiction in equity of the case, the relief, if any, to which the plaintiffs are entitled, being within the defendant church.

In addition to the facts admitted by the pleadings, the evidence shows the following: The terms "Free Baptists" and "Free Will Baptists" are identical in meaning, and are used to designate persons of the same religious belief who are members of the same denomination; and the change in name adopted by the defendant church in December, 1892, had no effect upon its creed or declaration of principles, nor upon its relation to other churches. The title to the church edifice and the lot upon which it stands is vested in the defendant corporation, the First Free Baptist Church of Waterloo; and unless the defendants are prevented from carrying the resolutions of January, 1894, into effect, that organization will be withdrawn from the Free Baptist denomination, and, if received by the Baptist denomination, will become a part of it.

The change proposed, if accomplished, will transfer, not only the organization, but the property of the defendant church, to the Baptist denomination, and that will have the benefit of both the organization and its property, including that in controversy. We do not understand that any party to the action questions the fact that the property would go with the corporation; but it is claimed by the appellees that the defendant church is a civil corporation, in which a majority rule, and that each church, in both the Free Baptist and Baptist denominations, has the right to fix and adopt its articles of faith and covenant; that the only effect of the proposed change would be to place the defendant church in the Baptist denomination; and that it would there continue to be independent, without any change in its articles of faith or covenant.

The appellants claim: (1) That the church edifice, and the lot on which it is situated, have been dedicated to the use of the Free Baptist denomination, for the advancement of Christianity according to the religious beliefs of that denomination, and that therefore they cannot be transferred to any other denomination; (2) that the attempt to carry out the resolution in question is an effort to

alienate the church property, and place it beyond the control of those who are adhering to the doctrine professed by the congregation and the form of worship in practice at the time of the dedication of the property and the creation of the trust; (3) that the appellees have not pursued the statutory provisions in regard to the changing of articles of incorporation of religious societies; (4) that a court of equity has jurisdiction to determine the questions affecting the property interests of the defendant church.

The questions we are required to determine are only those which relate to the property rights of the parties to this action. "Civil courts will not revise the decisions of churches or religious associations upon ecclesiastical matters, but they will interfere with such associations when rights of property or civil rights are involved." *Bird v. St. Mark's Church*, 62 Iowa, 573; 20 Am. & Eng. Enc. Law, p. 799. And, when controversies of which the civil courts have jurisdiction arise in such bodies, the courts will inquire as to the purpose for which they were instituted and the rule by which they are governed, and, so far as practicable, they will be given effect. *Rottmann v. Bartling*, 22 Neb. 375; *Atty. Gen. v. Pearson*, 3 Meriv. 409; *Harrison v. Hoyle*, 24 Ohio St. 234.

It was said in *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 147, 13 L. R. A. 198, that, "upon authority so general as to be beyond question, it is held that property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its adopted faith and teachings is by said church or association held in trust for that purpose, and any number of the church or association less than the whole may not divert it therefrom." This leads us to inquire whether the property in question is held in trust. On the day on which the articles of incorporation of the defendant church were adopted and its organization perfected, the lot on which the church edifice was afterwards erected was conveyed to the society by warranty deed, which recited the payment of a consideration, but did not contain any declaration of trust. Whether the property in controversy is to be regarded as held in trust does not wholly depend upon the terms of that instrument. In determining its character, we may properly examine the articles of incorporation of the defendant church, its declaration of faith and practice when the funds for the purchase of the lot and for the erection of the building thereon were obtained, and the purpose which the funds were provided to aid. The church record book shows that persons who desired to be organized into a Free Will Baptist Church met in Waterloo in January, 1867; a council previously authorized by the Waterloo Quarterly Meeting, having been chosen, was organized: church letters were read; the church covenant was read and adopted; and a resolution to organize a church to be known as the "Free Will Baptist Church" was adopted; and the church appears to have been organized. The church covenant bound the members to labor together for the building up of the church and the denomination, to con-

tribute for the support of the ministry and for other church expenses, to be benevolent to the needy, especially to the poor of their own church, and to sustain the benevolent enterprises of their own denomination and church, as mission, education, Sabbath schools, and moral reform. At a later day, application was made to the Waterloo Quarterly Meeting for admission to that body, and afterwards to the Cedar Valley Quarterly Meeting, to which it appears to have been admitted. In April, 1868, steps were taken to erect a church building, money was subscribed for that purpose, and the building was constructed. All that was done in the organization of the church and in procuring the property in question was in the name of the Free Will Baptist Society, and at all times until January, 1894, it appears to have acted with and as a part of the Free Baptist denomination.

We have no doubt that the property was obtained for the use and benefit of that denomination. It is said, however, that there is no practical difference between that and the Baptist denomination. They are similar in many respects, especially in matters of organization and government, and both recognized the Bible as the only infallible rule of faith and practice. But there are important differences of belief which have thus far prevented a union of the two denominations, and recent agitations for a union have shown that they will continue separate for an indefinite period of time. The evidence before us shows that the faith of the Baptist denomination is Calvinistic, and it is briefly stated as follows: "The belief in original sin or total depravity; predestination; particular redemption; effectual calling and perseverance of the saints." The Free Baptist faith is based upon the doctrines of Arminius, and is stated to be: "(1) Conditional election and reprobation, in opposition to absolute predestination. (2) Universal redemption, or that the atonement was made by Christ for all mankind, though none but believers can be partakers of the benefit. (3) That man, in order to exercise true faith, must be regenerated and renewed by the operation of the Holy Spirit, which is the gift of God. (4) That the grace which confers this is not irresistible. (5) That men may relapse from a state of grace, and die in their sins." Differences not disclosed by these statements of faith also exist. It is not any part of our duty to decide whether the difference between the respective articles of faith, covenants, and practice of the two denominations is substantial. It may be true that changes in such matters are constantly going on, and that it is beyond human power to prevent them; that in those things which make for worldly prosperity, as popularity, wealth, and numbers, the defendant church would be greatly benefited by its union with the Baptist denomination as proposed; but considerations of that kind have nothing to do with the legal rights of the parties to this action, and cannot be given weight in determining the questions of which we have jurisdiction. It is enough for the purposes of this case that the two denominations are now separate and distinct; that

the property in controversy was acquired by the defendant church for the special benefit of one of them; and that the plaintiffs, being members of that church and of that denomination, object to the proposed change and insist that it shall not be made.

According to the usages of the Free Baptist denomination, it is the duty of each of its churches to unite with some Quarterly Meeting. That is composed of two or more churches of the denomination, and has a constitution for its government. The functions of the Quarterly Meeting appear to be chiefly advisory. It cannot deprive a church of its independent form of government, nor its right to discipline its own members, nor labor with individual members of the churches as such, but it has the right to labor with the church as a body, in case of unscriptural or disorderly walk, and may determine whether a church is worthy of its fellowship. Some importance is attached to a provision in the "Manual of Church Government" in regard to the business of the Quarterly Meeting, which reads as follows: "When a church in good standing requests a dismission to unite with another Quarterly Meeting, or with another Evangelical denomination, a letter of dismission and recommendation is given." It is urged that this recognizes the right of a church to unite with another Evangelical denomination, but it does not purport to authorize the majority of any church to transfer the property of the church, and appears to refer to the church as an ecclesiastical, rather than as a purely legal, body. We find nothing in the record before us to show that the Quarterly Meeting has any authority in matters of property, and nothing to show that the defendant church was so organized that a majority of its members may dispose of its property for the benefit of another denomination, either directly or indirectly, in the manner attempted in this case. The property was acquired, as stated, for the use and benefit of the Free Baptist denomination, without any condition, expressed or implied, that it might be transferred against the objections of members of the church, however few in number.

We are aware that our conclusion is not in harmony with the decisions in some of the states, especially those of New York; but it is according to the doctrine heretofore announced by this court, and appears to us to be supported by the weight of authority, and to be founded on principles of equity. It must be understood that what we have said has special reference to the rights of the defendants to transfer the property in controversy to the Baptist denomination. Since the resolutions in question cannot be carried out without affecting prejudicially the interests of the plaintiffs in that property, the defend-

ants are enjoined from carrying them into effect. Nothing we have said is to be construed to affect any right the defendant church has to withdraw, as a church, from the Free Baptist and to unite with the Baptist denomination; but the withdrawal, if carried out, must be so effected as not to change or cloud the title to the property in controversy.

The decree of the District Court is reversed.

Given, Ch. J., dissenting:

I do not concur in the foregoing opinion. It seems clear to me that under the "Manual of Church Government," quoted in the opinion, this church, as a body, has the right to unite with any other Evangelical denomination, and to take its property with it. It is in this provision that this case differs from those cited. I do not question the doctrine that, when a church property is held exclusively for the promulgation of the faith and teachings of a particular denomination, it cannot be diverted to any other use by any number of the members less than the whole. To permit such a diversion would be a breach of the trust under which the property is held. Such is not this case. The opinion recognizes the right of this body to unite with the Baptist denomination, or, at least, declines to say that it may not. That is just what it was proceeding to do, and in the way provided, when this suit was commenced, and that is what the district court held it might do. The opinion does not prevent this church from consummating the union, but holds that it must be in such way as not to change or cloud the title to its property. If this property was held exclusively for the promulgation of the faith and teaching of the Free Baptist denomination, this would be correct, but it was not acquired nor is it held for that exclusive purpose. It was acquired by this body, and is owned and held by it for the promulgation of the faith and teachings of whatever Evangelical denomination it may see fit to unite with. It is therefore no breach of the trust under which this property was acquired and is being held to allow the owner to use it in promulgating the faith and teachings of any Evangelical denomination with which it may see fit to unite. To say otherwise is to deny to the defendant church the right to hold and use its own for the purpose for which it was acquired and is held. Whether such a union may be effected by a bare majority need not be considered, as the record shows that, of a membership of about sixty, fifty-four are in favor of the body uniting with the Baptist denomination. I think the decree of the district court should be affirmed.

Rothrock, J., concurs in this dissent.

Rehearing denied.

RHODE ISLAND SUPREME COURT.

William F. DE WOLF *et al.*

v.

Annie E. MIDDLETON *et al.*,

(..... R. I.)

1. Testator's intent that the heirs are to be ascertained by the statute in force when the executory devise takes effect appears where a

devise giving the fee to daughters provides that if they leave no surviving issue the estate "on their decease" shall be divided among his heirs at law according to the statute of descents, their heirs and assigns forever,—especially where there would be at his death but one heir recognized by law besides the daughters, because of the alienage of a son who was nevertheless recognized by the will as a beneficiary.

2. The alienage of a son which would

NOTE.—Effect of state statutes and Constitutions upon inheritance through an alien.

- I. The English doctrine.
II. The effect of state legislation.

Upon the question of an alien's right to inherit, see note to *Easton v. Huott* (Ill.) post, —, (1895).

As to the effect of state Constitutions and statutes upon the question of inheritance by or from an alien, see note to *Beaven v. Went* (Ill.) ante, 85 (1895).

The effect of treaties upon the right of aliens to inherit will form a separate note.

As to treaty guaranties to aliens, see note to *Gandolfo v. Hartman* (C. C. S. D. Cal.) 16 L. R. A. 277 (1892).

Upon the question of the disability of aliens and the escheat of property, see note to *American Mortg. Co. v. Tennille* (Ga.) 12 L. R. A. 529 (1891), and brief in *Toole v. Toole* (N. Y.) 2 L. R. A. 465 (1899).

I. The English doctrine.

The common-law doctrine prevailed in England, until by statute, 11 & 12 Wm. III. chap. 6, all the King's natural-born subjects were enabled to trace their descent through their alien ancestors. This act was amended and explained by the statute 25 Geo. II. chap. 30, and the whole law upon the subject was subsequently re-enacted and amended by the naturalization act of 1870 (38 Vict. chap. 14), as amended by the statute 33 & 34 Vict. chap. 102, and by the act 35 & 36 Vict. chap. 30, under the provisions of which real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject.

But it has been held that the above statutes have no retrospective effect. *Sharp v. St. Sauveur*, L. R. 7 Ch. 343, 26 L. T. N. S. 142, 41 L. J. Ch. 578, 20 Week. Rep. 269 (1871); *DeGeer v. Stone*, L. R. 22 Ch. Div. 243, 52 L. J. Ch. N. S. 57, 47 L. T. N. S. 424, 31 W. R. 241 (1882).

In *Collingwood v. Pace*, 1 Vent. 413, 1 Lev. 59, 1 Keb. 671 (1664), an alien father had two sons born in England, and the question was whether the one son could inherit from the other for the reason that he must deduce his title through his alien father, but the court held that the one could inherit from the other, though neither could inherit from the father, for the reason that the inheritance between them was immediate, and the one should make his title in a *mort d'ancestor*, and as heir to the brother, without mentioning the father.

With regard to the rules of descent in such cases, the court in that case stated that it must not govern itself therein by the general notions of law or proximity of nature, but by the principal laws of the country where the question arose, as the various countries had variously disposed of the manner of descents, even in the same law or degree of proximity.

L. R. A.

With regard to the distinction of descents or relations between ancestor and heir, and hereditary succession, the court in that case stated that in immediate descents there could no impediment, but what arises in the parties themselves. *Collingwood v. Pace*, 1 Vent. 413, 415, 1 Keb. 671 (1664).

Also that in immediate descents a disability on account of alienage in a *medius* ancestor would disable a person to take by descent, though he himself had no such disability. *Collingwood v. Pace*, 1 Vent. 413, 415, 1 Keb. 671 (1664).

And that in lineal descents, if the father was an alien, and had issue, a denizen born, who died in the lifetime of the grandfather, the grandfather died seised; the son should not take but the land escheated. *Ibid.*

That in collateral descents, if there were two brothers, and one was an alien or attainted and had issue, a denizen born, and the other purchased land and died without issue, the issue of the other should not inherit, for the reason that the father of such issue being the *medius* ancestor or *medium differens* of such descent, was incapable of taking. *Ibid.* The same was held in *Grey's Case*, 3 Dyer, 274a (1543).

So it was further held that, "if there were two brothers and one was an alien and had issue and died, and such issue purchased land and died without issue, his uncle would not inherit for the reason that his brother was a *medius* and unable to take." *Collingwood v. Pace*, *supra*.

That "in any descents the impediment of an ancestor that [was] not *medius* ancestor, between the persons from whom and to whom, will not impede the descent." *Ibid.*

That in the case of "a grandfather and grandmother, both aliens . . . [having] issue, the father a denizen, who [had] issue a son a denizen, the son [was] heir to the father notwithstanding the disability of the grandfather, for the reason that they [were] not *medii antecessores* between the father and the son, but paramount; and yet all the blood the father [had was] derived from his disabled parents." *Ibid.*

That if the descent between brothers was an immediate descent and the father was not *medius antecessor* between them, then the disability of one would not impede the descent of his brother, or his brother's son; but if it was a mediate descent, and the father was a *medius antecessor* between them, then the disability in the father might impede the descent. *Ibid.*

And the court further stated that the law doth not hinder, but that an alien is the same degree and relation of consanguinity as in the like cases of a denizen born; the son, father, and brother, though aliens, were yet son, father, and brother as natural-born subjects, and so taken notice of in the law. *Collingwood v. Pace*, 1 Vent. 413, 417, 1 Keb. 671 (1664).

Though an alien might take by purchase by his own contract that which he could not retain against the King, yet the law would not enable him, by act of his own, to transfer by hereditary descent; the alien dying, having since a denizen born, the land will not descend, nor can he take by the act

prevent his inheritance at the time of the death of the testator, who made an executory devise to his heirs at law according to the statute of descents, will not exclude a descendant of the son from this class, where a statute passed before the time of determining the heirs has removed the disability of alienage.

3. It seems that one who becomes a domiciled resident of a foreign country becomes an alien within the operation of the law which excludes aliens from inheritance.

4. The status as legitimate heir of an

alien born before the marriage of his parents is to be determined by the law of their domicile.

(February 25, 1895.)

BILL for the construction of certain clauses in the will of William De Wolf, deceased. By the second clause of the will, testator devised his Poppasquash farm to his widow for life, "and after her decease, I do give and devise the same real estate to my two daughters Charlotte and Maria; their heirs and

of the law, for the law *quæ nihil frustra* will not give him an inheritance or freehold by act of the law for he cannot keep it. *Ibid.*

If the eldest son is an alien, the law takes no notice of him; and therefore he cannot take by descent, so he cannot impede the descent to his youngest brother. *Ibid.*

And "a consequential consecutive disability, that reflects to an alien from one who must derive by or through him, though he perchance be a natural-born subject, has the same effect." *Ibid.*

That though a son was a natural-born subject, yet if his father was an alien there was a consecutive impediment "derived upon" such son, whereby he was consequently disabled to inherit from his uncle; and this consecutive disability was parallel to that which was called a corruption of blood. *Collingwood v. Pace*, 1 Vent. 418, 418, 1 Keb. 671 (1864).

In lineal degrees or descents, if there was a grandfather a natural-born subject, a father an alien, and a son a natural-born subject, and the father was made denizen, he could not inherit from the grandfather, and if the father died in the lifetime of the grandfather, the birth of the grandchild after the denization did not remove either the personal or the consequential impediment or incapacity of the father. *Collingwood v. Pace*, 1 Vent. 418, 419, 1 Keb. 671 (1864).

And in collateral descents, if the father, a natural-born subject, had two sons, aliens, who were both made denizens, and one died without issue, the other should not inherit. *Ibid.*

Where an Englishman by birth came to the United States after the Declaration of Independence, took the oath of allegiance, married an American woman, and had a son by such marriage born in the United States, and also a grandson the son of such son, also born in the United States,—it was held that such grandson was capable of inheriting real estate as a British subject, within the statute 13 Geo. III. chap. 21, and 4 Geo. II. chap. 21. *Fitch v. Weber*, 6 Hare, 51, 17 L. J. Ch. 73, 12 Jur. 76 (1847).

The privileges which the statutes, 4 Geo. II. chap. 21, and 13 Geo. III. chap. 21, confer, are the privileges of the children, and not of the father, and therefore acts intended by a British-born subject to have the effect of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of those statutes, unless such acts bring them within their disqualifying provisions. *Ibid.*

In *DeGeer v. Stone*, L. R. 22 Ch. Div. 243, 52 L. J. Ch. N. S. 67, 47 L. T. N. S. 434, 81 Week. Rep. 241 (1882), real property was devised by a testator domiciled in England at the time of his decease but born in Holland, where his parents were married. His mother was a Dutch subject born in Holland in 1696, his father was also born in that country in 1744, but his paternal great-grandfather was a natural-born British subject who went to Holland in 1691, in charge of a British regiment, and was married while in service to a Dutch woman, the testator's grandfather being the eldest son of the 31 L. R. A.

marriage. The testator's grandfather also served in his father's regiment, which had then ceased to be in the pay of the British, the testator's father also joining the regiment. It was held that the English statute of 7 Anne, chap. 5, gave the testator's grandfather the status of a natural-born British subject, and that the statutes of 4 Geo. II. chap. 21, and 13 Geo. III. chap. 21, gave also to the testator's father the rights belonging to that status; and further, that the testator himself was an alien, and that, as the statute 33 Vict. chap. 14, was not retrospective, the real estate escheated to the Crown.

II. Effect of state legislation.

The general doctrine of the common-law prohibiting the taking of real estate by inheritance through an alien has been very much modified by state legislation.

Alabama.

In *Bartlett v. Morris*, 9 Port. (Ala.) 206 (1833), title was claimed under the provisions of an act of the general assembly of Alabama, which authorized an alien to inherit the estate of her late uncle in the same manner as she would have inherited at law had she not been an alien. The evidence showed that the uncle was an alien, and died seized, that the lessor of the plaintiff was also an alien, as were her father and mother, the latter being a sister of the deceased uncle. The jury, in the court below, were instructed that, although the uncle was an alien, and the lessor of the plaintiff was also an alien, yet, by virtue of the special act, such alienage did not preclude the niece from inheriting and recovering the land in question, but upon appeal the decision was reversed the court holding that the act did not cause a transmission of the title held by the uncle at his death to the lessor of the plaintiff.

In the above case the court further stated that if the uncle, when he died, was a citizen possessed of inheritable estates, and if the lessor of the plaintiff was the alien daughter of a citizen mother, and the latter was a sister of the uncle, born since 1832, whom he had survived, there being no remote heirs to him on whom the law casts the descent, then every word of the act would have had effect.

California.

In *People v. Folsom*, 5 Cal. 373 (1855), the question was whether the mother and heir of a naturalized citizen of Mexico, who was not at the time of his death a citizen of Mexico or of the United States, but a subject of Denmark never a resident in the United States or in Mexico, was competent, under the laws as they then existed, to take by inheritance, and if not whether the state had an interest. The facts showed that the deceased died twelve days before the ratification of the treaty of Guadalupe Hidalgo. The court held that in order to give the United States any interest in the land it was necessary to prove the forfeiture either by the United States or by Mexico, and that the mother was entitled to undisturbed possession until office found, and that her title became absolute by reason that no inquest of office was found under the Mexican laws until after a change of gov-

assigns forever, provided, however, that in case my said daughters Charlotte and Maria should die leaving no surviving issue, then it is my will that the estate, on their decease, be divided among my heirs at law, according to the statute of descents, their heirs and assigns forever, and I do devise the same accordingly."

The fifth clause of the will was in practi-

cally the same terms and devised testator's Hopestreet estate.

At the time of testator's decease there were four children, William, Henry, Charlotte, and Maria. Neither daughter left issue and the court having decided (18 R. I. —) that the estate was to be divided as of the time of the death of the surviving daughter, the question in this case was as to the mode of

enment, no disability existing under the laws and Constitution of the United States; the court further stating that the common-law rule excluding from inheritance all who traced their descent through uninheritable blood was never in force in that state, and that there was no error in the decree of distribution to the first cousins, notwithstanding their relationship to him through alien ancestors.

In *State v. Smith*, 70 Cal. 153 (1886), a naturalized citizen died intestate leaving no resident heirs, but a nephew and three nieces nonresident aliens, his only next of kin. The nephew, after declaring his intention to become a citizen of the United States, obtained letters of administration in California, and, on behalf of himself and the other next of kin, "appeared and claimed the estate," which was distributed equally to the next of kin. Subsequently the estate brought escheat proceedings suggesting that inasmuch as laws could have no extra-territorial operation, the legislature had no power to provide for succession by foreigners who had never been residents. The court held that § 671 of the Civil Code of that state provided a rule with respect to property within the state, and conferred a right to be enjoyed within the jurisdiction, and that therefore the defendant's claim was valid.

In the above case the court also held that art. 1, § 17, of the Constitution of California, which prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property, did not prohibit the legislature from conferring the same rights upon those born in foreign countries who had never been resident in that state. *Ibid.*

And with regard to § 672 of the Civil Code of that state, it has been held that the words "nonresident aliens" were to be interpreted as indicating those who were neither citizens of the United States nor residents of the state. *Ibid.*

With respect to the appearance and claim of such nonresident alien, as required by that section of the Code, it has been stated that the clause was a limitation applicable, not only to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise, and that the claim might be *in pais*, as by taking possession, or conveying or contracting with respect to it; the time for such alien to make his claim being fixed at five years from the time of the succession, the proceedings taken within such time on behalf of the state being premature and therefore void. *Ibid.*

Connecticut.

Where a naturalized citizen died intestate leaving no lineal descendants, nor wife, sisters, father, mother, uncles nor aunts, but one brother an alien, five first cousins, and a number of children of first cousins, among whom was the appellant, such first cousins being naturalized citizens, the probate court found that the alien brother was entitled to all the personal estate, and that the first cousins were entitled to share equally all the real estate. Upon appeal, however, it was claimed that, according to the principles of the common law, the blood of an alien ancestor would impede the de-

scend of the title to land, where the title was required to be traced through such alien, and that this principle was a part of the laws of Connecticut; that the English act of 11 & 12 Wm. III., which removed this disability in favor of natural-born citizens of the realm, was also the law in Connecticut; and further, that the disability was never removed in favor of naturalized citizens, who, if compelled to trace their connection with the decedent through alien blood were disabled from taking, whereas the appellant, who was a natural-born citizen, was relieved from the disability caused by the alien blood of his ancestors, and therefore, together with the other natural-born children of decedent's cousins, was entitled to the real estate. *Campbell's Appeal*, 64 Conn. 277, 24 L. R. A. 667 (1894).

The court held that the common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood was never in force in that state, and that there was no error in the decree of the probate court.

Indiana.

In *Eldon v. Doe, Wynn*, 6 Blackf. 341 (1842), a father, a naturalized citizen, who made no mention of his wife and daughter at the time of his naturalization, devised real estate to his daughter, who, herself an alien, subsequently married an alien, and died leaving her husband and a son, who subsequently died, her surviving. The property was claimed by two brothers of the testator's daughter, who became naturalized citizens after her death, and by a nephew and niece, born in the United States, children of a deceased sister, who was herself an alien. In 1840, and after the death of testator's daughter, a special act of the legislature was passed for the relief of one of her brothers and others by which the lands of which she "died seised" were to "descend to, and vest in, such of her heirs as were, by the laws of this state, capable of acquiring real estate by descent at the time of her death, in the same manner as though the said [daughter] had been a citizen of the United States." The court held that neither the brothers nor the nephew and niece were entitled, the latter on the ground that they claimed by representation, their title coming through their alien mother, they being on that account incapable of acquiring real estate by descent at the time of the death of the testator's daughter under the Indiana laws.

In *Doe, Huddleston v. Lazenby*, 1 Ind. 234 (1843), *Smith*, 238, both parties claimed title from the state, and the facts showed that an alien died seised, leaving surviving him no wife, nor children, nor parents, but three brothers and a sister, two of the brothers residing in the state, the other brother and the sister being nonresident aliens. One of the resident brothers also died an alien without having taken steps toward naturalization, and the other also died an alien, but had declared his intention to become a citizen. The first-mentioned brother left no children, and was not shown to have been in possession jointly with his brother or severally; the other brother died in possession and left three sons and a daughter, all infants, who were the lessors of the plaintiff. These lessors were subsequently naturalized. The nonresident alien brother and sister upon petition

distribution. William, one of testator's sons, went to Cuba in 1818, and died there in 1830. He left, by a Cuban wife, one son, who always lived in Cuba and died there in 1852, leaving two children, one a daughter Carlota DeWolf, who became the widow Campillo. The other a son Enrique who always lived in Cuba and died there in 1890, leaving four children.

Further facts appear in the opinion.

Mr. James Tillinghast, for complainants:

Under a general devise to the testator's heirs, whether immediate in possession, or in remainder, vested or contingent, after an intervening estate, the class to take is to be ascertained and traced as of and from the date of his death.

Re Kenyon, 17 R. I. 149.

obtained an order for partition, the lessors of the plaintiff being made defendant. The petitioners sold the share set off to them thereby to the defendant. In an action brought by the infants, who were advised of the sale and made no objection, to recover such property, the court held that, in order to entitle the plaintiff to recover, he must show title in his lessors, which he could not do, as he could show no title by descent, as such title must have been deduced through the intestate, the original purchaser, who died an alien without having taken steps toward naturalization, and being a foreigner could not transmit by descent; and the court further held that the Indiana act of 1842 did not reach the case but applied only to aliens dying after it took effect.

In the above case a special act of the legislature of the state was passed in the year 1899, for the relief of the heirs of the intestate and his two brothers, who were residents of the state, which released and vested all the estate and interest of the state in any lands situated in that state, of which the intestate and his two brothers died seised, in such persons, being inhabitants of the United States, as could take the same by demise, descent, or in right of dower, as if the deceased person, and the persons thereby authorized to take, had been native citizens of the state, the persons taking thereunder, holding estates of the same nature and extent as they would have taken had they and the parties therein mentioned been native citizens of the state. Later the legislature passed another act, for the relief of the defendant, which provided that the proceedings in the partition action, and in the probate court relative to the partition of the real estate of the deceased, were declared sufficient to vest in the persons therein mentioned, and those holding or claiming by, through, or under them, the several portions of the real estate set apart to them, and releasing all claims of the state acquired by escheat, to the persons to whom such portions were set apart.

Under the Indiana statute of 1852 (1 Gavin & Hord Stat. § 1, p. 255), which provided that no person except a citizen of the United States, or an alien who was a bona fide resident thereof, should take, hold, convey, devise, or pass lands by descent, except in such cases of descent or devise as were provided for by law,—the court in the case of *Murray v. Kelly*, 27 Ind. 42 (1866), held that the act removed the common-law disability of an alien to inherit, the statute being as broad in favor of a bona fide resident alien as a native-born citizen.

In the above case it was claimed that the Indiana statute was unconstitutional by reason of a defect in its title, which was, "An Act Concerning Real Property and the Alienation thereof," but the court held that real estate being the subject of the act it was sufficiently expressed in the title.

In that case the court also held that the next of kin of an intestate, who were native-born citizens, children of resident aliens, were entitled to take by descent lands which had descended from a resident alien, the brother of their mother, to his son, who was also a resident alien, where such son had died without issue or nearer relatives, such next of kin claiming *ex parte paterna*, as against the next of kin of the son *ex parte materna*.

31 L. R. A.

A claim was also made in that case on behalf of two alien bona fide residents, who were also related in the same degree as the native-born citizens, *ex parte paterna*, but although the court held that the statute was as broad in favor of a bona fide resident alien as a native-born citizen, yet it stated that it had not inquired into the question as to whether they could inherit, as it clearly appeared that the native-born citizens could, the latter's claim being fatal to the claim of the next of kin *ex parte materna*.

Iowa.

Where a person died intestate without issue, leaving a naturalized brother, and a nephew who had been naturalized, but whose father died an alien, it was held that the brother succeeded to the whole estate for the reason that the nephew was not permitted by the common law to trace his descent through his alien father. *Stemple v. Herminghouser*, 3 G. Greene, 408 (1852).

Chapter 85 of the Iowa act July 4, 1888, § 1, prohibits nonresident aliens from acquiring title to or taking or holding any lands or real estate in that state by descent, devise, purchase, or otherwise, except as thereafter provided, but gives the widows, and heirs of aliens who have theretofore acquired lands in that state under its laws power to hold such lands by devise or descent for a period of ten years, and no longer.

And § 2 of the same permits nonresident aliens to acquire by purchase, and hold, real property for a limited time, but has no application to the acquiring of title by descent. Other provisions of the act are designed to protect nonresident aliens who owned land in the state when the act took effect, and the owners of liens upon or interests in real estate and judgments.

And § 7 provided that the act should not apply to aliens who were residents of the state who should have the same right to acquire, hold, and dispose of property as natural-born citizens of the United States, and repealed §§ 1908, 1909, of the Code.

In construing the above act the court, in *Furenes v. Mickelson*, 86 Iowa, 508, 511 (1892), stated that the above section gave to aliens who were residents of the state the same right to acquire, hold, and dispose of property as natural-born citizens of the United States had, but nothing more, and that such a citizen could not inherit mediately through a nonresident alien ancestor.

In the above case a naturalized resident of the state sought to inherit from his deceased resident great uncle, who was a naturalized citizen of the state, through his father, who was a nonresident alien, but the court held he could not so inherit as he did not take mediately from his uncle.

Kentucky.

In *Beard v. Rowan*, 1 McLean, 135 (1831), some of the claimants, children of deceased alien brothers and sisters, claimed, through alien ancestors, to be entitled to real estate, devised to the intestate by a will which showed it to be the clear intention of the testator that if, during the intestate's lifetime, he became a naturalized citizen, or the state law enabled him to take and hold real estate, such estate should vest absolutely in him in fee simple.

In the above case it was claimed that as the intestate, who came to the state of Kentucky in the

The same principle applies to contingent remainders.

Holloway v. Holloway, 5 Ves. Jr. 399; *Urquhart v. Urquhart*, 13 Sim. 613; *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimer v. Slater*, L. R. 7 Ch. Div. 322; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Minot v. Tappan*, 122 Mass. 535; *Buzby's Appeal*, 61 Pa. 111; *Stewart's Estate*, 147 Pa. 383; *Hawkins*,

Wills, p. 39; *Inglby v. Amcotts*, 21 Beav. 585.

The same rule equally applies to executory devises.

Pinkham v. Blair, 57 N. H. 226.

To give any effect to the word "assigns," the rights must be held to have vested at the testator's death, and the persons among whom they are to be divided at Mrs. Roger's death

year 1790, had not resided in the state two years prior to the passing of the act in 1800, he could not transmit lands by descent, but it was held that the statute of 1800 applied to both future and past residence.

The Kentucky statute above referred to enabled any alien, other than an alien enemy, who had actually resided within that commonwealth two years, during the continuance of his residence therein after the said period, to hold, receive, and pass any right, title, or interest to any lands or other estate within the commonwealth in the same manner, and under the same regulations, as the citizens of the state. *Beard v. Rowan*, 1 McLean, 136, 141 (1831).

Maryland.

Where the deceased died seised of real estate in Maryland, leaving no heirs, except an alien brother, who was never naturalized, and three nieces, the daughters of such brother, who were naturalized citizens of the United States, it was held that they could not claim title by inheritance through their father, for the reason that he was an alien and still living. *McCreery v. Somerville*, 22 U. S. 9 Wheat. 354, 6 L. ed. 109 (1824).

In the above case the court also stated that the English statute of 11 & 12 Wm. III. chap. 6, which was in force in Maryland, removed the common-law disability of claiming title through an alien ancestor, but did not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common law if the ancestor were a natural-born subject or citizen. *Ibid.*

In *Matthew v. Rae*, 3 Cranch, C. C. 699 (1829), aliens claimed as heirs at law of a decedent who came to the United States in 1796, and conformed to the naturalization laws of Pennsylvania of 1780, and of Maryland of 1779, which laws were annulled by Congress by the general naturalization law of 1790. The court held that the decedent was not a naturalized citizen, but that, as an alien had under the Maryland act of December, 1791, § 6, the right to purchase and hold lands in the District of Columbia, and transmit the same to his alien heirs, the plaintiffs were entitled.

Massachusetts.

Where the facts show that the father of the defendant and grandfather of the wife of the plaintiff died intestate seised in fee, in the year 1778, leaving five children, among whom was the father of the plaintiff's wife, and of two other children; that the father of the plaintiff's wife was, in 1775, a citizen of Massachusetts, but was captured by the British, and held by them until the close of the war, when he went to Nova Scotia and continued to reside there until his death in 1790; and the questions being, whether such party was an alien at the time of his father's death in 1778, and if an alien, whether the statute of 11 & 12 Wm. III. chap. 6, was adopted before the establishment of the Constitution of the commonwealth,—the court held that such party was an alien at the time of his father's death; and further, that the statute in question was adopted and in full force in that state at the time, and therefore found in favor of the plaintiffs. *Palmer v. Downer*, 2 Mass. 179, note (1801).

The statute in question in the above case enacted that all persons being natural-born subjects of the King, might inherit, and make their titles, by de-

scend, from any of their ancestors, lineal or collateral, although their father, mother, or other ancestor, by, from, through, or under whom they derived their pedigree, were born out of the King's allegiance, as fully as if such father, mother, or other ancestor, had been naturalized, or natural-born subjects.

In *Com. v. Andre*, 3 Pick. 224 (1825), a committee of the legislature by deed granted to the defendant and his heirs real estate which had been confiscated, the grantees being at the time an alien resident of the state never naturalized, the purchase being made for the benefit of another party a nonresident alien. Both parties dying intestate, an information to recover seisin and possession was subsequently filed, the heirs who were nonresident aliens appearing and answering, alleging that the lands had descended to them. The court held that the commonwealth having conveyed the land for valuable consideration could not reclaim it from either the grantee or his heirs for the cause of alienage in either of them.

Missouri.

In *Greenia v. Greenia*, 14 Mo. 526 (1851), the next of kin of a citizen were brothers and nephews nonresident aliens, and two nephews citizens of the state, and the question was whether the slaves should be given to the two nephews to the exclusion of the alien brothers and nephews, or whether the property should be equally distributed among them according to the statute of descents and distributions without regard to alienage. The court held they were equally entitled, the 7th section of the Missouri statute concerning descents and distributions providing that in making title by descent it should be no bar to a descendant that any ancestor through whom he derived his descent from the intestate was or had been an alien, the section being designed to remove the bar of alienage or restrict it in certain cases.

The Missouri act of 1820 permitted resident aliens in any part of the United States or territories, who had declared their intention to become citizens of the United States or territories, to inherit, and to transmit the inheritance of real estate within the state, and to acquire and hold the same by descent or purchase, and to alienate the same and to have the same rights and incur the like duties, in relation thereto as if they were citizens of the United States, the intention to become citizens and the preparatory oath being necessary to the enjoyment of the privilege. *Farrar v. Dean*, 24 Mo. 16, 17 (1856).

The rigors of the common law with respect to the rights of aliens to take and inherit real estate were modified by the legislation of the state of Missouri, and the disabilities consequent upon alienage, which extended to acquiring and holding real estate by purchase, devise, or descent were nearly swept away. By the laws of the territory, of 1820 (vol. 1, p. 697), the disability of an alien in that respect was removed as to foreigners residing in any of the United States or territories, who had declared their intention to become citizens, and such was the law until the Revised Statutes of 1836, by which, not only aliens residing in the United States who had made such declarations of intention, but aliens resident in the state, were made capable of acquiring real estate by purchase or descent, and

to be ascertained by tracing, "according to the statute of descents" and intermediate alienations, from those in whom the right thus vested at the testator's death.

People v. Conklin, 2 Hill, 67; *Ives v. Harris*, 7 R. I. 424.

All contingent interests in ascertained persons, whether by way of contingent remainder or executory devise, are descendible.

Cummings v. Stearns, 161 Mass. 506.

of alienating the same, and such provision was carried forward into the statute of 1845, with the additional right of "holding" real estate, and the same was re-enacted in the statutes of 1855 which gave the additional privilege to a nonresident alien to convey the land of his ancestor or deviser, provided it was conveyed within three years after the final settlement, and such act was re-enacted in the revision of 1865. In the year 1872 the legislature swept away every impediment, and declared that aliens should be capable of acquiring by purchase, devise, or descent real estate in that state, and of holding, devising, or alienating the same, and should incur the like duties and liabilities in relation thereto, as if they were citizens of the United States and residents of that state.

In *Burke v. Adams*, 80 Mo. 504, 510 (1888), where both the ancestor, and the heir were residents of the state when the father acquired the real estate in question by purchase, and both lived until the father's death in 1874, the heir having remained in the state ever since, the court held that the fact that the ancestor was an alien could make no difference as he resided in the state when the property was acquired and when he died, and that therefore under the statute an alien could take by descent from an alien.

New Jersey.

In *Colgan v. Pellens*, 48 N. J. L. 27 (1886), plaintiff claimed under a purchaser of lands who died seised, without issue, leaving his widow and three brothers and one sister, all aliens, him surviving. At the time of the purchaser's death one of the brothers was married and had two sons born in the state, both of whom died without issue. Another son was subsequently born, and the lands in question were conveyed to the plaintiff by the last-mentioned son, the widow of his deceased brother releasing her right to dower. The facts showed that the widow, as a means of procuring a grant of all the right of the state in such real estate to her heirs and assigns had stated that her deceased husband left no lawful heirs who could inherit. The case involved the construction of the 12th section of the New Jersey act "directing the descent of real estates" (Rev. Stat. 296), which provided that in making title by descent it should be no bar to a party that any ancestor through whom he or she derived his or her descent from the intestate was or had been an alien, and plaintiff's contention was that by force of this act the real estate descended to the two nephews the children of the purchaser's alien brother, and that upon the death of such two nephews the latter passed to their brother who was born after the death of such purchaser. The court, however, reserved the question so presented and the case was determined upon the question of adverse possession, the widow of the purchaser and her second husband and the issue of such second marriage having been in possession a sufficient length of time to give them title as adverse owners.

New York.

In *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 24 Am. Dec. 106 (1832), a naturalized citizen died in the year 1828, intestate and without issue, leaving several brothers and sisters all of whom were aliens, except the defendant, who claimed the

The law in force at the time of the descent cast must govern.

People v. Conklin, *supra*; *Orser v. Hoag*, 8 Hill, 79; *Pilla v. German Schol. Assn.* 23 Fed. Rep. 700; *Hausenleins v. Lynham*, 28 Gratt. 62.

Where a person dies leaving issue who are aliens, the latter are not deemed his heirs at law, for they have no inheritable blood, and the estate descends to the next of kin, who have

real estate of the decedent as the sole heir at law capable of inheriting. The decedent also left several nephews and nieces, children of a deceased brother, none of whom were naturalized except the lessor of the plaintiff, and the question presented was, whether the lessor of the plaintiff could inherit any part of the real estate, he being obliged to trace his relationship through his own father, who was never naturalized. The court held that the language of the 5th clause of the New York statute of descents, as prescribed by the New York act of February 23, 1786 (1 Rev. Laws 1813, p. 58), did not help the lessor of the plaintiff, for the reason that the children of the deceased brother, according to the section, were only to have such share of the estate of their uncle or aunt as their own father or mother would have inherited if living, and that the father in that case being an alien no share would have descended to him if living, because the law never casts the estate upon a person who cannot legally hold it, except in the case of an attainder for the benefit of the Crown; and further, that the true answer to all claims under the New York statute contrary to the rules of the common law was, that the statute was only intended to change the common-law canons of descent, the statute not being an enabling one to give capacity to persons to take by descent in cases where, by the common law, they were incapable of inheriting by reason of alienage or other disability; and for the further reason that if a literal interpretation were given to the 4th canon of descent, as prescribed by such statute, it would cast the greatest portion of the premises in question upon the alien brothers and sisters of the person last seised, and the lessor of the plaintiff, under the 5th canon, would share equally with his alien brothers and sisters, as tenants in common of his deceased father's share; and for the further reason that it never was the intention of the legislature to give such interpretation to the statute.

In the above case it was also stated that in order to entitle a person to take under the above statute the claimant must show his own capacity to take (if the plea of alienage was interposed); he must show that he was naturalized, which established his capacity to take; and secondly, he must show his consanguinity in the relation to the intestate prescribed by the act; and further, that he was a child of a brother or sister who would, if living, have inherited by that law.

And it was further stated that the act was intended to operate on natural-born or duly naturalized citizens only. *Ibid*.

The provision of the New York statute referred to in the above case is as follows: "Fifthly. In case any such brother or sister, who would have inherited by this law if living, shall die before the said person so seised, and leave a lawful child or children, such child or children surviving the said person so seised shall inherit, if a child, solely, and if children, as tenants in common in equal parts, such share as would have descended to his, her, or their father or mother, if such father or mother had survived the person so seised. *Ibid*."

In *Levy v. McCartee*, 31 U. S. 6 Pet. 102, 108, 8 L. ed. 324, 337 (1832), decided under the laws of the

an inheritable blood, in the same manner as if no such alien issue were in existence.

Orr v. Hodgson, 17 U. S. 4 Wheat. 453, 4 L. ed. 613; *Blight v. Rochester*, 20 U. S. 7 Wheat. 535, 5 L. ed. 516; *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 24 Am. Dec. 198; *Orser v. Hoag*, 8 Hill, 79; *Luhra v. Eimer*, 80 N. Y. 171; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 490; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84.

state of New York, the court held that one citizen of that state could not inherit in the collateral line to the other, when he took his pedigree or title through a deceased alien ancestor.

The facts in that case showed that a citizen died seised in 1818, intestate as to the land in question, and that two of the heirs, citizens of the state of South Carolina, children of an alien uncle on the maternal side of the testator, whose mother was also an alien, claimed as heirs of the testator, and also as heirs of his posthumous child, who died in infancy, and the question was, whether the claimants, notwithstanding the alienage of the intermediate ancestor through whom they made their pedigree, were capable of inheriting from the testator or his posthumous child.

In the above case the court stated that the English case of *Collingwood v. Pace*, 1 Vent. 714 (1664), was conclusive evidence that by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party made his pedigree as heir was an alien, the heir's title was barred.

In *Jackson, Doran, v. Green*, 7 Wend. 333 (1831), it was held that no one who was obliged to trace his descent through an alien could inherit real estate, if the death of the owner happened prior to January, 1830, as until that time the statute 11 & 12 Wm. III. chap. 6, was not incorporated into the New York law of descent. In that case the children of a naturalized citizen claimed through their father, who was the heir of a naturalized citizen, and were obliged to trace their descent through the grandmother, who was an alien.

And in *People v. Irvin*, 21 Wend. 128 (1839), it was held that the nephew of a person dying intestate of an estate by inheritance, although a naturalized citizen, was not capable of inheriting if his father was an alien and living at the time of the decease of the person last seised, notwithstanding the provision of the statute of descents that no person capable of inheriting, etc., shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, the statute in question, being substantially the same as the English act of 11 & 12 Wm. III., chap. 6, not enabling a person to deduce title through an alien ancestor still living.

So, in *People v. Conklin*, 2 Hill, 67 (1841), the facts showed that an American citizen died seised, in 1799, leaving no lawful issue and no blood relatives except such as were aliens and natives of Germany. By his will he devised his real estate to his wife for life and after her death to his two sisters and seven nephews and nieces, and their respective heirs and assigns forever, equally, share and share alike, and empowered his executor, after the death of his wife, to sell and divide the proceeds among the nine devisees; and further provided that if any of the sisters or nephews or nieces should die before a division, leaving lawful issue, such issue should stand in the place of the parent so dying. The widow of the testator was a native citizen of the United States and died in 1832, but all the nine devisees were aliens at the death of the testator, and all died aliens prior to 1823. One nephew, however, left a son, grandnephew of the testator, who was then living, who became a naturalized citizen in 1823. The court held that such grandnephew took

The law of inheritance of this state at the death of the testator in 1829, and of his son William in 1830, was the common law.

At common law "the character of a natural-born subject was incident to birth only; whatever were the situations of the parents the being born in the allegiance of the King constituted a natural-born subject.

Doe, Duroure, v. Jones, 4 T. R. 300; *Lery v. M'Cartee*, 31 U. S. 6 Pet. 102, 8 L. ed. 334;

no interest in the estate either as a devisee under the will, or as heir at law to his granduncle.

In the above case the grandnephew was obliged to trace the descent through his father, and his grandmother, who was a sister of the testator, both of whom were aliens, and therefore the common-law rule which prohibits descent through an alien ancestor applied, the New York statute of 1830 not helping the case, inasmuch as it was passed subsequent to the death of the testator.

In *Lynch v. Clarke*, 1 Sandf. Ch. 583, 637 (1844), a niece claimed as heir to her uncle, during whose lifetime her father died an alien, and the court held that provided she was a citizen of the United States she inherited all the real estate of which her uncle was seised, the descent to her, although the relations of such uncle were aliens, not being immediate, § 22 of the Revised Statutes of New York, 754, re-enacting so much of the act of 11 & 12 Wm. III. chap. 6, as provided that no person capable of inheriting under out statutes regulating descents should be precluded from such inheritance by reason of the alienism of the ancestor of such person, applying directly to the case, provided the niece was a citizen at the death of her uncle.

By the common law a natural-born subject or citizen could not transmit land by descent to another mediately through the blood of an alien; therefore in the case of a grandfather, father and son, if the father was an alien, whether he was or was not living at the time of the descent cast, the grandfather could not transmit lands by descent to the grandson, although both of them were natural-born subjects or citizens or had been duly naturalized, but if the person dying seised had inheritable blood, his real estate would descend to his next heir who had such inheritable blood, even though the person who would otherwise have been the heir of the decedent was an alien, as in the case of a decedent leaving two sons the eldest an alien and the youngest a natural-born subject or citizen, the alienage of the eldest son, who would otherwise have been heir at law of the father, not preventing the real estate from descending to the youngest son as heir at law. *Banks v. Walker*, 3 Barb. Ch. 448 (1848).

In the above case of *Banks v. Walker* it was held that the 22d section of the New York Revised Statutes relating to the descent of real property, which provides that no person capable of inheriting under the provisions of that chapter, shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, was broad enough to remove the disability arising from the alienism of the father and grandfather of the person claiming the inheritance, but did not remove the disability of the person who, in tracing his pedigree and consanguinity as collateral heir of the person dying seised, must trace it mediately through the blood of the father of the latter, an alien, and who was not an ancestor of the claimant.

In that case it was stated that the English statute of 11 & 12 Wm. III., chap. 6, which removed the disability of natural-born or naturalized subjects to inherit from each other where they were obliged to trace their pedigree or relationship through the

Dawson v. Godfrey, 8 U. S. 4 Cranch, 321, 2 L. ed. 634.

The result, therefore, is that Henry, Charlotte, and Maria took $\frac{1}{3}$ each.

Kenyon v. Kenyon, 17 R. I. 539; Endlich, Interpretation of Statutes, §§ 40 *et seq.*; *Jones v. Roe*, 3 T. R. 93.

Mr. B. M. Bosworth, for respondent Annie E. Middleton:

The words "heirs at law," unless a contrary

intent appears by the will, mean the heirs at law at the time of the decease of the testator.

Minot v. Tappan, 122 Mass. 535; *Buzby's Appeal*, 61 Pa. 111; *Abbott v. Bradstreet*, 3 Allen, 587.

As William De Wolf, testator, died in 1829, and those who claim under his son, William De Wolf, known as the Cuban heirs, were aliens, and in existence previous to 1863, previous to which aliens, by the law of Rhode

blood of an alien, was never in force in the state of New York.

In *Redpath v. Rich*, 8 Sandf. 79 (1849), the heir at law sought an account of the rents and profits, the defendants demurring to the claim denying plaintiff's title as heir. The facts showed that the intestate became seised of the premises in question in 1817, and died in the year 1823, without issue, and that the plaintiff, a nephew of deceased, was an alien born, but came to the United States in 1830, and was naturalized in 1840. The court held that such nephew, even though duly naturalized, was not entitled, as he was obliged to trace his descent through his alien mother, his uncle dying before the Revised Statutes of 1843 took effect.

With regard to the New York statute of April 10, 1843, § 1, which declares that every naturalized citizen of the United States who may have purchased and taken a conveyance of any lands or real estate within that state or to whom any such lands or real estate may have been devised, or to whom they would have descended, if he had been a citizen at the time of the death of the person last seised, before he was qualified to hold them by existing laws, might continue to hold the same in like manner as if he had been a citizen at the time of such purchase, devise, or descent cast,—the court held that such statute did not enable such an alien to inherit where his inability to do so arose by reason of the alienage of his ancestor. *Redpath v. Rich*, *supra*.

The same construction was put upon the New York act of 1843 in the case of *Smith v. Smith*, 33 Barb. 371, note (1860), in which case a naturalized citizen died in the year 1848, without issue, leaving three brothers, the plaintiff, and one of the defendants naturalized citizens at the time of his death, and two sisters one an alien who died intestate leaving children her surviving, and the other sister a naturalized citizen. The court held that the children of the alien sister of the deceased were incapable of inheriting for the reason that such sister was an alien and living at the death of the deceased, the statute of 1836 (2 N. Y. Rev. Stat. § 22, p. 38), which provides that no person capable of inheriting shall be precluded by reason of the alienism of any ancestor of such person not applying, and that therefore, such alien sister being incapable of taking at the time of the deceased's death, and the lands having descended to other persons, her children could take no interest, the three brothers alone being entitled.

The following cases are to the same effect: *McLean v. Swanton*, 13 N. Y. 535 (1860); *Heeney v. Brooklyn Benev. Soc.* 33 Barb. 360 (1861); *Larreau v. Davignon*, 5 Abb. Pr. N. S. 367 (1868); *Renner v. Muller*, 12 Jones & S. 535, 57 How. Pr. 229 (1879).

Where the question was whether, under the common-law rule of descents, the alienism of the common grandfather impeded the descent to cousins, whose immediate ancestors were brothers and capable of transmitting by descent,—the court held that such alienism did not impede the descent of such an estate between cousins who were children of two brothers, citizens of the United States, the descent between brothers being immediate and 31 L. R. A.

not impeded by the alienage of their father. *McGregor v. Comstock*, 3 N. Y. 409 (1850).

In the above case a naturalized citizen of the United States became seised of real estate and died in the year 1802, leaving a son who went to England in 1807, leaving there for the East Indies in 1818, after which he was not heard of. A brother of the intestate became a naturalized citizen in 1813, and died in 1833, leaving the plaintiffs his heirs at law who claimed as heirs of their cousin, the intestate's son. The court below nonsuited the plaintiffs on the ground that their grandfather, the father of the intestate and of their father, died an alien, and as they were compelled to trace their pedigree and relationship to the intestate through the grandfather, his alienism impeded the descent to them, but the court upon appeal, as above stated, reversed the decision. *Ibid*.

Where a naturalized citizen died intestate and without issue in the year 1835, possessed of real estate, leaving a widow, but no children, him surviving, it was held that the lands descended to the great-great-grandson of the common ancestor, even though such common ancestor was an alien, the deceased himself being a great grandson of such common ancestor. *McCarthy v. Marsh*, 5 N. Y. 253, 274 (1851).

With regard to the New York statute (1 Rev. Stat. 754, § 22), which provides that no person capable of inheriting under the provisions of this chapter shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, the court in *McCarthy v. Marsh*, *supra*, held that the statute enabled naturalized, as well as natural-born, citizens to inherit through alien ancestors, and that if there was any such thing known in the law as collateral ancestors, they were embraced within its operation, for the reason that the claimant was not to be precluded by the alienism "of any ancestor," which meant ancestors of any kind or description, the word being used in an unqualified and unlimited sense, and therefore in its most comprehensive sense.

In *Parish v. Ward*, 28 Barb. 328 (1855), an alien, empowered by act of legislature to take and convey real estate the same as a natural-born citizen, purchased real estate in the year 1809, and in 1823 sold a portion to defendant, excepting thereout the mines and minerals. In the same year the alien died intestate and without issue, leaving surviving him his father and four brothers, all nonresident aliens, except one who came to the United States in 1815. In 1817, an act of the legislature enabled such last-mentioned brother to take real estate by purchase or descent, the same as a natural-born citizen. Such brother died in 1838, having devised his estate in trust, and directed its conversion into personal estate. The father died after the decease of the first-mentioned alien and before the death of the latter. In 1840 the plaintiff, a nephew of deceased and an alien, was also authorized to take and hold real-estate the same as a natural-born citizen. Under the will the trustee conveyed the property to the plaintiff, together with the mines and minerals reserved in the deeds, and the action was brought to recover damages and to restrain

Island, were incapable of inheriting and holding lands, they cannot take under the second and fifth clauses of said will.

Mr. John C. Pogram, for respondent **Carlota De Wolf Campello**:

The entire estate in the lands in suit passed to Charlotte and Maria, under the will of their father. There remained nothing to pass to his heirs at the time of his death. This fee simple was qualified by a proviso that in a possible con-

tingency—namely, the death of both devisees without leaving issue—a new estate should be created or spring into being in the uncertain future, by way of executory devise, in favor of those persons who should then, “according to the statute of descents,” be the “heirs at law” of the testator.

Brown v. Williams, 5 R. I. 309, and cases cited; *Comyns' Digest, Estates by Devise*, note 16; *Watson v. Woods*, 8 R. I. 226.

defendant, who was the purchaser from the first-named alien and the other defendants, from digging and carrying away the minerals. The court held that under the first-mentioned act of 1807 the alien resident was entitled to acquire, hold, and alienate the real estate, and was capable of transmitting such estate to his next of kin, the act investing him with inheritable blood, and that therefore such estate descended as that of a citizen by birth, but that such act did not qualify or change the general law of descent which existed against alien heirs, and that therefore the father of the deceased could not inherit from him, but that his estate descended to his brother, the later acts of 1817 conferring upon him a right to take by inheritance, and also the right to dispose of such property by will, and that therefore the action was maintainable, the fact of alienage of a common father not impeding the inheritance between brothers, the inheritance between them being immediate, the maxim of the law being that as between brothers, a father, although a *medium sanguinis* is not a *medium hereditatis*.

In that case it was stated that if the New York act of 1807 had authorized the taking and holding of real estate by an alien and his heirs, the father of such alien might have inherited on the ground of the presumed intent on the part of the legislature to extend the inheritance to such heirs as an alien was capable of having, such seeming to be the doctrine in cases of patents, or special grants, or property acquired by an alien, under a special law authorizing lands to be taken and held by an alien grantee, to himself and his heirs, in which cases it has been held that an alien heir might take. To the same effect are the cases of *Goodell v. Jackson*, Smith, 20 Johns. 707 (1823); *Jackson, People v. Etz*, 5 Cow. 314 (1826); *Jackson, Smith v. Adams*, 7 Wend. 387 (1831).

In *McLean v. Swanton*, 13 N. Y. 535 (1856), a citizen of the United States died in 1840, having devised land in fee with a contingent limitation over, in case a devisee died without issue, in favor of four persons. The devisee died without issue in 1846, and the four executory devisees were all non-resident aliens, the plaintiff and her sister being the nearest descendants and relatives of the testator who were citizens of the United States at the time of his death, their mother, through whom the plaintiff deduced title by inheritance, being alive at the time of the testator's death, and an alien. The court held that by the common law the plaintiff would not be entitled to recover, being obliged to deduce her title through her mother who was an alien without heritable blood; and further, that in order for the plaintiff to avail herself of the 22d section of the New York Revised Statutes (1 Rev. Stat. 754), she must, at the time of the death of the person last seized, have been capable of inheriting the premises, or, unless she was heir to such person, the statute had no application to the case, as it did not profess to change any of the rules of descent, or make one an heir who would not be such by the general law of inheritance, its object being really to abrogate a very artificial principle by which it was held that where the descent, whether lineal or collateral, was medi-

ate, the kindred through whom the claimant made title as heir must be either natural-born or naturalized subjects, the statute simply removing an impediment to the free operation of the existing law regulating successions to real estate.

In *Larreau v. Davignon*, 5 Abb. Pr. N. S. 267 (1866), both parties claimed under an alien by birth, who acquired the property in question by purchase in the year 1845, and in 1847 declared his intention to become a citizen, being afterwards duly naturalized. The defendant, his sister, was an alien and with her husband resided in the state, but subsequently removed into Canada, where they resided until the decedent's death in 1865, when they returned to the United States with their children, and took possession. Two of their children were born in the United States. The decedent had a second cousin who became a naturalized citizen prior to the decedent's death, such cousin and the two nephews and nieces of the decedent were the only relatives of decedent who were citizens of the United States, but he had a large number of alien relatives residing out of the states. The court held that the second cousin was entitled to inherit to the exclusion of the children of the sister, who were debarred by reason of the alienism of their mother through whom they traced descent, the New York act of 1845, which authorized resident aliens to transmit lands to alien heirs, not authorizing citizens to do so, the decedent in the case being a deceased citizen, and not a deceased alien.

The New York statutes (4 Stat. at L. 294-304), which enabled resident aliens to take and hold real estate in that state, apply only to such as have purchased the lands claimed by them, or have taken a conveyance thereof, or to whom the lands have descended or been devised. *Ettenheimer v. Heffernan*, 66 Barb. 374, 377 (1873).

In *Luhns v. Eimer*, 15 Hun, 399 (1878). Affirmed in 80 N. Y. 171 (1890), the parties had entered into an agreement whereby the defendant was to sell and the plaintiff to purchase certain real estate, the plaintiff subsequently refusing to accept the title on the ground that the defendant's title was defective. The facts showed that a native of Germany came to the United States in 1847, and was naturalized in 1852, and in 1866 died intestate seized of real estate, leaving him surviving his widow, since deceased, his father, a nonresident alien who died in the same year, the defendant, his sister, who, previous to the death of her brother, married a citizen of the United States and became naturalized subsequent to the death of her brother and after the death of her husband married again. The deceased also left surviving him a nephew who came to the states in 1864 and was naturalized in 1870, also a resident alien niece who came to the states in 1865, the last-named nephew and niece being the children of a nonresident alien sister of the deceased. The court held that the defendant by her marriage with a citizen of the United States became herself a citizen before the death of her brother, and was therefore capable of taking title to real estate by descent at the time of his death becoming seized by descent directly from her brother, and not from or through her father who was an alien, the father of the intestate being at the time of his

If William, Jr., could himself have taken under this executory devise had he been alive, his lineal descendants, he being dead, stand in his place as one of the "heirs at law" of his father the testator, and as such are entitled to take as purchasers—not by descent—in his stead.

Co. Litt. lib. 1, § 1; 2 Bl. Com. 217; 3 Washb. Real Prop. 11.

Since the estate passed by devise, and not by

descent, one-fourth interest in the contingent remainder vested in William, Jr., the testator's son, notwithstanding his status as an alien.

An alien is capable of taking land by devise or grant, although not by descent, and of exercising complete dominion until office found and seizure by the sovereign, for whose benefit the alien holds.

Comyns' Digest, title *Alien* (C.); *Sheaffe v. O'Neil*, 1 Mass. 256; *For v. Southack*, 12 Mass.

son's death a nonresident alien incapable of taking any estate or interest in the land; and that the nephew and niece took no interest in the land, as they were both aliens at the death of the deceased, the New York act of 1845 not applying to their case.

So, in *Renner v. Müller*, 12 Jones & S. 535, 57 How. Pr. 229, 242 (1879), it was held that the collateral descent from a brother to the representatives of a deceased sister, in cases where the alien mother survived, was immediate, but that such mother did not prevent the descent of the estate, the pedigree which was deduced from the brother last seized passing by the alien mother, for the reason that she was not a *medium hereditatis*, and that under N. Y. Rev. Stat. chap. 2, § 22, even though the mother of the deceased, through whom the estate was claimed, was an alien and alive, the inheritance was not barred to brothers and sisters and their representatives who were otherwise capable of taking and inheriting.

In the above case an injunction was sought to restrain the defendant from paying over the rents of real estate to the alien next of kin of a decedent, and the action was to recover possession, and the rents and profits from the defendant and his tenants, the plaintiff asserting title as the sole heir of the decedent capable of taking by inheritance. The facts showed that a citizen of the United States died in January, 1874, seized of the property in question, leaving as blood relatives, residents of the United States, a niece the daughter of a deceased sister, a niece the wife of the defendant, and the daughter of another sister who was then living, and a nonresident alien, a nephew the brother of the last-named niece, and also another nephew the son of a deceased brother, the latter nephew residing in the United States since 1873. The deceased also left surviving him a mother, since deceased, two sisters, a brother, two nephews, and five nieces, all nonresident aliens. The court held that at the time of the intestate's death the law was that none but a citizen could inherit the fee by descent from a citizen ancestor, and that to that extent the common law still prevailed.

In the above case the court also held that the New York acts of 1868, 1874, 1875, and 1877 did not apply, for the reason that they were not in existence at the time of the intestate's death, neither did the Revised Statutes of 1880, 1843, 1845, and 1857 apply, for the reason that their operation was confined to lands of a resident alien, although section 1 of the act of 1845 was confined to lands purchased and conveyed, or devised or inherited prior to its enactment.

Under the laws of New York sisters stand upon the same footing as brothers, and the descent is immediate between brothers and sisters; therefore if an alien father cannot impede the descent between them or their representatives, the same rule as between them must apply in the case of an alien mother. *Renner v. Müller*, 57 How. Pr. 229, 242, 12 Jones & S. 535 (1879).

It has been held that the New York statute of 1845, as amended by the act of 1874, chap. 261, and by the laws of 1875, chap. 38, gives resident aliens, holding title to real estate, the power possessed by citizens to transmit such title by descent to their

heirs, and infuses an inheritable quality into the blood of the alien. *Maynard v. Maynard*, 36 Hun, 227, 231 (1885).

In *Branagh v. Smith*, 46 Fed. Rep. 517, 518 (1891), it was stated that the New York act of 1845, as amended by that of 1874, enabled those aliens "who, according to the statutes of this state [New York], would answer to the description of heirs," to take by descent from any alien resident, or any naturalized or native citizens of the United States, who had purchased and taken, or should thereafter purchase and take, a conveyance of real estate within the state; the act of 1875 permitting aliens to take as devisees; and that therefore such legislation did not, in terms, enlarge the capacity of aliens to take by descent from nonresident aliens, or to take by descent from resident aliens or naturalized or native citizens who had not acquired lands by purchase, there being a clear distinction recognized in law between titles acquired by purchase and titles acquired by descent, the latter vesting by operation of law.

In that case a nonresident alien brought action to recover real estate of which a decedent died seized in the year 1876, claiming title through her mother, who was a first cousin of the decedent, and a nonresident alien at the time of the deceased's death. The question was whether the claim of the plaintiff, as a nonresident alien, claiming by descent a title to property which had previously vested by descent in a nonresident alien ancestor was embraced within the provisions of the state statutes. The court held that the statutory law of that state, New York, gave the right of transmission by descent only to resident aliens and naturalized or native citizens, the mother of the plaintiff being none of these, and, secondly, that the right attached only to land acquired by purchase, the mother of the plaintiff in that case acquiring it by descent, and thirdly, that the statutes contemplated only one step of transmission to alien heirs, and that when that step was taken, by transmission from the decedent to the mother of the plaintiff, the operation of the statutes ceased.

Upon the question whether nonresident aliens took, by force of the New York statutes, lands acquired by descent, it was stated in *Callahan v. O'Brien*, 72 Hun, 216 (1893), that the statute applied only to lands acquired by purchase, and was not applicable to lands acquired by descent, the court relying upon the case of *Branagh v. Smith*, 46 Fed. Rep. 517 (1891).

In *Callahan v. O'Brien*, *supra*, a citizen and resident of the state acquired, in the year 1869, real estate by purchase, and in the same year another citizen and resident of the state also acquired title by purchase, the parties at the date of the last mentioned deed being husband and wife. In 1873 the plaintiff died seized, leaving a son an only heir a citizen and a resident of the state, and his widow him surviving. In 1888 the son died intestate seized, leaving his mother his sole heir, who then took the fee. In 1890 the mother died seized of both properties, leaving surviving her no ancestors nor descendants, but collateral relatives, namely a sister and a nephew, the son of a deceased brother, two nieces, the only surviving

148; *Fairfax v. Hunter*, 11 U. S. 7 Cranch, 619, 8 L. ed. 458; *Cross v. De Valle*, 1 Cliff. 282.

This one fourth therefore passed to the state of Rhode Island upon the death of William, Jr., in 1830.

Co. Litt. 2b; 1 Leon, 47; 4 Leon, 82.

The state by its act of 1868 has already cut off all claim on its part as against persons who

in the absence of the disabilities thereby removed would theretofore as well as thereafter take as heirs at law.

Wainwright v. Low, 132 N. Y. 313.

The law of the domicile determines the qualifications necessary to constitute heirship, and if an illegitimate child is once legitimated by the subsequent marriage of the parents in a state whose laws attach such effect to such

children of a deceased sister, and a grandnephew, and nephews and nieces, the surviving children of another deceased sister. The plaintiff, a sister of the deceased, and two of the defendants, one a nephew and the other a grandnephew, were resident citizens, but all the other litigants and their husbands and wives were nonresident citizens of the United States. The court held that such property as the intestate acquired by purchase descended to the resident citizen, and the nonresident aliens, collateral relatives of the deceased, as if they all were resident citizens, but that the real estate acquired by the deceased by descent from her husband vested in such of the heirs as were resident citizens to the exclusion of the nonresident aliens, and that the fact that such heir was compelled to trace his title through nonresident alien ancestors did not affect his right to take under the New York statutes, he himself being a resident citizen.

North Carolina.

The courts have held that at common law, if an alien was naturalized and died, leaving a kinsman who was also naturalized or native born, such kinsman could inherit, if near enough to take immediately, although there was a kinsman an alien who would have excluded him but for that fact, in which respect an alien differed from one attainted, the distinction being placed upon the ground that an alien was never capable of taking by descent, whereas a person attainted was, at one time, capable; but if a citizen kinsman was not near enough to take immediately, and was forced to claim by representation, through an alien, he could not inherit, for, if the alien was living, the right of representation did not apply, and if he was dead, representation would be of no avail, as the party could only take that to which the ancestor, if living, would have been entitled. *Campbell v. Campbell*, 5 Jones, Eq. 246 (1859).

And in immediate descents a disability by alienism, not only in the parties, but in any intermediate ancestor, through and by whom the descent was made, would prevent it taking effect, and for that reason, if the son or an alien was a citizen, he could not inherit to his grandfather nor to his uncle, because he must claim through his father, who was not inheritable: but, where a person did not so claim, by right of representation, through an alien, it was no obstacle to the descent to him that the nearest heir was an alien; as, where there were three brothers, all aliens, and the two youngest were naturalized, and the eldest had issue, and then one of the naturalized brothers died, the land could not descend to the eldest brother or to his issue, for the reason that he was incapable himself, and his issue could not claim to take by representation, and for that reason it descended to the second brother. *Rutherford v. Wolfe*, 3 Hawks, 272, 276 (1824).

In that case the lessors of the plaintiff were the grandnephews and nieces of the person last seized, and, in claiming as heirs to him, derived their title through their father, who was an alien, the defendant being in possession as tenant under the trustees of the University of North Carolina, who claimed the land as escheated property. The court below found for the defendants, but upon appeal the judgment was reversed, the court hold-

ing that the North Carolina act of 1801, chap. 575, applied and was not repealed by the subsequent act of 1808.

The 2d section of the North Carolina statute of 1801, chap. 575, provides that where any person shall die seized of real estate by inheritance in that state, leaving descendants or other relations citizens of the United States, who would, according to law, inherit were all the nearer descendants or relations extinct, but who, according to the then existing laws, could not inherit because there might be others who, if citizens, would be entitled to inherit, but being aliens could not hold land in that state, whereby such estate would escheat, in such a case the nearest descendants or relations of the deceased, being citizens of the United States, shall inherit.

In *Harman v. Ferrall*, 64 N. C. 474, 477 (1870), intestate died without lineal descendants, leaving surviving him a sister, a nonresident alien, and the plaintiffs and defendants, collateral relations, naturalized citizens, nieces of the intestate living in the United States, the daughters of his deceased brother who died without being naturalized, the infant plaintiffs also being natives, the children of another daughter of the deceased brother, who was a naturalized citizen and died before the intestate. The defendant was also a naturalized citizen and a child of a sister of the intestate, who died a nonresident alien, another defendant being a son of the intestate's brother, who had filed his intention to become a citizen but did not take the final oath of naturalization until after the death of the intestate, and was therefore not a citizen until afterwards. The court held that such last-named person, not being fully naturalized until after the intestate's death, could not inherit; but with respect to the rights of the other parties the court stated that the brother and sister of the intestate were to be considered as if they never existed, except for the purpose of counting relationship, and that their children took in their own right as they derived no inheritable blood from their ancestors, such ancestors at the time of their death not being capable of taking the inheritance, the doctrine of representation not arising as to the two nieces, who were naturalized citizens and daughters of the intestate's brother, and the niece who was a naturalized citizen and a child of the intestate's sister, who died an alien, such persons taking *per capita* each a fourth; the other fourth going to the children of the other daughter of the intestate's brother, who was a naturalized citizen and died before the intestate, who took *per stirpes* as representing their mother, who, if living, would have taken such fourth share.

Pennsylvania.

In *Rubeck v. Gardner*, 7 Watts, 455, 458 (1838), the question was whether the Pennsylvania act of February 23, 1791, authorized a citizen or subject of a foreign state to take lands in Pennsylvania by devise or descent from an alien who had purchased them without having complied with the conditions imposed by law, the act being passed for the encouragement of persons purchasing land in that state. The court held that the act referred to persons purchasing lawfully, and not to persons acquiring land contrary to law; and that it enabled

marriage, the legitimacy follows the child everywhere and entitles him to the right of inheritance.

1 Wörner, American Law of Administration, 157; Story, Conf. L. chap. 4; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 821; *Miller v. Miller*, 91 N. Y. 315, 43 Am. Rep. 669; *Dayton v. Adkisson*, 45 N. J. Eq. 603, 4 L. R. A. 488.

every person, being a citizen or subject of any foreign state, to acquire and take, by devise or descent, lands and other real property in that commonwealth, and that a title by devise or descent, being a derivative one, could rise no higher than its source, and that the devisee or heir could only take what the ancestor had; and that if the ancestor was an alien, and as such incompetent to take, there was nothing to descend or to pass by will. And the court further stated that if the act were to give the plaintiff the right to inherit, the heir or devisee of an alien would enjoy a greater and more entire estate than the alien himself had; and that to enable the alien heir to hold what his ancestor was prohibited by law from holding would be giving a boom to an illegal act.

South Carolina.

In *Richards v. McDaniel*, 2 Mill, Const. 18 (1818), a naturalized citizen died intestate in 1800, possessed of real estate acquired by him prior to his naturalization, his title thereto being legalized by a special act of the legislature of December 20, 1806. Plaintiff, a naturalized citizen, claimed as a second cousin of the intestate, and contended that as her naturalization dated prior to the death of the intestate, she was capable of inheriting. The defendants, also aliens by birth, were the brother and sister of the intestate, and if capable of inheriting, were so entitled to the exclusion of the plaintiff.

The brother, a lunatic, was never naturalized, and the sister was not naturalized until a year after the intestate's death. The question was whether she was capable of taking by descent. The court below found verdict for the plaintiff, but a motion for a new trial was granted, the court stating that the act of 1806, being a private act, was intended for the individual benefit of the persons therein named, among whom was the intestate, and that therefore, if he or those claiming under him, had a better title than that claimed under that act, a stranger could not say that the inferior titles should supersede the better,—especially as relating to those claiming under him; and that as the act of 1807 gave a certain, and therefore a better, title to the sister, she ought therefore not to be driven to that which was less so, and that for the reason that the act of 1806 did not profess to give the sister a right to inherit, while the act of 1807 did so expressly; and further that if the act of 1806 was conclusive as to the rights of the intestate, it ought not to be so considered as to the sister.

In *McDaniel v. Richards*, 1 McCord L. 123 (1821), it was held that a husband, whose alien wife had given notice of her intention to become a citizen, but died before naturalization, could not inherit through her.

In *Dupont v. Pepper*, 1 Harp. Eq. 5 (1824), the question was whether the defendants, the children and heirs of a decedent, who was a native-born citizen but married a British subject and resided abroad until the time of her decease in the year 1801, were capable of taking and holding real estate in South Carolina, either at common law, or under any statute, or under the protection of the treaty with Great Britain, the contention being that the mother of such children being a native citizen of that state, her children, though born abroad, were entitled to hold real estate by descent from her; but the court held that such children born of the

Mr. Darius Baker, for respondents, children of Enrique De Wolf:

An illegitimate child made legitimate by the laws of the state in which his parents are domiciled is forever after legitimate everywhere.

Miller v. Miller, 91 N. Y. 315, 43 Am. Rep. 669; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep.

alien father could not inherit either at common law or under the treaty of 1794, or by the act of Congress of January 29, 1795, or by the act of April 14, 1802, which gave the rights of citizenship to the children of citizens born in a foreign country, such children not coming within the provisions of the acts, for the reason that their father was not a resident of the United States.

But this decision was reversed upon appeal to the United States Supreme Court, where it was held that such children could inherit. *Shanks v. Dupont*, 28 U. S. 3 Pet. 242, 7 L. ed. 666 (1830).

Tennessee.

In *Starks v. Traynor*, 11 Humph. 292 (1850), a naturalized citizen left several relations residents of the state, namely a brother then since deceased leaving issue, and the complainants the children of another brother who died in the lifetime of the intestate, and the defendant, the son of a sister of the intestate, such sister and her husband both nonresident aliens dying in the testator's lifetime leaving two other children, one a nonresident alien then living. The facts showed that the defendant was a naturalized citizen previous to the intestate's death and that the complainants though born abroad immigrated to the United States during their minority with their father, and the contention was that they were entitled to the entire estate in exclusion of the defendant, for the reason that he traced his descent through the mother who was an alien and therefore incapable of inheriting, the common law providing that the inheritance could not be traced through an alien. The court held that at common law such contention was correct, but that the rule in that state was modified by the act of 1800, chap. 53, which, though repealed by the act of 1848, chap. 161, § 1, furnished the rule for the decision of that case, the rights of the parties arising and becoming vested under that act, and that therefore under its provisions the course of descent was not broken by the alienage of the ancestor of the next resident of kin who inherited under the act as if such alien ancestor had been a resident or naturalized citizen and died.

The defendant in the above case was therefore held to take equally with the surviving brother and children of the deceased brother who died in the state in the testator's lifetime, the complainants being entitled to represent the deceased father.

The first section of the Tennessee statute of 1800, referred to in the above case, provided that in all cases where any person within that state should die intestate, without issue, and possessed of any estate, real or personal, the said estate, and every part thereof, should descend to such persons or person who were next of kin to the decedent, and resident within the United States, to the perpetual exclusion of aliens who might be related to the said decedent in a nearer degree. In considering such statute the court stated that the persons on whom this capacity was bestowed were the next of kin resident within the United States, without regard as to whether they were naturalized citizens or aliens; and also irrespective of the degree of consanguinity in which they stood to the intestate; that was the resident next of kin, though related in a more remote degree, inherited in exclusion of the non-resident next of kin related in a nearer degree. *Starks v. Traynor*, 11 Humph. 292, 293 (1850).

321; *Dayton v. Adkisson*, 45 N. J. Eq. 608, 4 L. R. A. 489; *Story*, Conf. L. §§ 98 *et seq.*

The intention of the testator always controls, and so the words "heirs" and "heirs at law" will be construed to mean children, grandchildren, or descendants.

Waddell v. Waddell, 95 Mo. 388.

If he had made the executory devise over "to my children William and Henry or their descendants," would not these claimants have taken through aliens? They are descendants, and at common law an alien could take land by devise.

1 Am. & Eng. Enc. Law, pp. 458, 460, and note.

The words "heirs at law" mean, not those who stood in that relationship at the death of the testator, but those persons who, on the happening of the event which caused the executory devise to take effect, were heirs at law of the testator, that is, were William De Wolf's heirs at the death of Maria Rogers in 1890.

Doe, King, v. Frost, 3 Barn. & Ald. 546; 2 Fearnle, Contingent Remainders, 585, 586.

The law existing at the time of decision governs the rights of aliens to inherit realty.

Pilla v. German School Assn. 23 Fed. Rep. 700.

All English statutes passed before the emigration of our ancestors and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country.

1 Kent, Com. *478; *Bishop v. Tripp*, 16 R. I. 198; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586.

The statute of 11 & 12 Wm. III. being in its terms and purpose applicable to all "natural-born subjects within any of the King's realms or dominions," and taking into consideration the origin of the settlers here, the alien ancestry of many of the then inhabitants, their ownership of land, and the necessity of descent under law in many cases, what is more reason-

able to presume than that this statute was put in force in the colony?

East Greenwich v. Warwick, 4 R. I. 140; *Palmer v. Donovan*, 2 Mass. 179, note; *McCreery v. Somerville*, 22 U. S. 9 Wheat. 354, 6 L. ed. 109.

Messrs. Francis Colwell and Walter H. Barnes also for respondents.

Stiness, J., delivered the opinion of the court:

Upon a previous hearing in this case, 18 R. I. —, it was held that the second and fifth clauses of the will of William DeWolf gave to his two daughters, Charlotte and Maria, defeasible estates in fee, which, upon their deaths without issue, passed to the heirs of said William by way of executory devise. The question now arises whether the heirs are to be ascertained as of the date of the death of the testator in 1829, or of the death of the surviving daughter in 1890.

Three claims are made: First, by the complainants, that the estate is to be treated as vested in the heirs of the testator at his death, as in the case of a contingent remainder; second, by the respondent Annie E. Middleton, that the estate vested upon the happening of the contingency in 1890, but that the heirs are to be ascertained under the statute of descent in force at his death; and third, by the other respondents, that the heirs are to be ascertained by the statute in force in 1890, when the devise took effect.

In most, if not all, of the cases cited by the complainants, there was a precedent estate supporting a remainder, created from the death of the testator, but contingent upon an event. It would follow from this that the heirs must be ascertained as of the testator's death, because the interest in the remainder began then, *e. g.*: *Bullock v. Downs*, 9 H. L. Cas. 1; *Mortimore v. Mortimore*, L. R. 4 App. Cas. 448; *Stewart's Estate*, 147 Pa. 883; *Re Kenyon*, 17 R. I. 149.

With respect to the supposition that the above-mentioned act of 1890 was designed to apply exclusively to cases where there were no next of kin within the jurisdiction of the United States, qualified to inherit by the common-law rules of descent and distribution, and that if in fact there were any resident next of kin so qualified, they would be entitled to take the estate to the exclusion of other next of kin, who, though resident in the United States at the death of the intestate, were not so qualified, the court stated that such was not the proper construction of the act, as the new inheritable capacity which the statute conferred, placed persons who, previous to its passage, were disabled, to take by descent, on the same footing with those who were capable of inheriting, and that the words "next of kin" as used in the statute were not to be taken as meaning nearest of kin. *Ibid.*

Texas.

An alien who has declared his intention to become a citizen, has under the laws of Texas the rights of a citizen except that of the elective franchise, and can therefore possess real estate and transmit it by descent. *Settegast v. Schrimpf*, 35 Tex. 323 (1872).

Virginia.

In *Jackson v. Sanders*, 2 Leigh, 119 (1830), a citizen died seized leaving a brother a citizen, an alien sister and children of the alien sister who were citizens. 81 L. R. A.

zens, and grandchildren of the alien sister also citizens, but whose fathers as well as their grandmothers were aliens. The court held that under the Virginia statute (1 Rev. Code, chap. 96, § 18), which provided that in making title by descent it should be no bar to a party that any ancestor through whom he derives his descent from the intestate was or had been an alien, the descendants of such alien sister were entitled to take by descent *per stirpes*, and that the brother of the intestate took the other portion of the estate, the section being full and complete to remove out of the way the bar of alienage in both lineal and collateral descents, and also to remove any impediment from the life of an ancestor through whom the descent might be derived, the words "any ancestor" including both lineal and collateral, and that the words "is or hath been an alien" showed that the law contemplated a claim through a living as well as a dead alien ancestor.

By the Virginia statute, children born in that state can inherit through living alien ancestors, and therefore children born of alien parents residing in that state can inherit real estate there, and for the same reason such children born in another state may do the same in Virginia. *Hannon v. Hounihan*, 85 Va. 429 (1888), Code of 1878, chap. 109, § 4. E. W.

But a marked distinction between a contingent remainder and an executory devise is that estates of the latter kind arise when their time comes, and do not depend for support upon a prior estate. Wms. Real Prop. 289. They may be limited upon a fee, as in this case. An executory devise is the devise of a future estate, and if the executory devisee dies before the event happens the estate goes to the heir at the time of the event, and not to the heir at the time of the death of such devisee. *Goodright v. Searle*, 2 Wils. 29; *Cain v. Teare*, 7 Jur. 567; *Fearne, Contingent Remainders*, 560, and cases cited.

The happening of the contingency determines who is to take the estate, and until that time no one has an interest to transmit. *Brown v. Williams*, 5 R. I. 309.

In *Doe, King, v. Frost*, 3 Barn. & Ald. 546, where a testator gave an estate to his son in fee and if he should die without issue to the heir at law of the testator, subject to legacies for the younger branches of the family, it was held that the son took an estate in fee with an executory devise over to the person who, on the happening of the event contemplated by the will, should become the heir of the testator. This case was referred to as a correct decision by Denman, Ch. J., in *Doe, Pilkington, v. Spratt*, 5 Barn. & Ad. 781, upon the intention of the will. *Doe, King, v. Frost*, is also cited as an authority in *Cottmann v. Cottmann*, L. R. 3 H. L. 121 (1868). While the general rule is that the heirs of a testator are to be taken from the time of his death, yet the rule gives way to a contrary intent to be found in the will. Assuming, then, that the cases referred to go no further than this, we think that the will in this case shows such an intent. The property given to Charlotte or Marie is to go, "on their decease," in the second clause, and "on both their decease," in the fifth clause, to the heirs at law of the testator. In making such a gift his mind would naturally look forward to the time when the estate might vest in possession, and so the words used comport with an intent to point out the time and mode of ascertaining who the heirs will be, by designating a class to take as executory devisees. The agreed facts also point to such an intent. When the will was made the son William was a domiciled resident of Cuba, who, as an alien, was incapable, as our law then stood, of taking by descent. But that there can be no inference of an intent to exclude him on this account appears by the fact of a devise of real estate to him, and the fact that he, with the other children, was one of the residuary legatees in the will. Of course the testator could not foresee changes in our law in regard to alienage, but it is not impossible that he looked forward to a return of his son, or his family, to citizen-
31 L. R. A.

ship in this country, when he or they could stand as legatees in the class which he designated. Moreover, the words are that the estate, "on their decease be divided among my heirs at law." The division was to be prospective, and we see no reason why the class should not also be taken to be so. For these reasons, as well as those given in the previous opinion, we think that these were intended to fix the time for the vesting of the estate and for the ascertainment of the persons to take in possession. They are not substantially different from cases where the devise is to those who shall then answer the description. 2 Jarman, Wills, 6th ed. 992, and cases cited; *Re Swinburne*, 16 R. I. 208; *Pinkham v. Blair*, 57 N. H. 226.

In *Sears v. Russell*, 8 Gray, 86, the words "in case of the death of any child of a daughter, without issue, after its mother, and before its father, the share of such child not to go to its father, but to the testator's heirs at law," were construed to mean the testator's heirs then living, and under such construction the devise was held to be void for remoteness.

But it is argued that the words, "according to the statute of descents," import a class to be ascertained and traced from testator's death. We do not think this is so. In *Re Sturge and Great Western R. Co.* L. R. 19 Ch. Div. 444, it was held that a devise to persons "who shall by virtue of the statutes for the distribution of the estates of persons dying intestate be my next of kin," describes a class to be ascertained on the hypothesis that the testator lives up to and dies at the period of distribution. See also *Wharton v. Barker*, 4 Kay & J. 483.

It must be admitted that in some of the cases cited the language has been clearer than in the will before us, but, understanding, as we do, that the testator pointed out a time when his devise was to take effect and the class to whom it was then to be given, this case does not fall within the numerous cases of a remainder, which is to be traced from the testator's death. It is a gift to persons who shall be his heirs when the contingency arises, and not to those who were his heirs at the time of his decease.

We therefore decide that the heirs of William DeWolf, senior, are to be ascertained as of the date of the death of Mrs. Rogers, December 14, 1890, "according to the statute of descents" as it then was. By Pub. Stat. chap. 172, § 6, aliens are admitted to take and transmit title to real estate. It is admitted that by the law of Cuba the marriage of William DeWolf, Jr., to Susanna Du Coudray, in 1822, had the effect to render legitimate the son called Jerome DeWolf, born in Cuba in 1819. He was therefore an heir of this father according to the law of the father's domicile, and this determines his status here. *Melvin v. Martin*, 18 R. I. —.

MICHIGAN SUPREME COURT.

Jonathan L. CLUTTON
v.
Annie J. CLUTTON, *Appt.*

(.....Mich.....)

1. The omission of the noncollusion clause from a cross bill in a divorce suit is not fatal on appeal, but the court may allow it to be supplied.

2. A nonresident defendant of a divorce suit brought by a resident of the state may be granted a divorce on a cross bill, although the marriage and cause of divorce took place out of the state and the general provisions in How. Anno. Stat. (Mich.) § 6681, say that in such cases a divorce shall not be granted unless the party exhibiting the petition or bill therefor has resided in the state one year.

(February 7, 1886.)

APPEAL by defendant from a decree of the Circuit Court for Wayne County dismissing her cross bill in a proceeding for divorce. *Reversed.*

The facts are stated in the opinion.

Mr. John Ward, for appellant:

The domicil of either party gives the courts of the domicil jurisdiction to grant a divorce, as a matter in *rem*, that is valid within its territorial limits and binding on both parties.

1 Bishop, Mar. & Div. § 837; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Wright v. Wright*, 24 Mich. 180.

If the court, by reason of the nonresidence or otherwise has no jurisdiction over one of the parties, but has jurisdiction over the status of the other party, it can proceed to affirm, annul, or modify such status, this being a matter in *rem*.

1 Bishop, Mar. & Div. § 27.

Jurisdiction in divorce cases is strictly statutory.

Baugh v. Baugh, 37 Mich. 59, 26 Am. Rep. 495.

The complainant by filing his bill brought the marital relation between himself and the defendant under the jurisdiction of the court.

Under our statute she might have instituted the original suit herself in the court below, the residence of the complainant giving the court the jurisdiction required.

1 Bishop, Mar. & Div. § 27.

If a wife is sued in her husband's domicil, she may file a cross bill as answer, though she is in fact domiciled in another state.

5 Am. & Eng. Enc. Law, pp. 756, 757; *Sterl v. Sterl*, 2 Ill. App. 223; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335.

Mr. Franklin L. Lord, for appellee:

The statutes of Michigan forbid the court from granting a divorce, unless the applicant alleges and proves a residence of two years in the state before filing the bill. Under this heading we shall consider the following questions:

NOTE.—For effect of appearance to authorize judgment in divorce cases, see *note to Ellis's Appeal* (Minn.) 23 L. R. A. 287.

31 L. R. A.

The jurisdiction of a court in chancery to grant a divorce is purely statutory.

Wright v. Wright, 2 Md. 429, 56 Am. Dec. 733; *Carson v. Carson*, 40 Miss. 349; *Stokes v. Stokes*, 1 Mo. 228; *Perry v. Perry*, 2 Paige, 501; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563; *Mix v. Mix*, 1 Johns. Ch. 204; *Williamson v. Parisien*, Id. 389; *Grant v. Grant*, 12 S. C. 29, 32 Am. Rep. 506; *Wright v. Wright*, 6 Tex. 3.

Courts in this country possess no power in actions for divorces except such as are conferred by statute.

Barker v. Dayton, 28 Wis. 367; *Hopkins v. Hopkins*, 39 Wis. 167; *Bacon v. Bacon*, 43 Wis. 197; *Cook v. Cook*, 56 Wis. 208, 43 Am. Rep. 706.

Therefore the court below could have no jurisdiction over the cross bill, except such as is given by statute.

Le Barron v. Le Barron, 35 Vt. 365; *Hopkins v. Hopkins*, *supra*; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Steele v. Steele*, 35 Conn. 48; *Jeans v. Jeans*, 2 Harr. (Del.) 38; *McGee v. McGee*, 10 Ga. 477; *Carson v. Carson*, 40 Miss. 349; *Perry v. Perry*, 2 Paige, 501; *Burtis v. Burtis*, Hopk. Ch. 557, 14 Am. Dec. 563; *Jarvis v. Jarvis*, 8 Edw. Ch. 462; *Klein v. Klein*, 42 How. Pr. 166; *Olin v. Hungerford*, 10 Ohio, 268; *Grant v. Grant*, 12 S. C. 29, 32 Am. Rep. 506; *Cast v. Cast*, 1 Utah, 112.

The state may provide by statute for granting divorces to nonresidents, but divorces so granted will be regarded as invalid in any other state.

State v. Armington, 25 Minn. 29; *Van Fossen v. State*, 37 Ohio. St. 320, 41 Am. Rep. 507; 2 Bishop, Mar. & Div. 5th ed. § 136; *Wright v. Wright*, 24 Mich. 180; *Payson v. Payson*, 34 N. H. 518; *Hopkins v. Hopkins*, 35 N. H. 474; *Yates v. Yates*, 18 N. J. Eq. 280.

Only that country may grant a divorce in which the complainant is domiciled.

Harvey v. Farnie, L. R. 5 Prob. Div. p. 153; *Briggs v. Briggs*, Id. 163; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Richards v. Richards*, 8 Mackey, 481; *People v. Dawell*, 25 Mich. 257, 12 Am. Rep. 260.

Jurisdiction to grant a divorce to dissolve a marriage of any person is vested in the state which has control of the status of the person in question. Divorce jurisdiction depends upon domicil.

Cheever v. Wilson, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Turner v. Turner*, 44 Ala. 437; *Thompson v. State*, 28 Ala. 12; *House v. House*, 25 Ga. 478; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; *Litowich v. Litowich*, 19 Kan. 451, 37 Am. Rep. 145; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Sewall v. Sewall*, 123 Mass. 156, 23 Am. Rep. 299; *Ross v. Ross*, 103 Mass. 575; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *State v. Armington*, 25 Minn. 29; *Leith v. Leith*, 39 N. H. 20; *Flower v. Flower*, 43 N. J. Eq. 152; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Mellen v. Mellen*, 10 Abb. N. C. 329; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Colein v. Reed*, 55 Pa. 375; *Ditson v. Ditson*, 4 R. I. 87; *Hare v. Hare*, 10 Tex. 355;

Cook v. Cook, 56 Wis. 195, 43 Am. Rep. 706; *Shaffer v. Bushnell*, 24 Wis. 372; *Steele v. Steele*, 35 Conn. 48.

Courts may be given authority by statute to grant a divorce, where either of the parties is a resident.

The residence of the wife ordinarily follows that of the husband upon the legal fiction that his domicile is hers; but in an action for divorce upon the ground of desertion the wife is entitled to maintain a separate residence from that of her husband.

Cook v. Cook, 56 Wis. 205, 43 Am. Rep. 706; *Hanberry v. Hanberry*, 29 Ala. 719; *Turner v. Turner*, 44 Ala. 437; *Jenness v. Jenness*, 24 Ind. 357, 87 Am. Dec. 335; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Mellen v. Mellen*, *supra*; *Ashbaugh v. Ashbaugh*, 17 Ill. 476; *Schonwald v. Schonwald*, 2 Jones, Eq. 369; *Ditson v. Ditson*, *supra*; *Craven v. Craven*, 27 Wis. 418; *Dutcher v. Dutcher*, 39 Wis. 651; *Burten v. Shannon*, 115 Mass. 439.

If she is not in fault but has a cause for divorce against him and is actually domiciled in another state, she cannot, by virtue of a legal fiction that his domicile is hers, sue him in the courts of his domicile as though she were residing in the same state as he.

Toney v. Lindsay, 1 Dow, P. C. 117; *Burten v. Shannon*, 115 Mass. 439; *Dutcher v. Dutcher*, 39 Wis. 651; *Pate v. Pate*, 6 Mo. App. 49; *Hopkins v. Hopkins*, 35 N. H. 474; *Schonwald v. Schonwald*, 2 Jones, Eq. 367; *Cheever v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Masten v. Masten*, 15 N. H. 159; *Kashaw v. Kashaw*, 3 Cal. 312; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Coltin v. Reed*, 55 Pa. 375.

A husband and wife may and often do have distinct and separate domiciles, so far as divorce jurisdiction is concerned.

Hanberry v. Hanberry, 29 Ala. 719; *Turner v. Turner*, 44 Ala. 437; *Moffatt v. Moffatt*, 5 Cal. 280; *Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335; *Sawtell v. Sawtell*, 17 Conn. 284; *Hinds v. Hinds*, 1 Iowa, 36; *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Wright v. Wright*, 24 Mich. 180; *Hopkins v. Hopkins*, *supra*; *Payson v. Payson*, 34 N. H. 518; *Frary v. Frary*, 10 N. H. 61, 32 Am. Dec. 395; *Yates v. Yates*, 13 N. J. Eq. 280; *Mellen v. Mellen*, 10 Abb. N. C. 329; *Ditson v. Ditson*, 4 R. I. 87; *Dutcher v. Dutcher*, *supra*; *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706; *Schonwald v. Schonwald*, *supra*.

The complainant in a cross bill can have no greater rights than he would have in an original bill, and any jurisdictional fact which must be alleged to entitle complainant to relief on filing an original bill will be equally necessary for the complainant in a cross bill asking for the same relief.

Pate v. Pate, *supra*; *Wright v. Wright*, 6 Tex. 13; *Crossman v. Crossman*, 33 Ala. 486; *Bennett v. Bennett*, 28 Cal. 599; *Coulthurst v. Coulthurst*, 58 Cal. 239; *Phelan v. Phelan*, 12 Fla. 449; *Burns v. Burns*, 13 Fla. 369; *Powell v. Powell*, 53 Ind. 518; 2 Bishop, Mar. & Div. §§ 41, 61, 166; *Story*, Eq. Pl. § 229; *Cooper*, Eq. Pl. 86, 215; *Calverley v. Williams*, 1 Ves. 31 L. R. A.

Jr. 218; *Hackley v. Mack*, 60 Mich. 604; *Tobey v. Foreman*, 79 Ill. 489; *Lamon v. McKee*, 7 Mackey, 446.

The oath to a cross bill praying for a divorce must contain the statutory noncollusion clause. *Ayres v. Gartner*, 90 Mich. 380.

Moore, J., delivered the opinion of the court:

The complainant, Jonathan L. Clutton, a resident of the city of Detroit since June, 1886, brought his suit for divorce against the defendant, Anna J. Clutton, a resident of Ontario, alleging the marriage of the parties in Ontario, and charging, as causes for divorce, desertion and denial of marital privileges. The defendant, Anna J. Clutton, appeared in the suit and filed her answer, admitting the marriage between the parties, as stated in the original bill, but denying all of the causes for divorce stated therein by complainant; and in her answer charged complainant with having deserted her in 1886, and with having failed to support her. She further charges "that complainant, being of sufficient ability, and worth \$20,000 or more, as she is informed and believes, has grossly refused and neglected to provide a suitable, or any, maintenance for herself or their said children, and that she claims the benefit of this answer, and the facts and charges set forth therein, as a cross bill, and prays that she may be granted a divorce from the bonds of matrimony with the complainant, and that she may be released from the obligations thereof, and that she may have such other and further relief," etc. This answer and cross bill were sworn to, but the verification did not contain the statutory noncollusion clause. The complainant filed a general replication to the answer, and a general demurrer to it as a cross bill. The court below sustained the demurrer, dismissed the cross bill, and the defendant appeals to this court. The only questions necessary to discuss here are: First. Was it essential, in order to sustain the cross bill, that the noncollusion clause should have been stated in said bill? Second. Can a decree of divorce be granted a nonresident of the state, who is brought in by the complainant, who is and has been a resident of the state for the statutory period required to give the court jurisdiction?

As to the first question, it was held, in the case of *Ayres v. Gartner*, 90 Mich. 380, that the oath or affirmation administered to the complainant, in swearing to a bill for divorce, shall negative the existence of any collusion, understanding, or agreement whatever between the affiant and the defendant in relation to the application for divorce, is mandatory, and its absence cannot be waived by any act of the defendant. In *Tackaberry v. Tackaberry*, 101 Mich. 102, a different rule is stated in relation to a cross bill. It was there held that the objection, made for the first time on appeal, that the answer to a cross bill in a divorce case is not sworn to, comes too late. In the case of *Daly v. Hosmer*, 102 Mich. 392, it was held that it was a proper exercise of the court's discretion to permit the amendment of the verification of a cross bill by adding the noncollusion clause, and the filing of a replication, after decree; and it was further stated that,

had the question arisen upon the hearing, the power to do so would probably not have been questioned, and that the questions were not raised then, but, when raised, were no more meritorious than they would have been upon the hearing. We think the case before us is one where it would be very proper to admit the verification of the cross bill, if the facts would warrant it, so as to show noncollusion.

As to the other question, it is urged that the statute forbids the granting of a decree of divorce in favor of a nonresident of the state, citing, How. Anno Stat. § 6231, which reads: "No divorce shall be granted unless the party exhibiting the petition or bill of complaint therefor shall have resided in this state one year immediately preceding the time of exhibiting such petition or bill, or unless the marriage was solemnized in this state, and the complainant shall have resided in this state from the time of such marriage to the time of exhibiting the petition or bill, and when the cause for divorce occurred out of this state, no divorce shall be granted unless the complainant or defendant shall have resided within this state two years next preceding the filing of the petition or bill, and no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill for divorce, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony." Prior to the enactment of this statute, it had been repeatedly held, in this state, that a decree of divorce could be granted where one of the parties was a resident of the state. Is it not true that the complainant's filing his bill brought the marital relations existing between him and the defendant, and the parties thereto, under the jurisdiction of the court? The defendant, having appeared in said proceeding, was equally interested with the complainant in the subject-matter of the suit as a proceeding *in rem*, and, having submitted herself to the jurisdiction of the court, its jurisdiction having been first invoked by the complainant, ought she not to be entitled to a final hearing of the case, and to such relief as is equitably hers? Is it not probable that, in enacting the latter portion of the statute, contained in these words, "when the cause for divorce occurred out of this state, no divorce shall be granted unless the complainant or defendant shall have resided within this state two years next preceding the filing of the petition or bill," the legislature had just such a condition as exists in this proceeding in mind? Section 6231, as an entirety, has not been construed by this court, but portions of it have been. It has been contended that, under that portion of the statute reading, "no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill of divorce," where relief was sought by way of answer in the nature of a cross bill in a divorce proceeding, no testimony could be taken until four months had elapsed after the filing of the cross bill. It is possible that a literal interpretation of the statute would sustain that contention, but it was held, in the case, already cited, of *Daly v. Hoerner*, that a proper construction of this provision would allow testimony to be taken before four months had elapsed after the

filing of the answer in the nature of a cross bill, if four months had intervened after the filing of the original bill. It was stated "that this provision of the statute was to prevent hasty divorces, and that the object is attained in four months from the filing of the petition or bill, as well where a cross bill is filed as where it is not." The question now under discussion has never been determined by the Michigan court.

A similar statute was construed in the case of *Jenness v. Jenness*, 24 Ind. 359, 87 Am. Dec. 335. The statute of that state provides that "divorces may be decreed, etc., 'on petition filed by any person who, at the time,' etc., 'shall have been a bona fide resident of the state one year previous to the filing of the same, and a bona fide resident of the county at the time of filing such petition.'" Another section provides the method of notifying the defendant when not a resident of the state, and another section of the statute provides that "in addition to an answer, the defendant may file a cross-petition for divorce, and when filed, the court shall decree the divorce to the party legally entitled to the same." In that case the defendant was a nonresident of the state, and it was urged, as it is here, that the court could not grant her a divorce. The court discussed the question at length, and granted a decree to the nonresident defendant, making use of this language: "That to give the statute any other construction would be to say that in two cases precisely alike in their facts, the defendant in one being a resident, and in the other a nonresident, the former might result in a decree for divorce on cross-petition, with such alimony as ought to be given where the plaintiff is in fault; while in the latter, that vindication of character which can often be secured only by a decree, could not be had by the defendant, nor could the alimony be adjusted upon the basis of the fact that the defendant was the party aggrieved. Such a discrimination against nonresident defendants finds no place within the letter of the statute, still less in its spirit, and a construction which would allow it, would invite, in the class of cases in which they could be most successfully perpetrated, the very worst abuses." It was further added: "While our statute is intended to prevent nonresidents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by coming here to petition for divorces, it, at the same time, arms them with every weapon of defense which is afforded to our own people, when brought into court at the suit of those whose bona fide residence here gives us jurisdiction."

In Illinois the statute provides as follows: "No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state." That statute was construed in the case of *Sterl v. Sterl*, 2 Ill. App. 223. In that case the complainant filed his bill for divorce against his wife, who was a resident of the city of New York. She filed her cross bill in the cause.

charging the appellee with desertion, and also adultery, committed in the state of Illinois. In discussing the case the court says: "It is insisted by the appellee that under the provisions of the above section of the statute the appellant had no right to file her cross bill, praying, amongst other things, for a divorce, for the reason that she was not a resident of this state, and that fact appearing on the face of her cross bill, he could avail himself of such fact of nonresidence by way of demurrer. . . . It is a familiar principle of law that a court of equity having acquired jurisdiction of the parties and of the subject-matter of the suit will retain and exercise such jurisdiction, until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having, as he had a legal right to do, filed his bill against appellant praying relief and summoning the appellant into the court. When she is thus brought in, and having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is that the appellee challenges the jurisdiction of the court to grant her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee, that by reason of the arbitrary provisions of the statute, there is no escape from this dilemma, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate, and yielding obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims, that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court, at the suit of appellee, and, as may be presumed, against her will. We think that by the plainest principles of equity the appellee is, under such circumstances, precluded from questioning the jurisdiction of a court which he has himself invoked; and that the court having acquired jurisdiction of the subject-matter, and the parties to the suit, at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider, and determine all the equities of the parties, to the end that complete justice may be done to all in the same case." The court held that the nonresident wife, upon her showing, was entitled to relief.

We think it follows that it would be a reasonable construction of the Michigan statute to say that, where the complainant in a divorce proceeding has resided in the state the full statutory period, and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of the issue between them upon its merits and according to equity, even if, in order to do so, it is necessary to grant a decree of divorce to the defendant for the reasons stated in her answer, filed in the nature of a cross bill. In the case at issue the verification of the cross bill should have been amended as we have indicated, and the demurrer should have been overruled.

81 L. R. A.

The cause is remanded for hearing in the court below, with costs to appellant.

The other Justices concur.

Helen H. NEWBERRY

v.

William L. CARPENTER, Circuit Judge.

(.....Mich.....)

The constitutional protection against unreasonable seizures is violated by entering a private enclosure and taking away from the possession of the owner under order of court a wrecked boiler, engine, and other materials for use as exhibits on a prosecution of another person for criminal negligence in causing the explosion of the boiler.

(McGrath, Ch. J., dissents.)

(December 24, 1895.)

PETITION for a writ of mandamus to compel defendant to vacate an order depriving complainant of the possession and power of control over a certain boiler and some machinery owned by her but in possession of the public authorities for the purpose of use in connection with a criminal prosecution. *Granted.*

The facts are stated in the opinion.

Mr. Otto Kirchner, with **Messrs. Wells, Angell, Boynton, & McMillan** for relator.

Messrs. Allan H. Frazer and Ormond F. Hunt for respondent.

Grant, J., delivered the opinion of the court:

The facts in this case are as follows: The relator was the owner of a large building in the city of Detroit, occupied by a printing establishment and other business enterprises. A large number of persons were employed in it. A steam engine and boilers were used in heating the building, and situated in the basement. On November 6, 1895, one or both of the boilers exploded, completely wrecking the building, causing the death of thirty-seven persons, and injury to others. It was claimed by the prosecutor of the county that one Thompson, the engineer, caused the explosion by his criminal negligence in the management of the engine and boilers, and is therefore guilty of manslaughter. An indictment was promptly returned by the grand jury against him, charging him with that crime. Immediately after the explosion the police department of the city of Detroit took possession of the building, and removed the *débris* and the bodies of those

NOTE.—The above decision, while of great importance and applicable to a multitude of cases, is believed to be upon a substantially new question.

For constitutional protection against unreasonable searches and seizures as affecting the use of books and papers in actions for forfeiture or penalty, see division II. of note to *Levy v. San Francisco Super. Ct.* (Cal.) 29 L. R. A. 818.

For a question somewhat similar, see *Martin v. Ellicott* (Mich.) post, 160, also *State v. Dupaquier* (La.) 26 L. R. A. 162.

killed. On November 16 the prosecuting attorney appeared before one of the circuit judges of the county of Wayne, and upon his verbal statement, without any sworn petition or affidavit, the following order was made:

"On motion of O. F. Hunt, assistant prosecuting attorney, and after hearing argument of H. E. Boynton and Otto Kirchner, friends of the court therein, it is ordered that the steam engine, boiler or boilers, and materials surrounding the same, and now upon the premises known as '45 and 47 Larned street, West,' be and the same are ordered into the custody of the police department of the city of Detroit, as exhibits in said cause; the same, however, not to be removed from said premises. This order to remain in force only until the decision of a motion for injunction now pending before Judge Lillibridge, and subject to the terms of an order this day made by him."

The relator moved to vacate this order, which the court refused, and the object of this proceeding is to set aside that order. Upon the hearing of this motion the prosecutor filed an affidavit from which it appears that, after the police department took possession of the *débris*, an arrangement was made between him and Mr. Thompson, through his attorney, and the relator, that certain persons (expert engineers) should, on behalf of the respective parties, have free access to the engines, boilers, machines, and the premises, for the purposes of examination. The learned prosecutor further states in his affidavit that this property is essential to be used as exhibits upon the trial of Mr. Thompson, as well as for the further investigation into the causes of the disaster by the grand jury, and claims the right of the prosecution to hold them until all criminal trials connected with the disaster are tried. It thus appears that the prosecution had the entire control and charge of this property for a period of ten days prior to the making of this order, and have had ample opportunity for an examination thereof by the officers and experts to determine the cause of the disaster, so far as it can be determined from these articles.

The importance of this case to the relator is apparent from the statement of her counsel in their brief that she is threatened with civil suits for damages upon the ground that she was guilty of negligence. Not only, therefore, is she by this order deprived of her private property, which she may desire to use in her business, but may be deprived of the evidence which may establish her innocence of any fault. She is charged with no crime. The broad claim of the learned prosecutor is that the courts possess the power, upon his motion, to enter upon the premises of private persons, and seize any property which may, in his judgment, have any bearing upon a crime with which another is charged. If the order in this case be sustained, it results in holding that a citizen's team, with which he earns a livelihood, may be seized by the police authorities because he believes that such team was used by an alleged criminal in the commission of a crime. If A be arrested, charged with arson in the burning of B's house, and there be some evidence in the house believed to connect A with the crime, the police authorities may seize and hold possession of the house for 31 L. R. A.

months, and until the trial, and prevent the owner from rebuilding. So, under like circumstances, a manufacturer might be deprived of the possession of his property necessary for the successful carrying on of his business. Other illustrations will readily suggest themselves. The power is certainly an extraordinary one, and those who assert it ought to be able to find some common or statute law authorizing it. The exercise of power no more arbitrary than this has caused revolutions. The learned prosecutor cites the following authorities in support of his contention: *Whart. Crim. Pl. & Pr. § 60*; *Bishop, New Crim. Proc. §§ 210, 211*; *Ex parte Hurn*, 92 Ala. 102, 13 L. R. A. 120; *Woolfolk v. State*, 81 Ga. 551; *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *O'Connor v. Bucklin*, 59 N. H. 589. These authorities do not even hint at such an arbitrary and broad power. The citation in *Wharton* says only that "those arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged." The citation from *Bishop* goes no further. In *Ex parte Hurn* money was taken from the possession of the prisoner, and delivered to the sheriff, who was afterwards served with a writ of garnishment at the suit of an attaching creditor of the prisoner. The sheriff paid the money into court, and asked instructions as to what he should do with it, while the prisoner asked an order for its restoration to himself. It was held that the case could not be reviewed upon mandamus. Many cases are cited and reviewed in that decision, none of which sustain the present case. That court quotes with approval the case of *Boyd v. United States*, hereinafter referred to. The conclusion of the court in that case is that "it is the duty of an officer, having no other authority than the right to make the arrest, to search the party arrested, and seize and remove from him the dangerous weapons found upon his person." That authority is confined by the decision to the seizure of articles found upon his person and connected with the offense. In *Woolfolk v. State* the respondent was charged with murder. During the progress of the inquest he was required to remove his clothing, and while so doing he made statements which were introduced upon the trial. It was objected that the circumstances surrounding the defendant amounted to force and compulsion, but the testimony was held proper. In deciding that case the court discusses the right of seizure, and speaks only of seizure from the person.

In *Spalding v. Preston* a large number of pieces of German silver, of the precise size and thickness of Mexican dollars, and made in that form for the purpose of being stamped and milled into counterfeit coin of that description, were taken by a sheriff from the person who was carrying them at the time to a place of manufacture, for the purpose of having them finished, so that he could put them in circulation as genuine coin, and were detained by the sheriff to be used as evidence against the person from whom they were taken, and also for the purpose of preventing their circulation. These were material to be used in counterfeiting. It was held that "the owner

of them, in the absence of evidence that they were put in that form without his knowledge, or against his consent, could not sustain trover against the sheriff therefor." *O'Connor v. Bucklin* is another case of taking property found upon the person of the party accused.

In my judgment, no case cited in the opinion of my brother, the chief justice, sustains the power here asserted. In *Closson v. Morrison*, 47 N. H. 482, 93 Am. Dec. 459, the property was taken from the person of the respondent, and was levied upon by attaching creditors while in the hands of the sheriff. The decision quotes the statute of that state authorizing search and seizure, and maintains the right of the officer to take weapons from the prisoner, and also money or other articles of value found upon him, by means of which, if left in his possession, he might procure his escape. *Commercial Erch. Bank v. McLeod*, 65 Iowa, 665, 54 Am. Rep. 36, is a similar case, where the property of the prisoner, taken from his person upon arrest, was attached in the hands of the officer. In *Langdon v. People*, 133 Ill. 382, the property seized was a forged official certificate. It was held not to be private property, and was seized upon a search warrant made upon due complaint. In the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, Mr. Justice Bradley, in delivering the opinion of the court, quotes with approval the language of Lord Camden in *Entick v. Carrington*, 19 How. St. Tr. 1029: "No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass, and even treading upon the soil. If he admits the fact, he is bound to show by way of justification that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment." The right of search and seizure is very fully and ably discussed in the *Boyd Case*, at pages 622 *et seq.*, 116 U. S., and page 748, 29 L. ed. In *Hibbard v. People*, 4 Mich. 125, an act to authorize the issue of a warrant to seize liquor and retain it to abide the order of the court, and to be used in evidence upon a trial, was held to be unconstitutional. This decision was approved in *Robison v. Miner*, 68 Mich. 557.

The people of this state, through their legislature, have made ample provisions for the seizure of property in criminal cases, and they are summarized as follows: (1) Personal property stolen, embezzled, or obtained by false pretenses; (2) counterfeit or spurious coin, forged bank notes, or other forged instruments, or any tools, machines, or other materials provided or prepared for making them; (3) obscene matter; (4) lottery tickets; (5) gaming apparatus. Section 9619, How. Anno. Stat., provides what shall be done with the articles so seized. The statutes are declaratory of the legislative will upon the subject of search and seizure, and cannot be extended by 31 L. R. A.

the courts to include the right to enter the inclosures of private citizens, and seize their lawful property, to be held as evidence against alleged criminals. No intimation is found in any statute of this state, or in any decision of this court, that a prosecutor may cause to be seized the property of third parties, the possession, ownership, and use of which are not prohibited by law, and which are useful and required in the legitimate prosecution of their businesses, and their private inclosures to be entered for that purpose. Such seizures are unwarranted, unreasonable, and prohibited by the Constitution of the United States and of this state. Important as is the proper administration of the criminal law, the power to administer must be exercised with due regard to the constitutional rights of the citizen, among which is the right to the possession and control of his lawful property. Justice Cooley says: "The only lawful mode of making search upon one's premises is under the command of search warrants; and these are allowed to discover stolen or smuggled goods, or implements of gaming and in a few other cases for which provision must be found in the statutes. The authority to issue them is liable to great abuses, and the law is justly strict regarding their requirements." Cooley, *Torts*, 295. See also Cooley, *Const. Lim.* 364-370; 2 Hare, *Const. L.* 880; *Potter v. Beal*, 49 Fed. Rep. 798.

The order of the circuit judge was without authority of law, and must be set aside.

The writ will issue.

Long, Montgomery, and Hooker, JJ., concurred with **Grant, J.**

McGrath, Ch. J. dissenting:

On the 6th day of November, 1895, a boiler situate upon relator's premises in the city of Detroit exploded, killing thirty-seven persons. At the time of the explosion a grand jury was in session, and after the explosion said grand jury brought into the circuit court for the county of Wayne an indictment against one Thompson, who was the engineer employed by relator, and in charge of the boiler in question at the time of the explosion, charging said Thompson with manslaughter. The circuit judge, upon application of the prosecuting officers, after hearing counsel for said Thompson, and also counsel for relator, directed the police department to take the said boiler and attachments into custody, as exhibits in said matter. Relator afterwards moved to set aside the order. Affidavits were presented on behalf of the people, setting forth that certain parts of the boiler attachments had been taken away, that the grand jury were considering the matter of further indictments relating to said matter, and that the said boiler and attachments were necessary exhibits in the prosecution of said cause. The circuit judge declined to set aside the order, and relator applies for a mandamus to compel such vacation.

It is contended on behalf of relator that there is no warrant in law for the order of the circuit judge, and that the order violates section 26 of article 6 of the Constitution, which protects persons, houses, papers, and possessions of

every person from unreasonable searches and seizures. A "search warrant" is defined as an examination or inspection by authority of law of one's premises or person, with a view to the discovery of stolen, contraband, or illicit property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which he is charged. How. Anno. Stat. §§ 9615 *et seq.*, authorizes the issuance by a magistrate of search warrants in certain cases. Section 9619 provides that when any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any of the other things for which such warrant is allowed, the property and things so seized shall be safely kept, by the direction of the court or magistrate, so long as shall be necessary for the purpose of being produced or used in evidence on any trial, and afterwards the stolen or embezzled property may be restored to the owner, and other things shall be destroyed. Section 9396 provides that when complaint is made on oath to any magistrate that complainant believes that any of the provisions of that act are being violated, or are about to be violated, a search warrant may issue, and under the warrant such officer may arrest the person complained against, and seize and bring in every article or instrument designed or adapted to torture or inflict wounds upon any animal, etc. Section 9290 authorizes indecent books and pictures to be seized and taken. Section 9598 authorizes the disinterment of bodies for the purpose of inquests and post mortem examinations. Sections 9472 and 9475 provide that a magistrate may require a recognizance from witnesses in criminal cases, with sureties, and upon failure to recognize or to give sureties, if ordered, that the witness may be committed to prison.

It is contended that none of these statutes cover the present case, and insisted that there is an absence of authority for the order here made, but these statutes relate to preliminary or initiatory proceedings, and are designed to confer authority upon inferior tribunals, having no general powers. The statute confers upon circuit courts power to make all orders in any cause pending therein which may be necessary or proper for carrying into effect the jurisdiction vested in such courts by law. Suppose that the attendance of a witness in the trial of a criminal case has been with difficulty procured, and there is danger that he will abscond; has the circuit court no power to secure the attendance of such witness beyond the day? Yet there is no statutory provision conferring such authority, unless it be found in the statute conferring general authority. Suppose that in the trial of a murder case the court deemed it material, in order that the ends of justice be subserved, that the body be exhumed, has the court no power in the premises? Can it be true that a magistrate may commit the relator to prison, and that the circuit court, upon an indictment presented to it, has no authority respecting an article which has been before the grand jury, and which is, in and of itself, criminating evidence? Is an exploded boiler, or the right of property therein, more sacred than the person? The right of an officer to pursue a fleeing criminal in and upon my

premises, and into my dwelling, does not depend upon the statute. There is no statute which authorizes an officer to take from a prisoner such evidence of guilt as may be found on the person,—the bloody knife, the revolver with an empty chamber, garments stained with blood, the shoe or boot which fits the track, the coat with the missing button, the knife with the broken blade, the hat found at the scene of the crime. Such taking and use do not violate the rule that the prisoner shall not be compelled to furnish evidence against himself. It is not only the right, but the duty, of an officer making an arrest to take from the prisoner, not only stolen goods, but any articles which may be of use as proof in the trial of the offense with which the prisoner is charged. Whart. Crim. Pl. & Pr. 9th ed. §§ 60, 61. He may take from the prisoner any articles of property which it is presumable may furnish evidence against him. 1 Bishop. Crim. Proc. 3d ed. 210; *Rex v. O'Donnell*, 7 Car. & P. 138. This right of sequestration is plain, notwithstanding the property may be claimed by a third party; and stolen goods may be held as against the owner, if necessary for use as evidence, however clear the title of the claimant may be. *Ex parte Hurn*, 92 Ala. 102, 18 L. R. A. 120; *Closson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459; *Commercial Exch. Bank v. McLeod*, 65 Iowa, 665, 54 Am. Rep. 36; *Woolfolk v. State*, 81 Ga. 551.

The right to impound exhibits, even in a civil case, has been generally exercised by the courts, and the right to hold articles found in possession of a person charged with crime is not limited to such as are supposed to be stolen, but extends to evidentiary articles. It is not the fact that there is a contest over the ownership of stolen goods that gives the people the right to retain them, but rather that they are of the *res geste* and evidential. The prisoner's consent does not give the owner the right of possession as against the people. The right to the possession and enjoyment of property must be subordinated to the law of overruling necessity. It is subject to the necessary burdens and restrictions imposed by the general police power of the state, in order to secure the general comfort, health, security, and protection of the citizen. The limitations upon the police power and its execution do not embrace such reasonable judicial orders as may be found necessary, in the course of the administration of the criminal law, for the detention of witnesses and the preservation of evidence. Police officers must be given a reasonable latitude in the pursuit of offenders, the detection of crime, and the collection of evidence; and the courts vested with jurisdiction to try such offenders must be allowed to exercise a reasonable discretion respecting the preservation of the evidence of crime in matters before them. The principle of the rule that permits the traveler upon the highway to go upon the abutting land when the highway is impassable; that permits entry upon my premises in case of fire, and the destruction of my property, if deemed necessary to stay the conflagration; that permits the inspector to enter my close,—extends to measures necessary for the prevention of crime, the detection, pursuit, and arrest of offenders,

and the preservation of criminating evidence. All are matters, not alone of individual interest, but of public concern.

The cases of *Entick v. Carrington*, 2 Wils. 275; *Boyd v. United States*, 115 U. S. 616, 29 L. ed. 746; and *Potter v. Beal*, 49 Fed. Rep. 793,—are cases of paper searches and seizure and involve the right of the government to invade private premises and search among private papers for evidences of crime, and the right to compel the production of one's own private papers in a criminal prosecution as evidence against himself. *Entick v. Carrington* was one of a series of cases of trespass, in which defendants attempted to justify under a warrant issued by the Earl of Halifax. The court held that the warrants were wholly without authority and void. The cases are fully discussed in Cooley, Const. Lim. 6th ed. p. 364, note. *Boyd v. United States* was an information in a case of seizure and forfeiture of property against thirty-five cases of merchandise seized as forfeited under the revenue laws. At the trial it became important to show the value of a previous invoice of twenty-nine cases of the same class of merchandise. The district judge made an order requiring the production of the invoice of the twenty-nine cases. The claimants, in obedience to the order, produced the invoice, under objection. When the invoice was offered in evidence, claimants objected to its reception on the ground that in a suit for forfeiture no evidence could be compelled from the claimants themselves, and that the statute, so far as it compelled the production of such evidence, was unconstitutional. The question which addressed itself to the court, as stated by Mr. Justice Bradley, was whether "a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws,—is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the 4th Amendment of the Constitution, or, is it a legitimate proceeding?" *Potter v. Beal* was a proceeding in equity against a bank receiver to recover the possession of certain private and personal books, papers, and other documents, in a certain trunk, which was in the bank vault when the bank was closed by order of the controller. The relief sought was an order that the books, papers, and other documents be delivered to plaintiff, and that defendant be enjoined from using the same before the grand jury. Defendant answered that the trunk came into his possession as assets of the bank; that it is his duty to examine the contents thereof, and ascertain whether it contains property of the bank, or memoranda, books, papers, or accounts concerning its affairs. The district attorney, appearing, was permitted to intervene and make a motion asking for such an order as would lay the papers before the grand jury. The court held that plaintiff was entitled to speedy possession of his private and confidential papers, but that the bank was entitled to know what was taken from its vaults, and referred it to a master, with directions "to open the trunk, and, after examination, to deliver to defendant such papers, documents, and other things as are the property of the bank, and are

not material to the issue; to deliver to plaintiff such as are private, and are not the property of the bank, together with such as so relate to the bank transactions, and are necessary and material to be introduced by Mr. Potter in his own behalf; and such as are not included in the two classes named, as relate to bank transactions, and, in the judgment of the master, are or may be material to the issue suggested in the motion of the district attorney, and the government's case, shall be sealed and returned to the trunk and the safe custody of the clerk, who should relock the trunk, return the key to the counsel for plaintiff, but hold the trunk and contents." These cases do not hold that all searches and seizures are unreasonable. They do hold that the invasion of the privacy of one's home, and the seizure of private papers and documents, are an unreasonable search and seizure, and are within not only the article of the Constitution prohibiting unreasonable searches and seizures, but also the article that no person shall be compelled to give evidence against himself. The rule is, however, that forged documents, or such as are unlawfully held or unlawfully used, are subject to seizure. In *Langdon v. People*, 133 Ill. 382, a complaint was made by the state's attorney that one R. R. Langdon had forged an official certificate, and that complainant verily believed that such certificate was concealed in the office lately occupied by said Langdon. Thereupon a search warrant was issued, and the forged certificate brought before the justice who issued the warrant. The court held that the certificate was not a private paper, within the rule of *Boyd v. United States*; that it was a forged paper; and that it was unlawful for plaintiff in error to have it in his possession. In *Con. v. Dana*, 2 Met. 329, the court, speaking of the constitutional provision relating to searches and seizures, says: "This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law. The law, therefore, authorizing search warrants in certain cases, is in no respect inconsistent with the declaration of rights." Mr. Cooley, in his *Constitutional Limitations*, 6th ed. p. 370, says that the warrant is not allowed for the purpose of obtaining evidence of an intended crime, but only after lawful evidence of an offense actually committed. Nor even then is it allowable to invade one's privacy for the sole purpose of obtaining evidence against him, except in a few special cases, when that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction. In a note the author says: "We do not say that it would be incompetent to authorize, by statute, the issue of search warrants for the prevention of offenses in some cases; but it is difficult to state any case in which it might be proper, except in such cases of attempts, or of preparations to commit crime, as are in themselves criminal."

The present case is not one where it is sought

to compel relator to produce evidence against herself, for she is not the person charged; and, even if she were, the use of the boiler as evidence cannot be distinguished from any case where the instrument causing the death is produced, although taken from the prisoner, or found in defendant's apartments. Nor is this a case where any attempt has been made to invade private premises for the discovery of evidence of crime. An explosion had occurred, and thirty seven persons had lost their lives in consequence. The matter was submitted to the grand jury, and they have brought in, and presented to the court making the order complained of, an indictment against the person in charge of the boiler at the time of the explosion, charging him with criminal carelessness with respect to the care and management of the boiler. It is insisted that the boiler, in and of itself, is evidence of the causes which led to the explosion, and of the carelessness of the management. It is true that in counsel's brief it is said that the relator "may be subjected to suits by persons who received injuries by the destruction of the building;" but there is no good reason why the police authorities, whose mission is in part the protection of property, cannot in this particular case be intrusted with the preservation of the *status quo* of this property, especially as the same is held under an order of the court, and subject to its direction. It frequently happens that animals affected with infectious diseases are killed by the public authorities to prevent the spread of the disease; and, if the poor man's team had been stolen and taken from the thief, the necessity for its use would not necessarily determine the owner's right to its possession. If, in a partially burned building, was found a package of combustible material saturated with kerosene, would there be any question of the right of the authorities to take and preserve the package for use as evidence? Illustrations of what might readily be held to be unreasonable seizures could be multiplied without effort, but they would be without force. The prohibition is against unreasonable seizures, and all seizures are not regarded as unreasonable. The question here is whether this is an unreasonable seizure. Relator's contention is that any impounding of any of her property for the purpose named is unwarranted. Because a man may not be put out of his own house, it does not follow that a revolver or a steel drill or a knife may not be sequestered for use as evidence in a criminal proceeding. Because a man's team, with which he earns a livelihood, which has been used by another to convey away stolen goods, may not be impounded, it does not follow that the *status quo* of an exploded boiler, the negligent use of which, resulting in the death of thirty-seven persons, is charged as manslaughter, and concerning which no claim is made of a desire for its use, nor does it appear but what it is useless, except for scrap iron, may not be preserved for use as evidence upon the trial of the offense charged, especially as it is claimed by the record here that the police authorities have, since the ex-

31 L. R. A.

plosion, been endeavoring to exercise a certain surveillance over it, and in that endeavor a conflict between police officers, counsel for the accused, and the owner had arisen, and certain of the connections of the boiler had been spirited away.

It is urged that some common or statute law authorizing such a seizure should be pointed out. The cases referred to sustain the right to hold evidentiary articles, irrespective of the question of ownership, and as against the owner; and no case can be found which disputes this right, or intimates that such articles cannot be seized and impounded, where the rules referred to in the *Entick* and *Boyd Cases* are not infringed. Those cases do not intimate that a search warrant may not issue in a proper case for the discovery and seizure of evidences of crime. The officers of the law, to whom is committed the prevention and detection of crime and the collection of criminating evidence, are daily committing acts for which there is no express authority in the statutes, or elsewhere in the books. In the recent notorious case of *Com. v. Mudgett (Holmes)* 4 Pa. Dist. R. 739, the officers of the law, in their efforts to secure criminating evidence, entered upon private property, and excavated under cellar floors and elsewhere, and no one raised any question as to the right so to do. Such acts are generally regarded as demanded by public necessity, in the interest of good morals, and the detection and punishment of crime,—matters of public concern, to which the right of the owner to immediate possession of property must at times be subordinated. The police authorities certainly had the undoubted right to make an investigation under the direction of the prosecuting officers. Upon the presentation of the indictment, the court making the order obtained jurisdiction of the matter. It cannot be said that the court would not have the power, had it been found necessary, to compel witnesses to give sureties for their appearance, or to commit them on refusal so to do. If this be true, can it be seriously contended that this exploded boiler cannot be impounded? The court might in such case order the witness into custody, although not before the court. While the order here was not technically a search warrant, yet it was in the nature of one, omitting the direction to search, and directing the officer to take into custody an article which was fully identified, and admitted to be the one with respect to which the criminal carelessness is charged, and the explosion of which is conceded to have been the cause of the loss of life. It was its unlawful use that is alleged to have produced the result. The possession is that of the court, and is but temporary. If it be claimed that the deprivation of the use is a serious inconvenience, the court may be appealed to, and possibly some means may be devised to preserve the evidence and release the property; but that is a matter which should be addressed to the judgment and discretion of the court making the order. The writ must be denied.

Joseph MARTIN, *Plff. in Err.*,

v.

Marcus D. ELLIOTT.

(.....Mich.....)

An order of court that a veterinary surgeon may be sent on the premises of a party against his will to examine a horse whose condition is in dispute, provided the owner or any person he may select shall accompany such surgeon, is in excess of the power of the court.

(July 2, 1895.)

ERROR to the Circuit Court for Shiawassee County to review a judgment in favor of defendant in an action brought to recover damages for breach of warranty in the sale of a horse. *Reversed.*

The facts are stated in the opinion.

Mr. Albert L. Chandler, for plaintiff in error:

Inspection has never been compelled in Michigan except in civil damage cases for personal injuries.

Graves v. Battle Creek, 95 Mich. 266, 19 L. R. A. 641; Shinn, Pr. § 1068.

If a view is permitted, the statute (How. Anno. Stat. § 7620) gives the only remedy.

This order is a new feature.

Hunter v. Allen, 35 Barb. 42.

It has no precedent nor law to support it.

Cooke v. Lalance Grojean Mfg. Co. 29 Hun, 641.

There was no necessity for it and the court had no power to make it.

Thompson, Trials, § 865.

Mr. John T. McCurdy for defendant in error.

Long, J., delivered the opinion of the court:

This action is brought to recover damages for breach of warranty in the sale of a mare. On the trial the plaintiff contended that in the purchase the defendant warranted the mare sound and all right, whereas in fact she was not sound, but sick and disordered, and had been so overdriven and heated that she broke out in blotches and continued so up to the time of the trial. The plaintiff testified that these blotches were as large as a kernel of wheat, and feasted; that he used a wash which drove them away, but that they would come back again. One of plaintiff's witnesses testified that the horse had these blotches at the time plaintiff purchased her, but that the defendant said she had scratches, and her hair looked rough from want of care. This witness testified that she was now no better than when purchased, as he had seen her a week before, and that she did not have scratches, but something else which would injure her value. Plaintiff paid \$200 for her, and gave testimony that she was in fact of little or no value. At the time of the trial the mare was in the plaintiff's barn. The defendant claimed that, in view of this testimony, he had the right to have an examination made of the

mare by a veterinary surgeon. The court then made the following order: "On motion of John T. McCurdy, attorney for said defendant, and it also appearing to the court that the plaintiff in this case claims the horse about which this action is brought is now in practically the same condition that she was at the time she was purchased from defendant, and that since said purchase the horse had been in possession of plaintiff in this case; therefore after hearing Odell Chapman and A. L. Chandler, attorneys for said plaintiff, in opposition thereto, it is ordered that the defendant have the privilege of sending a veterinary surgeon to examine the mare in question, provided he shall be accompanied by the plaintiff or some person whom plaintiff may select. The court further orders that the plaintiff give such veterinary surgeon access to the premises and stable where said mare is located to make such examination. This order is made upon the authority of the case of *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, such examination to take place any time between the hours of 6 o'clock and 10 o'clock P. M. of this day." The defendant sent Mr. Van Sickles, a veterinary surgeon, to make the examination. Plaintiff objected to the making of the order and to the veterinary surgeon's going to make the examination. Mr. Van Sickles, after the examination, was called as a witness, and testified that the mare was in perfect health, but had a slight irritation under the fetlock, and also a few pimples, but no pustules. The jury returned a verdict in favor of the defendant. The plaintiff contends that the court was in error making this order.

It appeared in the case of *Graves v. Battle Creek*, 95 Mich. 266, 19 L. R. A. 641, upon which the court below relied in making the order, that the plaintiff was seeking to recover for personal injuries. She appeared as a witness, and the jury observed her use of the injured arm and wrist. A physician testified in her behalf to its condition and the prospect of recovery. He was asked: "Is the fact that the plaintiff is able to use her arm in the ordinary ways, as it has appeared here, as she used it in this room, as you have seen her when she was in the witness chair,—is that proof that the injury to the arm has subsided, and that there is no pain there; that is, is there any surgical proof?" This question was permitted to be answered. The defense then requested the court to direct that plaintiff remove her glove from the injured hand and exhibit the hand to the jury; also that she submit the injured hand to a physician to be examined in the presence of the jury. This was refused. It was held by this court that the direction should have been given. It was said: "The rule is well recognized by substantially all the courts of the country that the injured party may exhibit his wounds to the jury, in order to show their nature or extent, and that rule has been followed in this state. Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency, and in the orderly conduct of the trial." The fact was recognized in the above case that a wide discretion vested in the trial court, which justifies a refusal to require the examination when the necessities of the case are

NOTE.—For discovery by bill, see note to Cargill v. Kountze Bros. (Tex.) 24 L. R. A. 183.

See also the preceding case of Newberry v. Carpenter (Mich.) ante, 163.

31 L. R. A.

not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative. The rule thus laid down did not, however, justify the order made in the present case. The mare in question was in possession of the plaintiff and upon his premises. The order compelled the plaintiff to permit the parties to enter upon his premises to make the examination, and by a party whom the plaintiff objected to as coming there. The court had no power to compel the plaintiff to submit to such an invasion of his premises. If the plaintiff refused to let the mare be examined at that time, or to have his premises visited for that purpose, it was his right. The testimony also was merely cumulative. Several witnesses had seen the horse only the day before, and gave testimony as to her condition.

For this error the judgment must be reversed, and a new trial ordered. We need not discuss the other questions raised.

Hooker, J., did not sit; the other Justices concurred.

Alexander JEFFREY, *Plff. in Err.*,

DETROIT, LANSING, & NORTHERN
RAILROAD COMPANY.

(.....Mich.....)

1. **The liability of a railroad company for failure to keep a sidewalk across its track in fit and safe condition** as required by law is not affected by the fact that a right of action might possibly exist for the same defect against a municipality.
2. **A man injured while driving a span of horses with a snowplow across a railroad track** in cleaning a sidewalk is not precluded by his unusual use of the walk from maintaining an action against the railroad company for a defect in the walk caused by missing planks, if the accident was due to failure to keep the crossing in a reasonably safe and suitable condition for ordinary use.

(January 16, 1896.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence in permitting its crossing of a public highway to become unsafe and out of repair. *Reversed.*

The facts are stated in the opinion.

Messrs. Black & Dodge, for plaintiff in error:

This statute permits a railroad corporation to cross a highway but upon condition that it restores the highway to its former state as near as may be.

The legislature plainly intended by this statute to authorize the railroad company to cross highways with their tracks subject to the duty to put and maintain the crossing in

such condition as not to impair the use of such street by the public.

State v. St. Paul, M. & M. R. Co. 35 Minn. 131, 59 Am. Rep. 313; *People v. Chicago & A. R. Co.* 67 Ill. 119.

The duty to restore a highway to its former condition implies the duty to maintain it in such a condition.

Farley v. Chicago, R. I. & P. R. Co. 42 Iowa, 234; *State v. St. Paul, M. & M. R. Co.* *supra*; 9 Am. & Eng. Enc. Law, p. 411; 1 Redf. Railways, § 132, p. 577; *Mann v. Central Vermont R. Co.* 55 Vt. 484, 45 Am. Rep. 628; *Roberts v. Chicago & N. W. R. Co.* 35 Wis. 679; *Judson v. New York & N. H. R. Co.* 29 Conn. 434; *Gillett v. Western R. Co.* 8 Allen, 560; *People v. Chicago & A. R. Co.* 67 Ill. 118; *Delzell v. Indianapolis & C. R. Co.* 32 Ind. 45; *Little Miami R. Co. v. Greene County Comrs.* 31 Ohio St. 338; *Kelley v. Southern Minnesota R. Co.* 28 Minn. 98; *State v. Dayton & S. E. R. Co.* 36 Ohio St. 436; *Gulf, C. & S. F. R. Co. v. Greenlee*, 62 Tex. 344; *Mulby v. Chicago & W. M. R. Co.* 52 Mich. 108.

The defendant was in duty bound, both by the statute as well as by the common law, to maintain the street within the rails, at least so that it should be reasonably safe for travel.

Messrs. M. V. Montgomery & R. A. Montgomery for defendant in error.

Hooker, J., delivered the opinion of the court:

The defendant owns and operates a railroad which crosses Larch street, in the city of Lansing, upon a curve, one rail being some inches higher than the other. A sidewalk has crossed said track for many years, and the defendant has been accustomed to keep it in repair. Between the rails, planks, laid upon the ties and flush with the top of the rails, constituted a portion of the walk built and maintained by defendant shortly before the accident complained of. The defendant's servants removed from between the rails the two planks lying nearest to the higher rail. The ground was soon after covered with snow, and the plaintiff while engaged in cleaning the snow from the walk with a team and snowplow, as usual, attempted to cross the track, when the point of the plow struck the rail, by reason of the absence of the two planks, and he was injured. The court directed a verdict for the defendant upon the ground that the defendant owed no duty to the public to keep the sidewalk within the rails of its track in such repair as to enable the plaintiff to draw a snowplow with a span of horses over said walk across its track, and therefore was not guilty of negligence in removing the planks from said walk.

The safety of the public requires that the maintenance of the railroad track be exclusively within the control of the railroad company, and crossings are by our law required to be constructed by them. This, we think, is not merely to relieve the city from the expense, but is to insure the safety of the public, as well those who ride upon the trains as travelers upon the highway. It is the uniform practice of railroads to attend to these crossings, both of the wagon road and sidewalk, to the exclusion of the municipal authorities, so far as the track itself is concerned. This is recognized

NOTE.—As to safety of highway crossings, see also *Terre Haute & I. R. Co. v. Clem (Ind.)*; 1 L. R. A. 588.

31 L. R. A.

by the law, and is one of the reasons for holding that the statute which requires a proper restoration of the highway at the time of the building of the railroad by implication imposes the duty of maintaining it in proper condition. This is but declaratory of the common law. See *Maltby v. Chicago & W. M. R. Co.* 52 Mich. 110. The right of the plaintiff to recover is not given by the statute authorizing actions against municipalities who fail to keep highways in a condition reasonably fit and safe for travel, though it is possible that such statute may have a bearing on the extent of the defendant's duty. We think that railroads must maintain crossings between tracks and rails reasonably fit and safe for the usual and ordinary purposes of the public, and the fact that a right of action might possibly exist against the cities does not affect their liability. In case of a failure, the railroad would be liable, whether the city were or not. *Maltby v. Chicago & W. M. R. Co.* 52 Mich. 111.

In this case a sidewalk had long been provided. If removed, and the street left in a dangerous condition, as measured by the gauge of the ordinary uses and purposes of the highway, it was negligent, and a cause of action would lie upon behalf of any person injured while making a proper, reasonable, and common use of the way. It is claimed that this was the usual way of cleaning walks, and had been for years, and was a proper use of the highway. While we do not intimate that such practice imposed any additional or greater duty upon defendant, a question not before us, if it appears that the accident was caused by reason of a failure to keep the crossing in a reasonably safe and suitable condition for ordinary uses, the plaintiff should not be denied redress because it was an unusual or hazardous use of the walk, it being, as already said, a proper and necessary use.

The judgment must be reversed, and a new trial ordered.

McGrath, Ch. J., did not sit; the other Justices concurred.

Frank A. TANNER

c.

Thomas MERRILL *et al.*, *Plffs. in Err.*

(.....Mich.....)

A receipt in full, given without protest on payment of the undisputed part of a claim after refusal to pay another part which is disputed, when the money is apparently accepted in full satisfaction, constitutes an accord and satisfaction.

(December 30, 1895.)

ERROR to the Circuit Court for Saginaw County to review a judgment in favor of plaintiff in an action brought to recover the unpaid portion of certain wages for work and labor performed. *Reversed.*

The facts are stated in the opinion.

Mr. Dan. P. Foote, for plaintiffs in error: In the absence of fraud, mistake, or advan-

tage a receipt in full is conclusive when given with a knowledge of all the circumstances and when the party giving it cannot complain of any misapprehension as to the compromise he was making.

19 Am. & Eng. Enc. Law, p. 1122; *Pratt v. Cattle*, 91 Mich. 484; *Acerill v. Wood*, 78 Mich. 342; *Nash v. Manistee Lumber Co.* 75 Mich. 346; *Prichard v. Sharp*, 51 Mich. 432; *Houghton v. Ross*, 54 Mich. 335.

A receipt given by a party on a settlement of a disputed claim cannot be questioned except upon the ground of fraud, duress, oppression, mistake, or undue advantage.

Dowling v. Eggemann, 47 Mich. 171; *Gates v. Shutts*, 7 Mich. 127; *Davis v. Hammond*, 75 Mich. 1; *Dailey v. King*, 79 Mich. 568; *Galvin v. O'Brien*, 96 Mich. 433; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230; *Hull v. Swarthout*, 29 Mich. 249; *Hart v. Gould*, 62 Mich. 262.

Mr. Rowland Connor, for defendant in error:

A receipt in full, given without valid consideration, is not binding, does not preclude recovery of the amount actually due, and is subject to parol explanation and contradiction.

A receipt may be explained, and what it was intended to cover shown.

Hart v. Gould, 62 Mich. 269; *Rowe v. Wright*, 12 Mich. 289; *Michigan C. R. Co. v. Dunham*, 30 Mich. 128; *Lawrence v. Griswold*, Id. 410; *Roberts v. Field*, 27 Mich. 337; *Hicks v. Leaton*, 67 Mich. 371.

Acceptance of less than claimed will operate as a settlement only by express agreement to that effect.

St. Louis, Ft. S. & W. R. Co. v. Davis, 35 Kan. 464; *Hayes v. Massachusetts Mut. L. Ins. Co.* 125 Ill. 626, 1 L. R. A. 303; *Kenny v. Kane*, 50 N. J. L. 562; *Husted v. Dodge* (Iowa) 35 N. W. 462; *Day v. Gardner*, 42 N. J. Eq. 199; 19 Am. & Eng. Enc. Law, pp. 1115, 1116.

A receipt is never conclusive where undue influence can be alleged against it.

19 Am. & Eng. Enc. Law, p. 1121; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 463; *McAllister v. Engle*, 52 Mich. 56; *Vyne v. Glenn*, 41 Mich. 112; *Hackley v. Headley*, 45 Mich. 569.

At the time of the giving of the receipt in question the parties were not dealing on equal terms. A woodsman in the woods is in much the same situation as a seaman at sea.

Any contract made or any receipt given under such circumstances should be closely scanned. Courts always look with suspicion upon business transactions between wards and guardians. And a very little matter is sufficient to void a contract or receipt given by a ward to a guardian.

Powell v. Powell, 52 Mich. 432; 19 Am. & Eng. Enc. Law, p. 1121; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 132 Ind. 517, 18 L. R. A. 105; *Nash v. Manistee Lumber Co.* 75 Mich. 352.

Hooker, J., delivered the opinion of the court:

The defendants appeal from a judgment recovered against them at circuit. They are lumbermen, and the plaintiff worked for them

NOTE.—For part payment in full satisfaction, see also note to *Fuller v. Kemp* (N. Y.) 20 L. R. A. 735.
31 L. R. A.

at Georgian bay, his transportation from Saginaw to that place having been paid by them. When he quit work, a question arose as to who should pay this, under the contract of employment, and defendant's superintendent declined to pay any transportation. The plaintiff needed the money due him to get home, and showed a telegram announcing the illness or death of his mother, and said that he must go home, to which the superintendent replied that "he did not pay any man's fare;" whereupon a receipt in full was signed, and the money due, after deducting transportation was paid. The plaintiff testified that they had no dispute, only he claimed the fare and the superintendent refused to allow it.

The most important question arises over a request to charge upon the part of the defendants, which reads as follows: "The testimony of the plaintiff is that, at the time the receipt put in evidence in this case was signed by him, he claimed that his railroad fare should not be deducted from his wages; that this was denied by the agents and superintendents of defendants, and it was taken out of his wages; that he then signed the receipt with full knowledge of its contents; and that his railroad fare had been taken out of his wages. This being so, the receipt in this case, upon the plaintiff's own testimony, cannot be contradicted. While a receipt, in certain cases, may be contradicted, it must be in a case of mistake, ignorance of fact, fraud, or when some unconscionable advantage had been taken of one by the other party. Therefore, the receipt in this case shows a full settlement of all claims plaintiff had against the defendants." The only theory upon which it can be contended that this request should have been given is that the plaintiff accepted less than he claimed (but no more than defendants admitted to be due), and gave a receipt in full when the defendants' superintendent refused to pay more. We do not discover any testimony tending to show an agreement to accept as payment either in full or by way of compromise, except the receipt; and the question resolves itself into this, whether a receipt in full is conclusive of the question of defendants' liability, when it is given upon payment of a portion of a claim admittedly due, accompanied by a refusal to pay more, in the absence of mistake, fraud, duress, or undue influence. It is urged upon behalf of the plaintiff that receipts are always open to explanation, and that there is no consideration to support the acceptance of a portion of a valid claim as full payment. The cases which counsel cite do not support the broad contention of plaintiff's counsel, which would seriously derange business affairs if it should be sustained. The doctrine that the receipt of part payment must rest upon a valid consideration to be effective in discharge of the entire debt is carefully limited to cases where the debt is liquidated, by agreement of the parties or otherwise, which was not the case here. It was in dispute in the case of *St. Louis, Ft. S. & W. R. Co. v. Davis*, 35 Kan. 464, the opinion says that "it is a well-settled principle of law that the payment of a part of an ascertained, overdue, and undisputed debt, although accepted in full satisfaction, and a receipt in full is given, does not estop the creditor from recovering the

L. R. A.

balance. In such case the agreement is without consideration." The case of *Day v. Gardner*, 42 N. J. Eq. 199, was one where the agreement was to forgive a debt, implying its existence. In *Hasted v. Dodge* (Iowa) 35 N. W. 462, the opinion of Mr. Justice Rothrock shows the debt not to have been in dispute. Moreover, the doctrine was not applicable to the case for reasons shown. See also *American Bridge Co. v. Murphy*, 13 Kan. 35. In *Bailey v. Day*, 26 Me. 88, the claim was liquidated by judgment. In *Hayes v. Massachusetts Mut. L. Ins. Co.* 125 Ill. 626, 1 L. R. A. 303, the supreme court of Illinois applies the doctrine relied upon, but expressly states "that it has no application where property other than money is taken, or where there is an honest compromise of unliquidated or disputed demands. See also *Bishop, Cont. § 50*; 2 *Parsons, Cont. 618*. In *Marion v. Heinbach* (Minn.) 64 N. W. 386, the supreme court of Minnesota says: "But where the claim is unliquidated it would seem to be true that if the creditor is tendered a sum less than his claim, upon the condition that, if it is accepted it must be in full satisfaction of his whole claim, his acceptance is an accord and satisfaction." See also *Fuller v. Kemp*, 138 N. Y. 234, 20 L. R. A. 785, where the same doctrine is held; *Fire Ins. Asso. v. Wickham*, 141 U. S. 577, 35 L. ed. 866.

The important fact to ascertain is whether the plaintiff's claim was a liquidated claim or not. If it was, there was no consideration for the discharge. If not, the authorities are in substantial accord that part payment of the claim may discharge the debt, if it is so received. Upon the undisputed facts, the claim of the plaintiff, as made, was not liquidated. It was not even admitted, but on the contrary, was denied, because the defendant claimed that it had been partially paid by a valid offset. While the controversy was over the offset, it is plain that the amount due the plaintiff was in dispute. If so, it is difficult to understand how it could be treated as a liquidated claim, unless it is to be said that a claim may be liquidated piecemeal, and that, so far as the items are agreed upon, it is liquidated, and to that extent is not subject to adjustment on a basis of part payment. Cases are not numerous in which just this phase of the question appears. This would seem remarkable, unless we are to assume that, in calling a claim unliquidated, the courts have alluded to the whole claim, and considered that, where the amount is not agreed upon, the claim as a whole is unliquidated, and therefore subject to adjustment. If this is not true, no man can pay an amount that he admits to be due without being subject to action whenever and so often as his creditor may choose to claim that he was not fully paid, no matter how solemn may have been his acknowledgment of satisfaction so long as it is not a release under seal. The general rule is a technical one, and there are many exceptions. It has been said that it "often fosters bad faith, and that the history of the judicial decisions will be found to show a constant effort to escape from its absurdity and injustice." *Harper v. Graham*, 20 Ohio, 105; *Kellogg v. Richards*, 14 Wend. 116; *Brooks v. White*, 2 Met. 283, 37 Am. Dec. 95. Again it is said to be "rigid and unreason-

able," and defeats the expressed intentions of the parties, and therefore "should not be extended to embrace cases not within the letter of it." *Westcott v. Waller*, 47 Ala. 492; *Johnson v. Brannan*, 5 Johns. 268; *Simmons v. Almy*, 103 Mass. 35. See *Milliken v. Brown*, 1 Rawle, 891, where the rule is vigorously denounced. It has no application in cases of claims against the government. If one accepts the amount allowed, it is a discharge of the whole claim. *United States v. Adams*, 74 U. S. 7 Wall. 463, 19 L. ed. 249; *United States v. Child*, 79 U. S. 12 Wall. 232, 20 L. ed. 860. See also *Wapello County Comrs. v. Sinnaman*, 1 G. Greene, 418; *Brick v. Plymouth County*, 63 Iowa, 462; *Perry v. Chebogan*, 55 Mich. 250; *Calkins v. State*, 18 Wis. 389. Again it has been repeatedly held that part payment is a bar to a claim for interest. Another exception is found in composition with creditors.

It is believed that we may safely treat this claim as one claim, not as two, and that it was unliquidated, inasmuch as it was not admitted. In *McGlynn v. Billings*, 16 Vt. 329, the defendant, after an examination of accounts, claimed that he owed the plaintiff \$82, and drew a check for that sum, and tendered it as payment in full. It was refused and it was delivered to a third person with directions to deliver it whenever the plaintiff would receive it as payment in full. This was done and it was held to discharge the debt. In *Hills v. Sommer*, 53 Hun, 392, the plaintiffs shipped lemons to dealers in St. Joseph, Mo., and were notified that some were defective, with a claim of a specific rebate, which plaintiffs refused to allow. A draft was subsequently sent for the amount which the defendants had previously expressed their willingness to allow, with a letter stating that it was in payment of the invoice. The draft was cashed, and action brought for the remainder of the claim. Verdict was directed for the defendants. *Pierce v. Pierce*, 25 Barb. 253, seems to be a similar case. In *Potter v. Douglass*, 44 Conn. 546, a plaintiff refused \$45, which was tendered in full payment of a claim. He took it, however, on account, as he said, and wrote a receipt to that effect, which defendant refused, for the reason that it stated that the money was received on account. The plaintiff, however, kept the money. It does not appear that this amount of \$45 was disputed. Apparently, it was not. Yet the court called the claim an unliquidated demand, and held it to have been discharged. In *Perkins v. Headley*, 49 Mo. App. 562, it is said: "But if there is a controversy between him [the creditor] and his debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but on the condition that the creditor accept it

in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction as a conclusion of law." While no Michigan case decisive of this question is cited, and we recall none, it was held in *Houghton v. Ross*, 54 Mich. 385, that "a receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equivalent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything." And in *Pratt v. Cistle*, 91 Mich. 484, it was said that: "(1) Settlements are favored by the law, and will not be set aside except for fraud, mistake, or duress. (2) A settlement evidenced by the execution of mutual receipts of '\$1, in full for all debts, dues, and demands to this date,' except as to certain specified items, is conclusive in the absence of fraud or mistake, as to all prior dealings between the parties not covered by the excepted items." See also *Donling v. Eggemann*, 47 Mich. 171.

It therefore appears that such settlements should have weight, and it seems reasonable to hold that the rule contended for does not apply, for the reason that this was an unliquidated demand, although a certain portion of it was not questioned. Clearly, the claim was disputed, and, so far as this record shows, the defendants' superintendent was given to understand that the money paid was accepted in full satisfaction, as plaintiff's own evidence shows that he gave it without protest, and without stating to defendants' superintendent that he said, aside, to his fellow laborers, that it would make no difference if they did give the receipts. To hold otherwise would be a recognition of the "mental reservation" more effective than just. Upon the plaintiff's own testimony, he accepted the money, with the knowledge that the defendants claimed that the amount paid was all that was his due, and gave a receipt in full. There is nothing in the case to negative the inference, naturally to be drawn from this testimony, that there was an accord and satisfaction of an unliquidated demand.

The judgment must be reversed. No new trial should be ordered.

Long and Grant, JJ., concurred with **Hooker, J.**

Montgomery, J.: I think that the payment of an admitted indebtedness is no consideration for a discharge of a further claim by the creditor.

McGrath, Ch. J., concurred with **Montgomery, J.**

MASSACHUSETTS SUPREME JUDICIAL COURT.

Ellen McMANUS
v.
INHABITANTS OF THE TOWN OF
WESTON.

Patrick McMANUS
v.
SAME.

(164 Mass. 263.)

1. Road commissioners who under the Massachusetts statute have in respect to roads the powers formerly possessed by selectmen and surveyors of highways are, while acting within the scope of their powers and duties, public officers, and not servants of the town for whose acts the town is liable.

2. Acts in the nature of repairs to or improvement of an existing way are within the terms "making and repairing," in the statute conferring power on road commissioners, so that in performing them they will act as public officers although the work is ordered by the county commissioners, is unusual and extensive in character, and provided for by a special appropriation by the town, and a statute requires towns to complete roads according to the lay out or order of the county commissioners.

(September 9, 1895.)

EXCEPTIONS by plaintiffs to rulings of the Superior Court for Middlesex County directing verdicts for defendant in actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Overruled.*

Plaintiffs were driving along a road in defendant town and persons in charge of a steam drill engaged in work upon the road neglected to give warning or to so control the steam as to prevent the frightening of plaintiffs' horse. As a result the horse became frightened and caused the injuries for which the suit was brought.

Further facts appear in the opinion.

Messrs. Elder, Wait, & Whitman, for plaintiffs:

The town by paying the bills and receiving the money from the county ratified the proceedings of the men who were doing the work, and by voting, March, 1891, to continue the work, authorized what was being done at the time plaintiffs were injured.

Gilkey v. Watertown, 141 Mass. 317.

"Road making" does not necessarily mean building a new or altering an old road. In common speech in the country it means working on the highway for any purpose,—repairs or construction. Making a road safe and convenient for travel calls, many times, as often for repairs as for new construction.

The title of chapter 52 is, *Of the Repairs of Ways and Bridges*, and repairs are all this chapter deals with.

The provisions for carrying out orders of county commissioners are contained in chap.

NOTE.—As to personal liability of highway officers for negligence, see note to *Bates v. Horner* (Vt.) 22 L. R. A. 824.

31 L. R. A.

49, Pub. Stat., and impose the duty upon the town alone.

Towns are parties to the proceedings and may apply for a jury.

Gloucester v. Essex County Comrs. 3 Met. 375.

The county commissioners at no time lose control of the work.

The penalty for nonperformance is upon the town and not upon any of its officers.

Chap. 52, § 61.

It would result in endless confusion to say that the duty was imposed both upon the town and upon the road commissioners.

Bean v. Hyde Park, 143 Mass. 245; *Blanchard v. Ayer*, 148 Mass. 174; *Todd v. Rowley*, 8 Allen, 51; *Denniston v. Clark*, 125 Mass. 22; *Pratt v. Weymouth*, 147 Mass. 245; *Waldron v. Haverhill*, 143 Mass. 582.

The town by proceeding with this work relieved itself from statute liability under chapter 49, and received partial compensation for what it did from the county. It was acting in furtherance of its own pecuniary interest as well as for the benefit of the public.

Tindley v. Salem, 187 Mass. 173, 50 Am. Rep. 289.

Receiving partial compensation by a town is a ground of liability, and persons acting for it in the work are its agents.

Neff v. Welleley, 143 Mass. 487, 2 L. R. A. 500.

Messrs. Allin & Mayberry, for defendant:

Road commissioners, being vested with all the powers and duties of surveyors of highways, are to be regarded as public officers so long as they act within the lines of their statutory duties.

Pub. Stat. chap. 27, § 75; *Walcott v. Swampscott*, 1 Allen, 101; *Clark v. Easton*, 146 Mass. 43; *Prince v. Lynn*, 149 Mass. 198.

They were acting within the scope of their duties, as defined by statute, at the time this accident happened. The statutes imposed upon them the duty of carefully and judiciously expending the money appropriated by the town, for making as well as repairing highways and townways.

Pub. Stat. chap. 52, § 3; Acts 1871, chap. 298, § 2; Acts 1877, chap. 58.

When the town appropriated money to carry out the work on Central avenue as ordered by the county commissioners, and made no special provision for its expenditure, it became the duty of the road commissioners to expend it.

Hennessy v. New Bedford, 153 Mass. 260; *Pratt v. Weymouth*, 147 Mass. 245; *Bean v. Hyde Park*, 143 Mass. 245.

If the road commissioners had no authority to construct the road, they and all their employees would be acting without authority of the town, and the town could not be held liable for their acts.

Cushing v. Bedford, 125 Mass. 526; *Bean v. Hyde Park*, *supra*.

The statute includes "making and repairing highways and town ways." It would be straining the language out of its natural meaning to give it any other interpretation than that which includes the duty of spending money for the

construction of highways laid out by the county commissioners and ordered to be built by the town.

Pub. Stat. chap. 52, § 3.

The exemption from liability arises from the public character of the officer whose duty it is to do it.

Tindley v. Salem, 187 Mass. 171, 50 Am. Rep. 289; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160; *Doherty v. Braintree*, 148 Mass. 495.

In some of the cases it is said that the town voluntarily assumed to do the work; but as this expression is used indiscriminately in reference to cases of construction and cases of repairs, it evidently means that the act of selecting agents whom they could direct and control to do the work was a voluntary act, and not that the doing of the work itself, independent of the persons employed, was voluntary, either in the case where the statute compels them to keep the ways in repair or where the county commissioners rightfully order them to build a road.

Sullivan v. Holyoke, 185 Mass. 273; *Tindley v. Salem*, and *Doherty v. Braintree*, *supra*; *Pratt v. Weymouth*, 147 Mass. 245; *Prince v. Lynn*, 149 Mass. 198; *Waldron v. Haverhill*, 143 Mass. 582; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160.

That the money was appropriated for a particular work makes no difference.

Pratt v. Weymouth, 147 Mass. 245; *Hennessey v. New Bedford*, 153 Mass. 260.

Morton, J., delivered the opinion of the court:

These two cases were tried together, and both depend on the same facts; and the principal question in each is whether the road commissioners acted as public officers, or as servants of the town. We think that they acted in the former capacity, and not in the latter. The office of road commissioner is of recent origin. It was first established by chapter 158, Stat. 1871. By the second section of that statute it was provided that "said road commissioners shall have and perform exclusively all the powers and duties now vested by law in selectmen and surveyors of highways, concerning the laying out, altering, making, repairing, or discontinuing streets, ways, sidewalks, sewers, and drains." This was amended by chapter 51, § 1, Stat. 1873, which substituted therefor a new section, as follows: "Said road commissioners, in matters concerning streets, ways, bridges, monuments at the termini and angles of roads, guide posts, sidewalks, shade-trees, sewers, and drains, shall exclusively have the powers and be subject to the duties, liabilities, and penalties of selectmen and surveyors of highways." This section, with an added provision about the moving of buildings in public streets, forms section 75, chap. 27, Pub. Stat., and that, in turn, forms section 23 of chapter 428, Stat. 1893, in regard to the powers and duties of town officers. It is evident that the object of the amendment was, not to restrict the powers and duties of the road commissioners, but rather to enlarge them, or, perhaps, to make it clearer what they were originally intended to include. The purpose of the statute was to enable towns to unite

in one board for the sake of greater efficiency powers, and duties which, speaking generally, were exercised by the selectmen and surveyors of highways, in regard to streets and ways, and to give them the exclusive control over such matters. And it is apparent that a board, so constituted, and acting within the scope of its powers and duties, would act as a board of public officers, and not as servants of the town. *Walcott v. Swampscott*, 1 Allen, 101; *Tindley v. Salem*, 187 Mass. 173, 50 Am. Rep. 289, *et seq.*, and cases cited; *Blanchard v. Ayer*, 148 Mass. 174. The plaintiffs contend, however, that the work in which the road commissioners were engaged upon Central avenue did not come within their powers and duties as public officers. But we think that what they were doing fairly may be called a "making and repairing," within the meaning of section 3, chap. 52, Pub. Stat. Although ordered by the county commissioners, the work did not relate to the construction of a new way, or the building of one that had been materially widened or lengthened or changed from its original layout, but was in the nature of repairs to and improvement of an existing way, and for the purpose of rendering it safer and more convenient to travelers. The petition under which the county commissioners acted was for the relocation of an existing way. What was to be done was spoken of in the first appropriation by the town as "repairs on Central avenue," and the exceptions expressly state that the ledge where the work was being done at the time of the injury complained of was wholly within the old lines, and that the location by the county commissioners did not differ much from the old line of fences; meaning, as we infer, that the old road and the road as located by the county commissioners were substantially the same. There is nothing to show that the removal of the ledge would not have been within the ordinary scope of the powers and duties of surveyors of highways. From the absence of any testimony as to the previous condition of the road, it is not easy to say that the repairs, though extensive, were not such as would not have come within the province of the road commissioners after the town had appropriated the money for them. *Proctor v. Stone*, 158 Mass. 564. The fact that they were unusual, or permanent, or expensive, or authorized by a special vote and appropriation, would not prevent them from being of such a character. *Hennessey v. New Bedford*, 153 Mass. 260; *Pratt v. Weymouth*, 147 Mass. 245; *Denniston v. Clark*, 125 Mass. 216; *Mitchell v. Bridgewater*, 10 Cush. 411. In *Cragie v. Mellen*, 6 Mass. 7, it was assumed without question that it was the duty of the highway surveyors to make safe and passable a town way which had been laid out for the inhabitants of Cambridge, and approved by them. See also *Cyr v. Dufour*, 68 Me. 492. In *Callender v. Murah*, 1 Pick. 417, 426, which has never been questioned as an authority (*Burr v. Leicester*, 121 Mass. 242), it is said that the authority of highway surveyors "would seem to include everything which may be needed towards making the ways perfect and complete, either by leveling them where they are uneven and difficult of ascent and descent, or raising them

where they should be sunken and miry." In consequence of this decision, and of the suggestions contained in it, a statute was passed giving a remedy to land owners who sustained damages by any act done in raising, lowering, or otherwise for the purpose of repairing a highway or town way. Rev. Stat. chap. 25, § 6; Pub. Stat. chap. 52, § 15. But as was said in *Denniston v. Clark*, 125 Mass. 225, "this statute does not affect the extent of the authority of the public and its officers, or the principle upon which that authority rests." It is true that it has been held that the powers and duties of highway surveyors were confined to repairs, and that neither they nor selectmen had authority, by virtue of their respective offices, to build or contract for the building of new ways, or of ways that were so widened or altered that what was to be done would amount to the substitution of a new way for an old one, either within the same or other lines. *Todd v. Rowley*, 8 Allen, 51; *Denniston v. Clark*, 125 Mass. 220; *Bean v. Hyde Park*, 143 Mass. 245; *Blanchard v. Ayer*, 148 Mass. 174; *Bemis v. Springfield*, 122 Mass. 110. There is no general rule defining what are repairs, and what are changes or alterations so radical that they fairly cannot be called such. *Proctor v. Stone*, *supra*. The original statute creating the office of highway surveyors gave them power to amend as well as to repair (Stat. 1786, chap. 81, § 1); and the law seems to have been liberally applied in favor of repairs. Though the word "amend" was omitted in the Revised Statutes and the later revisions, there is nothing to show that there was any intention to restrict the powers of the surveyors within narrower limits than those established by the original act. By Stat. 1877, chap. 58, amending section 2, chap. 298, Stat. 1871, which abolished the payment of highway and town way taxes in labor and materials, and provided that towns should raise by assessment on the polls and estates by residents and nonresidents such sums of money as were necessary for making and repairing highways and town ways, it was provided that the sums so voted should be expended by the surveyors of highways and the road commissioners in making and repairing the ways; the difference between the highway surveyors and road commissioners being that, in the case of the former, the expenditures were to be under the direction of the selectmen, but, in the latter, not. Section 2 of chapter 298, Stat. 1871, with the amendment of chapter 58, Stat. 1877, was incorporated into and forms section 31, chap. 52, Pub. Stat., on which the defendant relies. The meaning of the word "making" in this connection does not appear to have been considered, or to have received any construction. In the act establish-

81 L. R. A.

ing the road commissioners it evidently meant something more than "repairing." Stat. 1871, chap. 158, § 2. In the present and earlier statutes it seems to have been used, in some instances, in a sense which would include building or constructing. Pub. Stat. chap. 52, § 13; Id. chap. 49, §§ 9, 75; Rev. Stat. chap. 24, §§ 10, 44, 47, 64; Id. chap. 25, §§ 9, 15; Stat. 1796, chap. 58, § 1; Stat. 1818, chap. 121, § 1. It is so used in the sewer acts. Pub. Stat. chap. 50, §§ 1, 3, 4. But we do not think that it can be construed, in the section on which the defendant relies, as authorizing the road commissioners, whenever a new way is laid out in a town, to go on and build it. *Cragie v. Mellen*, and *Cyr v. Dufour*, *supra*. The road commissioners are not given power generally over the laying out, making, discontinuing, and repairing of ways, but only such powers as the selectmen and highway surveyors have, and such as are bestowed by the section under consideration. It is clear that neither the selectmen nor highway commissioners have authority to build new ways. We think that the jurisdiction of road commissioners is confined to existing ways, within lines corresponding substantially to existing lines, and possibly to making passable ways newly laid out (*Cragie v. Mellen*, *supra*); and that, as applied to them, the word "making" means more than repairing, and may properly include work of the general character of that which they were doing in this case upon Central avenue; and that, after the town had made the appropriation, it was for the commissioners in the absence of any further action on its part to do the work with such instrumentalities and in such manner as seemed to them best. *Pratt v. Weymouth*, and *Hennessey v. New Bedford*, *supra*. Although the duty of completing the road according to the layout and order of the county commissioners is imposed by statute upon the town, there can, we think, be no question that the town fulfills the duty thus imposed upon it if the money necessary to carry out the order of the county commissioners is appropriated by it, and the work is done by public officers duly chosen by it, and within whose jurisdiction it comes. Whether the work is done by public officers, or by persons specially appointed by the town, it is equally within the power of the county commissioners to see that their order is complied with. The fact that the town voluntarily adopted the statute providing for the election of road commissioners can make no difference as to whether the commissioners were or were not acting as public officers. *Tindley v. Salem*, *supra*. A majority of the court think that the exceptions should be overruled, and it is so ordered.

Exceptions overruled.

IOWA SUPREME COURT.

Charles EASTON *et al.*, *Appts.*,
v.

Josephene HUOTT, *Defendant*,
and

Pelagie HUOTT *et al.*, *Interveners, Appellees.*

(.....Iowa.....)

Nonresident aliens may inherit from an alien resident land situated in a state whose

statutes prohibit nonresident aliens from acquiring title to land in the state, except that the widow and heirs of aliens who have acquired lands in the state may hold such lands by devise or descent for a period of ten years.

(October 5, 1895.)

APPEAL by plaintiffs from a decree of the District Court for Jefferson County in

NOTE.—*Alien's right to inherit.*

I. *The common-law doctrine.*

II. *Upon what the right depends.*

III. *Power of the states to regulate.*

IV. *In lands granted for military services and colonization.*

V. *Inheritance of patent lands.*

VI. *Effect of annexation of territory or division of an empire.*

VII. *The effect of naturalization.*

VIII. *Effect of marriage with an alien and residing abroad.*

As to the effect of state Constitutions and statutes upon the question of inheritance by or from an alien, see *note* to DeWolf v. Middleton (R. L.) *ante*, 148.

Upon the question of the effect of state statutes and Constitutions upon inheritance through an alien, see *note* to Beaven v. Went (Ill.) *ante*, 85.

The effect of treaties upon the right of aliens to inherit will form a separate note.

As to treaty guaranties to aliens, see *note* to Gandolfo v. Hartman (Cal.) 16 L. R. A. 277.

Upon the question of disability of aliens and the escheat of property, see *note* to American Mortg. Co. v. Tennessee (Ga.) 12 L. R. A. 529, and *brief* in Toole v. Toole (N. Y.) 2 L. R. A. 465.

I. The common-law doctrine.

Where the title to real estate is created by operation of law, as in the case of a title by descent, the common law prohibits an alien from inheriting, and therefore, under such law, there can be no descent by, from, or through an alien, for the reason that an alien has no inheritable blood, and the law, *que nihil frustra*, will never cast descent upon any one who cannot hold the estate, no notice being taken of an alien heir on whom the inheritance cannot be cast.

At common law inheritance is understood to descend through the channel of blood or consanguinity, and when that blood is corrupted by alienage or infamy the inheritance is altogether obstructed or diverted into a different channel. Jackson, Fitz Simmons, v. Fitz Simmons, 10 Wend. 9, 24 Am. Dec. 198 (1832).

The above propositions of law are supported by the following authorities: Jenkins v. Noel, 3 Stew. (Ala.) 79 (1830); Smith v. Zaner, 4 Ala. 99, 106 (1842); Harley v. State, 40 Ala. 689, 695 (1867); Norris v. Hoyt, 18 Cal. 217 (1851); Farrell v. Enright, 12 Cal. 450 (1859); Walker v. Potomac Ferry Co., 3 MacArth. 440 (1879); Jost v. Jost, 1 Mackey, 487 (1882); Wunderlie v. Wunderlie, 144 Ill. 40, 19 L. R. A. 84 (1893); Eldon v. Doe, Wynn, 6 Blackf. 341 (1842); Doe, Huddleston, v. Lazenby, 1 Ind. 234 (1848); Smith (Ind.) 205 (1850); Furenes v. Mickelson, 86 Iowa, 508 (1892); Stemple v. Herminghouser, 3 G. Greene, 408 (1852); Fry, Vaughan, v. Smith, 2 Dana, 38 (1834); Hunt v. Warrnicke, Hardin (Ky.) 61 (1806); Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86 (1823); Stevenson v. Dunlap, 7 T. B. Mon. 134 (1824); Trimble v. Harrison, 1 B. Mon. 140 (1840); White v. White, 2 Met. (Ky.) 185 (1859); Yeaker v. Yeaker, 4 Met. (Ky.) 33, 81 Am. Dec. 530 (1862); Guyer v. Smith, 22 Md. 31 L. R. A.

239, 247, 85 Am. Dec. 650 (1864); Buchanan v. Deshon, 1 Harr. & G. 280 (1827); Slater v. Nason, 15 Pick. 345, 349 (1834); Piper v. Richardson, 9 Met. 157 (1845); Wilbur v. Tobey, 16 Pick. 177 (1854); Foss v. Crisp, 20 Pick. 124 (1838); Wacker v. Wacker, 26 Mo. 426 (1858); Farrar v. Dean, 24 Mo. 16 (1856); Utassy v. Gleding-hagen (Mo.) 33 S. W. 444 (1896); Montgomery v. Dorion, 7 N. H. 475 (1855); Ettenheimer v. Heffernan, 66 Barb. 374, 377 (1873); Kilfoy v. Powers, 3 Dem. 198 (1884); Re Beck, 81 N. Y. S. R. 965 (1900); Mick v. Mick, 10 Wend. 379 (1833); Jackson, Fitz Simmons, v. Fitz Simmons, 10 Wend. 9, 24 Am. Dec. 198 (1832); Englishbee v. Helmuth, 7 N. Y. Legal Obs. 188, 189 (1849); Overing v. Russell, 82 Barb. 263, 265 (1860); Beck v. McGillis, 9 Barb. 35 (1850); Jackson, Ganevoort, v. Lunn, 3 Johns. Cas. 109 (1802); Re Leefe, 4 Edw. Ch. 385, 407 (1844); People v. Conklin, 2 Hill, 67 (1841); Heeney v. Brooklyn Benev. Soc. 33 Barb. 360 (1861); Larreau v. Davignon, 5 Abb. Pr. N. S. 367 (1866); Mooers v. White, 6 Johns. Ch. 390 (1822); Renner v. Muller, 12 Jones & S. 535 (1879); Lynch v. Clarke, 1 Sandf. Ch. 583 (1844); Banks v. Walker, 8 Barb. Ch. 446 (1848); McCarthy v. Marsh, 5 N. Y. 263, 274 (1851); Parish v. Ward, 28 Barb. 328 (1856); Redpath v. Rich, 3 Sandf. 79 (1849); People v. Irvin, 21 Wend. 128 (1839); McGregor v. Comstock, 3 N. Y. 409 (1850); Jackson, Doran, v. Green, 7 Wend. 333 (1831); Wadsworth v. Wadsworth, 12 N. Y. 376 (1855); Munro v. Merchant, 28 N. Y. 9 (1863); Atkins v. Kron, 5 Ired. Eq. 207, 210 (1848); Copeland v. Sauls, 1 Jones, L. 70 (1853); Campbell v. Campbell, 5 Jones, Eq. 246 (1859); Den, Paul, v. Ward, 4 Dev. L. 247 (1853); Rutherford v. Wolfe, 3 Hawks, 272 (1824); Jackson v. Burns, 3 Binn. 75 (1810); Haigh v. Haigh, 9 R. I. 26 (1868); Laurens v. Jenney, 1 Speers, L. 356, 365 (1843); McCaw v. Galbraith, 7 Rich. L. 74, 84 (1853); Richards v. M'Daniel, 2 Mill, Const. 18 (1818); Ennas v. Franklin, 2 Brev. 398 (1810); McClenaghan v. McClenaghan, 1 Strobh. Eq. 295, 321, 47 Am. Dec. 532 (1847); Trezevant v. Osborn, 3 Brev. 29 (1812); Scott v. Cohen, 2 Nott & M'C. 293, 297 (1820); Dupont v. Pepper, Harp. Eq. 5 (1824); Baker v. Shy, 9 Heisk. 85, 89 (1871); Hinkle v. Shadden, 2 Swan, 46, 49 (1852); Emmett v. Emmett, 14 Lea, 369, 371 (1884); Blythe v. Easterling, 20 Tex. 565 (1867); Barclay v. Cameron, 25 Tex. 233 (1860); Andrews v. Spear, 48 Tex. 567 (1878); Hubbard v. Goodwin, Kennedy v. Goodwin, 3 Leigh, 492, 509 (1878); Com. v. Bristow, 6 Call (Va.) 60 (1809); Read v. Read, 5 Call (Va.) 160 (1804); Sands v. Lynham, 27 Gratt. 291, 21 Am. Rep. 348 (1876); Fairfax v. Hunter, 11 U. S. 7 Cranch, 603, 3 L. ed. 453 (1813); McCreery v. Somerville, 22 U. S. 9 Wheat. 354, 6 L. ed. 109 (1824); Levy v. McCartee, 31 U. S. 1 Pet. 102, 8 L. ed. 334 (1832); Blight v. Rochester, 20 U. S. 7 Wheat. 535, 5 L. ed. 516 (1822); Cross v. De Valle, 1 Cliff. 282 (1859); Branagh v. Smith, 46 Fed. Rep. 517 (1891); Spratt v. Spratt, 26 U. S. 1 Pet. 343, 7 L. ed. 171 (1823); 29 U. S. 4 Pet. 393, 7 L. ed. 897 (1830); Orr v. Hodgden, 17 U. S. 4 Wheat. 453, 4 L. ed. 613 (1819); Dumonceil v. Dumonceil, 13 Ir. Eq. Rep. 92 (1848); Collingwood v. Pace, 1 Vent. 413 (1664); 1 Keb. 671 (1645).

The common-law rule prevails in equity, for the reason that equitable estates are subject to the same modes and conditions as corresponding legal estates. Cross v. De Valle, *supra*.

Alienage in any mediate ancestor will interrupt

favor of interveners in an equity proceeding to determine the ownership of certain real estate of which Xavier Huott died seised, which recognized the claims of interveners, who were alien heirs of decedent. *Affirmed.*

The facts are stated in the opinion.

Messrs. Jones & Fullen, for appellants:

The common-law doctrine that an alien had no inheritable blood had been adopted as the law of the land before the adoption of our Constitution.

Stemple v. Herminghouser, 3 G. Greene, 408.

the descent between persons who are capable of taking and transmitting land by descent. *Murray v. Kelly*, 27 Ind. 42 (1866).

So that children of a parent still alive cannot derive an inheritance when such parent is incapable of acquiring that inheritance on account of alienage. *Walker v. Potomac Ferry Co.* 3 MacArth. 440 (1879).

Even a natural-born subject cannot take by representation from an alien, because an alien has no inheritable blood through which a title can be deduced. *Jenkins v. Noel*, 3 Stew. (Ala.) 79 (1830); *Stemple v. Herminghouser*, 3 G. Greene, 408 (1852); *Campbell v. Campbell*, 5 Jones, Eq. 246 (1859); *McClenaghan v. McClenaghan*, 1 Strobb. Eq. 295, 321, 47 Am. Dec. 532 (1847).

In *Lambert v. Paine*, 7 U. S. 3 Cranch, 97, 2 L. ed. 377 (1805), it was said to be questionable whether a British subject, born in England in the year 1750, and who always resided there, could, in the year 1786, take and hold lands in Virginia by descent or by devise.

In a later case, the circuit court held that a British subject could not, in the year 1793, inherit lands in the United States from a citizen of such state. *Contee v. Godfrey*, 1 Cranch, C. C. 479 (1808).

So, in *Read v. Read*, 5 Call (Va.) 160 (1804), it was held that a British subject who was born before the Revolution could not, prior to the treaty of 1794 between the United States and Great Britain, inherit lands in the United States.

Upon the signing of the Declaration of Independence all British subjects became aliens to the United States, and therefore incapable of taking by descent. *Com. v. Bristow*, 6 Call (Va.) 60 (1806).

And as an alien cannot inherit at common law, so he cannot interrupt the descent of others, and therefore the next of kin will in such a case inherit. *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84 (1893); *Englishbee v. Helmuth*, 7 N. Y. Legal Obs. 188, 189 (1849); *Vaux v. Neebit*, 1 McCord, Eq. 352, 372 (1826); *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 24 Am. Dec. 198 (1823); *Smith v. Zaner*, 4 Ala. 99, 106 (1842); *Stemple v. Herminghouser*, and *McClenaghan v. McClenaghan*, *supra*; *Scott v. Cohen*, 2 Nott & M'C. 293, 297 (1820).

And in such a case a more distant relative, who is a citizen, is entitled to inherit. *Halyburton v. Kershaw*, 3 Desaus. Eq. 105 (1810).

So, where lands descended to four coparceners, one of whom was an alien, it was held that the other three were entitled. *Contee v. Godfrey*, 1 Cranch, C. C. 479 (1808).

And nothing less than a plain and express statutory provision in relation to land can change the rule of the common law. *Stemple v. Herminghouser*, 3 G. Greene, 408 (1852).

Nonresident aliens therefore cannot claim through an intestate prior to the passing of the California statute. *Norris v. Hoyt*, 18 Cal. 217 (1861).

If one who has been naturalized dies leaving his eldest son an alien, and a younger son a citizen, the younger son inherits taking immediately from his father. *Campbell v. Campbell*, 5 Jones, Eq. 246 (1859).

But if one who has been naturalized dies leaving a nephew, a citizen, the son of an alien brother, such nephew cannot inherit to his uncle whether his father be dead or living, if he cannot take immediately, and representation would of no value, father was an alien. *Ibid.*

R. A.

So, if one who has been naturalized dies leaving a grandson, a citizen, the child of a son who was an alien, such grandson cannot inherit, for he cannot take immediately, and although his father be dead representing him will be unavailing. *Ibid.*

If the land descended to the next heir immediately, as from brother to brother, and not mediately, or by representation, it was no objection to the vesting of the title in the immediate heir by descent that such heir, and the person from whom the estate descended, had no common or inheritable blood, except such as was derived from a common ancestor who was an alien. But if the first immediate heir was an alien, so that he could not have inherited the estate if living, those who could only claim through him by representation, and not as the next immediate heirs to the deceased owner of the estate, were also passed by, and they could not inherit by representation through the blood of such alien. *Jackson, Fitz Simmons, v. Fitz Simmons*, 10 Wend. 9, 11, 24 Am. Dec. 199 (1823).

Therefore, if an alien had children born within the King's dominion, or such children were naturalized, they might inherit from each other. *Ibid.*

Children born abroad, of alien parents who subsequently became residents, and whose parents became naturalized citizens before such children arrived at the age of twenty-one, were held entitled to inherit. *Renner v. Muller*, 12 Jones & S. 535 (1879).

And it has been held necessary to cite a nonresident alien brother and sister of a decedent upon application for the probate of a will. *Kilfoy v. Powers*, 3 Dem. 198 (1884).

But the disability does not extend to personal property. *Beck v. McGillis*, 9 Barb. 35 (1850); *Meakings v. Cromwell*, 5 N. Y. 136 (1851); *Megrath v. Robertson*, 1 Desaus. Eq. 445, 449 (1795).

The common-law rule excluding all tracing their descent through uninheritable blood was never in force in the state of Connecticut, and therefore first cousins of the deceased, notwithstanding their relationship to him through alien ancestors, were held entitled to inherit. *Campbell's Appeal*, 64 Conn. 277, 24 L. R. A. 667 (1894).

It is a settled principle in the common law that the descent between brothers, or between a brother and sister, is immediate, and the alienage of the father does not impede the descent between children. The father is *medium differens sanguinis*, but not *medium differens hereditatis*. *Lubrs v. Elmer*, 80 N. Y. 179 (1880); *Smith v. Mulligan*, 11 Abb. Pr. N. S. 438, 441 (1871); *Bradley v. Dwight*, 62 How. Pr. 300 (1881); *Banks v. Walker*, 3 Barb. Ch. 446 (1848); *Jackson, Doran, v. Green*, 7 Wend. 333 (1831); *McGregor v. Comstock*, 3 N. Y. 409 (1850); *Renner v. Muller*, 57 How. Pr. 229, 232 (1879); *Campbell v. Campbell*, 5 Jones, Eq. 246 (1859).

And this is so for the reason that brothers and sisters inherit from each other, and therefore a parent, if living and an alien, is passed by. *Renner v. Muller*, 12 Jones & S. 535 (1879).

And for the further reason that they are respective stocks of descent, and alienism is an impediment only where it comes between the stock of descent and the person claiming to take. *Lubrs v. Elmer*, 80 N. Y. 179 (1880).

If some of the persons answering the description of heirs are incapable of taking by reason of alienage, they are disregarded and the whole title vests in those heirs competent to take, provided

The question was fully settled in *King v. Ware*, 53 Iowa, 97, that the nonresident alien heirs could not inherit any share, but the whole would pass to the heirs who were residents of this state.

The intention of the saving clause of the

statute was to fix the rights of nonresident widows and heirs of nonresident aliens who had heretofore acquired lands under the laws of Iowa.

If a nonresident alien had acquired property in this state under our laws heretofore in force,

they are not compelled to trace the inheritance through an alien. *Ibid.*

In such a case the inheritance will not pass through him, but will pass by him to the next one who is competent. *Renner v. Muller, supra.*

The above rule was held not to be changed by the New York statute of 1786, which changed the order of descent so as to allow brothers and sisters to take where there was no father living, or, if living, he was incapable of taking by reason of alienage, not, however, through the father, but immediate from the decedent as at common law. *Ibid.*

The rule which enables brothers, sons of an alien father, to inherit of each other for the reason that the descent between them is immediate, applies between one of the brothers and the representatives of the other, and also between the representatives of both. *Renner v. Muller, supra.*

But it is otherwise in the case of a descent from cousin to cousin. *Jackson, Doran, v. Green*, 7 Wend. 333 (1831).

The common-law rule by which aliens were precluded from inheriting lands prevailed in the state of New York, but was modified by the laws of 1845, chap. 115. *Lynch v. Clarke*, 1 Sandf. Ch. 583 (1844).

And it has been stated that the question as to the right of a nonresident alien to hold property at common law and under the civil law is a matter between the alien and the government, and cannot be called in question in a collateral proceeding between individuals. *Racouillat v. Sansevain*, 32 Cal. 376, 386 (1867).

So, it has been held that the proof of alienage in a collateral proceeding will not deprive an alien of real estate. *Ramirez v. Kent*, 2 Cal. 558 (1862).

Where a native of New York, who resided and owned land in the state at the time of the Revolutionary war, at which time he joined the British and so continued until after the Declaration of Independence, leaving in the year 1783 with his family, except his eldest son, for Nova Scotia, but dying on the passage, his family subsequently settling in that country, except such eldest son, who remained in the state in possession of the property until 1838, when he died leaving children,—it was held that the children of such eldest son were entitled to the estate as against their alien uncles and aunts, who were children of the original owner, who by his electing to continue his allegiance to the British government became an alien. *Orser v. Hoag*, 3 Hill, 79 (1842).

Although in the cases of *Blythe v. Easterling*, 20 Tex. 585 (1857), and *Barclay v. Cameron*, 25 Tex. 233 (1860), the court found that the common-law rule precluding an alien from taking by descent was in force in Texas, yet the more recent cases would seem to doubt the correctness of such holding, and to decide that such rule did not exist in that state.

So, it has been held that prior to March, 1836, the laws of Mexico, which were based upon the civil law, were in force in Texas, the state Constitution of that year and the act of 1840, together with the old Mexican laws, forming the Code. *Barrett v. Kelly*, 31 Tex. 476, 481 (1868).

Again in the same case, it was stated that the Texas act of 1840, which repealed all laws in force prior to September 1, 1836, and adopted the common law of England as a rule of decision, so far as it was not inconsistent with the Constitution or the act of Congress then in force, abolished all the laws relating to alienage so far as they were of Mexican or Spanish origin.

31 L. R. A.

In that case the court also said that upon the annexation of the republic to the United States in 1845 none of the citizens of the United States were aliens to Texas and *vice versa*, and all causes for invoking the common law of England or the Constitution or statute laws of the state on the subject, in suits between citizens of Texas and those in other parts of the United States, were swept away.

The court, however, in that case held that an alien could defend his title against any one but the government, and based its decision upon the principles of the common law, as laid down in the New York case of *Jackson, Smith, v. Adams*, 7 Wend. 368 (1831).

These holdings would, however, appear to be contrary to the case of *Sabrigio v. White*, 30 Tex. 576, 588 (1868), wherein the court held that art. 44 of Pasch. Dig. (Tex.) p. 238, note, showed beyond all controversy that the common-law rule that an alien cannot cast descent upon an alien was wholly inapplicable to the republic of Texas, and that the decision in *McKinney v. Saviego*, 59 U. S. 18 How. 235, 15 L. ed. 365, was pronounced under a total misapprehension of the state law at the time the plaintiff's rights accrued.

They are also contrary to the opinion of the court in *Settegast v. Schrimpf*, 35 Tex. 323, 342 (1872), and to the case of *Andrews v. Spear*, 48 Tex. 567, 580 (1878); and to the still later case of *Hanrick v. Hanrick*, 64 Tex. 112 (1880), 61 Tex. 596, 602 (1884), 63 Tex. 623 (1885), wherein the court expressly held that the Texas statute of 1840, regulating descent and distribution, was not repealed by the adoption of the Constitution of 1845, but continued in force until re-enacted in 1848, and that therefore the common-law rule was never in force in that state.

II. Upon what the right depends.

It is a general rule of the common law that the title to real property must be acquired and pass according to the *lex rei sitæ*, and the rule not only applies to the alienations and acquisitions made by the acts of the parties, but also to the estates and rights acquired by operation of law, the principle originally applicable as between countries entirely foreign to each other prevailing among the states of the American Union. From such a rule the doctrine results that the title of aliens to land within the limits of the several states is matter of state regulation. *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84 (1893).

The right to inherit depends upon the existing state of allegiance at the time of the descent cast. *Orser v. Hoag*, 3 Hill, 79 (1842); *Inglis v. Sailor's Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 617 (1830).

And the capacity to take must then exist. *Sample v. Herminghouse*, 3 G. Greene, 408 (1852).

The laws of descent in the state of New York embrace and make no distinction between a native-born and a naturalized citizen, and the question, Who are entitled to inherit? must be determined by the law and the facts existing at the time of the death of the intestate. *Larreau v. Davignon*, 5 Abb. Pr. N. S. 367 (1876).

III. Power of the states to regulate.

Each state has the undoubted right to enact laws regulating the descent of a succession to property within its limits, and to permit inheritance by or from an alien. *Harley v. State*, 40 Ala. 689, 695, (1867); *Re Gill's Estate*, 79 Iowa, 296, 9 L. R. A. 126 (1890); *McClenaghan v. McClenaghan*, 1 Strobb. Eq. 295, 321, 47 Am. Dec. 532 (1847).

justice and good faith required our legislature to enact the saving clause to protect the widow and heirs of such nonresident aliens and the true construction of said section undoubtedly means nonresident aliens. This act does not apply to resident aliens.

King v. Ware, supra.

Messrs. Wilson & Hinkle for appellees.

But when a state makes aliens capable of taking lands by descent within its own territory, it by no means makes them citizens of the United States, nor does it give them any capacity to take by descent, or in any other capacity whatever in any other state, each state having the undoubted right to regulate the law of descents within its own limits. *Montgomery v. Dorian*, 7 N. H. 435 (1836).

In *Englishbee v. Helmuth*, 7 N. Y. Legal Obs. 186, 180 (1849), the court stated that the legislature might remove the disability of an alien heir and authorize him to take as by descent, but that the state could not by special act authorize an alien or nearer kin to take to the exclusion of a citizen of kin more remote, as it would be divesting an heir who had acquired a title under the general law of inheritance, but that where there were no heirs who could be affected, and the property was in or must go to the people, the legislature had the power to authorize the party to take as by descent, or in any other manner.

IV. In lands granted for military services and colonization.

In *Jackson, People, v. Etz*, 5 Cow. 314 (1828), it was held that a grant of lands to an alien soldier for military services during the Revolutionary war enabled the heirs of such soldier who died during the war to inherit even though they were aliens.

So, in the case of *Warnell v. Finch*, 15 Tex. 163 (1855), it was held that the alien heir of one who had fallen with either of certain persons specially named therein could hold under a grant of land from the government directly to the heir, and that where the grant from the government was to the heir, if not in contravention of law nor obtained through fraud, such heir could take and hold under the grant as well as if he had been a citizen, but such was not the case if the alien heir claimed by descent cast from the father; and that if the father was the grantee the alien heir could neither take nor hold lands by such title.

Where a patent was granted in the year 1846, "to the heirs of an intestate" dying in 1835, it was held that such patent inured only to the benefit of those who were his heirs at the time of his death, and did not include those who became his heirs before the patent by reason of the removal of their alienage, but that with respect to the grants of the legislature to the heirs of those who fell while serving under a certain-named person in the war, it was otherwise. *Hornaby v. Bacon*, 20 Tex. 556 (1857).

In *Holliman v. Peebles*, 1 Tex. 673 (1848), the question was, whether a foreign colonist who, under the colonization laws of 1823 had received a league of land as the head of a family from the government of Mexico, but never at any time had a permanent domicile nor introduced his property into the country, and finally abandoned the same, was entitled to hold the lands so received by him under the laws of the colonization, and whether the plaintiffs, as aliens, were disabled from continuing the action to recover the property. The court held that he had no power to hold such lands, and that under the laws of Mexico, his heirs, being aliens, could not maintain the action as they had no title by inheritance.

So, in *Yates v. Iams*, 10 Tex. 168 (1853), it was held that under the general principles which, pervaded 31 L. R. A.

Robinson, J., delivered the opinion of the court:

The facts admitted by the demurrer are substantially as follows: Xavier Huott was an alien, but a resident of Jefferson county, in this state. In March, 1870, he acquired the absolute title to 140 acres of land in that county; and in September, 1893, he died in-

the law in 1823, and under which the grant in question was made, and upon the general policy of the government in relation to the right of property in lands granted for colonization, the heir of an intestate, domiciled out of the republic of Mexico, could not acquire title by inheritance to lands of the intestate who died in the province of Texas.

V. Inheritance of patent lands.

In *King v. Ware*, 53 Iowa, 97 (1880), the defendant averred that the intestate was a nonresident alien, and that eight of his children were foreign aliens; that two of his sons, residents and citizens of that state, inherited the whole; that subsequently one of such sons died leaving his share to his widow, who with the survivor of such two sons sold to the defendant. The plaintiff claimed title to an undivided interest by virtue of a purchase from one of the nonresident alien children of the intestate. The court held that, the title of the intestate having been acquired by him by patent from the United States, he took an estate of inheritance, the act of Congress of March 3, 1845, and the act supplementary thereto approved on the same day, which provided for the admission of the states of Iowa and Florida, into the union of states, containing an express condition that such states should provide by an ordinance, irrevocable without the consent of the United States, that such states should never "interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress might find necessary for securing the title in such soil to the bona fide purchasers thereof," the proviso being accepted and approved by an act and ordinance of the general assembly of that state, January 15, 1849.

In *Blakeley v. Caywood*, 4 Or. 279 (1872), the question was as to the power of the heirs to inherit land which had been patented under the donation act to an alien who had declared his intention to become a naturalized citizen of the United States but had died prior to naturalization. The court held that his death did not render the grant void, and that the United States had no title.

The section in question in the above case (§ 4 of the donation act of 1850) provides that no alien shall be entitled to a patent for lands granted by this act until he shall produce to a surveyor general of Oregon record evidence that his naturalization as a citizen of the United States has been completed, but if any alien having made his declaration of intention to become a citizen of the United States after the passage of this act shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act shall descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue.

In *Ware v. Wisner*, 4 McCrary, 66, 60 (1853), the land was originally entered upon by a nonresident alien to whom patents were issued, who died in July, 1861, leaving eleven children, two of whom resided in, and were citizens of, the United States, the remaining children, except two, being nonresident aliens. The question was raised as to the rights of two of the daughters who married two brothers born in Canada, of parents who were native-born citizens of the United States, who had emigrated to that country, but had never formally

testate, leaving a widow, but no children. Among his surviving relatives were a nephew, Charles Easton, and two nieces, Mary Fox and Jane Miller (all of whom are citizens of the United States and children of his sisters, now deceased), and three sisters, and a nephew (who is the only surviving son and heir of a deceased brother, all of whom

are nonresident aliens and citizens of France).

This action was brought by the nephew and nieces who are residents of the United States and the husbands of those nieces. They admit that the widow, who is made a party defendant, is entitled to an undivided one-half of the land, and claim that Easton is entitled

renounced their allegiance to the American government, and it was not shown that the sons had ever renounced their allegiance. Both the father and the sons were engaged in business in Canada, and voted there upon their property qualifications, but the father always refused to take the oath of allegiance to the British government. The complainant was the owner of the premises by purchase of the interest of the two children of the deceased, who resided in the state and were citizens, and the defendant was the owner by purchase of the interest of five of the remaining heirs, including the two daughters who married American citizens. In 1854 the deceased by will directed his Canadian and other property, real and personal, to be sold, the money arising from such sale together with his other personal estate to be collected and divided between his children share and share alike. The court held that neither the father nor sons ever ceased to be citizens of the United States within the doctrine of expatriation, and that the title to the land in controversy vested in the two children who were resident citizens, and in the two daughters who married American citizens, each being entitled to one fourth, and made a decree quieting the title of such purchasers. See also *Warnell v. Finch*, 15 Tex. 163 (1855), and *Hornsby v. Bacon*, 20 Tex. 556 (1857), *supra*, IV.

VI. Effect of annexation of territory or division of an empire.

In *Jones v. Mc Masters*, 61 U. S. 20 How. 8, 15 L. ed. 805 (1857), it was held that in Texas, until an act of the legislature was passed upon the subject of alienage, or some other proceeding was taken on behalf of the government divesting the estate for alienage, effect could not be given to a plea of alienage, the division of an empire working no forfeiture of a right of property previously acquired.

In *Cryer v. Andrews*, 11 Tex. 170 (1853), descent was cast upon an alien, a citizen of the United States, after the Constitution of the republic was adopted, and the court held that annexation had the effect of making him a citizen of the state, so as to fall within the provisions of the Texas statute of 1840, regulating descent, the very act of union making the citizens of each government citizens of the other, the rules controlling the rights of other citizens from that time operating upon their rights, the doctrines and rules in relation to the rights of aliens ceasing.

By the Constitution of the republic of Texas aliens were allowed to hold land by title emanating directly from the government, and so, upon the ground that the division of the empire works no forfeiture of a right of property previously acquired, they were held entitled to hold lands acquired by descent or purchase before the change of government. *White v. Sabariego*, 23 Tex. 243 (1859).

In *Wardrup v. Jones*, 23 Tex. 489 (1859), it was contended that the plaintiff could not assert her claim as heir of her deceased husband, for the reason that she was an alien at the time of his death, and had remained such ever since, the republic of Texas being annexed to the Federal Union in 1846, and the nine years within which the Texas statute required an alien to become a citizen not having elapsed prior to the consummation of the an-

nexation. The court held that she was entitled to the estate upon becoming a citizen of the United States.

In *Barrett v. Kelly*, 31 Tex. 476, 481 (1868), it was held that in the year 1840 the laws of the republic of Texas relative to alienage, so far as the same were of Mexican or Spanish origin, were abolished, and that all causes for invoking the common law of England or the constitutional or statute laws of the state on the same subject in suits between citizens of Texas and those residing in other parts of the United States, were swept away by the union of the two governments, or rather by the merger of Texas in the United States.

So, it has been held that a citizen of Mexico was not divested of his title to lands in Texas by the Revolution, nor by the Constitution or laws subsequently adopted, but that such citizen retained the right to alienate the same and transmit to his heirs, who were also citizens of Mexico, for the reason that the division of an empire did not destroy the rights of property. *Airhart v. Massieu*, 98 U. S. 491, 25 L. ed. 218 (1878).

In *Pettus v. Dawson*, 82 Tex. 18, 21 (1891), at the time of the death of a son, his mother was an alien residing in Kentucky, and before the nine years given to her by the Constitution of the republic of Texas and the act of 1840, which was passed for the purpose of carrying out the intention of the Constitution, the republic became a part of the United States by its admission into the Union. It was therefore held that the mother became a citizen by reason of such admission, and was capable of inheriting, the question of alienage being eliminated.

VII. The effect of naturalization.

An alien may take and hold, dispose of, or transmit, by descent, any real estate, as an individual citizen, when he has declared his intention to become a citizen of the United States pursuant to the provisions of the naturalization laws, and when fully naturalized he becomes invested with all the rights of a native citizen except as restricted by the Constitution from holding certain offices. *Baker v. Shy*, 9 Heisk. 85, 89 (1871).

But the land must be acquired after the filing of such declaration, and therefore the common law will remain in force as to lands previously acquired, as it will also apply to aliens who have not taken advantage of the terms of the act. *Wright v. Sadler*, 20 N. Y. 320 (1859).

Though an alien be naturalized after descent cast, he cannot secure the estate, for the reason that the fee will not rest in abeyance, and that the capacity to take must exist at the time the descent happens, as naturalization may confirm a defective title, but will not confer an estate. *Stemple v. Herminghouser*, 3 G. Greene, 408 (1852).

Where a naturalized citizen of the United States devised his estate in Ireland to his brothers and sisters, and by a residuary clause devised all his other property to his brothers and sisters and their children, and appointed trustees who were aliens, giving them power to sell, and one of the legatees, who was a naturalized citizen of the United States, claimed the whole of the property situated in the States as the only legatee who could take by descent, the rest being aliens,—the court held (it having been previously determined that the real estate

to an undivided one-fourth, and Mrs. Fox and Mrs. Miller each to an undivided one-eighth, of the land; or, in other words, that the three are entitled to all of it which does not belong to the widow of the decedent. The sisters and nephew who reside in France filed a petition of intervention, in which they allege their relationship to the decedent, and aver that each is entitled to an undivided

one-twelfth of the land. The demurrer is founded upon the theory that, as the interveners are nonresident aliens, they cannot inherit any part of the land in question.

The correctness of the ruling upon the demurrer depends upon the force and effect to be given to chapter 85 of the acts of the 22d General Assembly. Section 1 of that act provides that "nonresident aliens are hereby pro-

hibited from owning by the testator and situated in the United States did not pass under the will) that the whole of such property vested in such naturalized citizen. *Scott v. Cohen*, 2 Nott & M'C. 293, 297 (1820).

In *Leary v. Leary*, 50 How. Pr. 122 (1874), the owner of real estate died, leaving a widow and two infant children, all of whom died shortly after his decease. At the time of the death of the youngest child, its heirs at law were two brothers and a sister of its father, all, except one brother, being naturalized prior to the death of the owner, and a sister, nonresident aliens. The court held that the estate vested absolutely and wholly in the naturalized brother to the exclusion of the other brother and sister, and that their subsequent naturalization did not divest his title.

The retroactive effect of naturalization refers to titles acquired by purchase, and not to a title or estate which passes to an alien by operation of law. *Heeney v. Brooklyn Benev. Soc.* 33 Barb. 360, 368 (1861).

In *Keenan v. Keenan*, 7 Rich. L. 345 (1854), intestate, a naturalized citizen, left a widow a resident alien, and a brother a naturalized citizen, him surviving, and it was held that the latter was entitled to his real estate, to the exclusion of the widow, whose subsequent naturalization had no retroactive effect.

Naturalization has no retrospective effect. *Vaux v. Nesbit*, 1 McCord, Eq. 352, 372 (1826).

So, it has been held that the English naturalization act (Stat. 33 Vict. chap. 14, § 2), is not retrospective. *Sharp v. St. Sauveur*, L. R. 7 Ch. 343, 26 L. T. N. S. 142, 41 L. J. Ch. 576, 20 Week. Rep. 209 (1871).

VIII. Effect of marriage with an alien and residing abroad.

It has been stated that the marriage of a daughter, even under age, is an immediate emancipation from the control of her father, and by such marriage she has the power of changing her domicile to that of her husband, which she could not otherwise have changed by her own election during her minority. *Peck v. Young*, 26 Wend. 613, 625 (1841).

Where, however, the daughter was not of a proper age to contract matrimony until after her status in respect to her allegiance to this country was fixed by the close of the Revolution, it was held that her marriage subsequent to that event could not deprive her of the right to inherit real estate in the United States. *Ibid.*

In *Shanks v. Dupont*, 28 U. S. 3 Pet. 242, 7 L. ed. 606 (1830), a native of South Carolina left two daughters, both born in that state before the Declaration of Independence. One of the daughters married a citizen of that state, and died in 1802, entitled to one half of the property in question which formed part of James Island taken possession of by the British in 1780. In the year 1781, the other daughter married a British subject, and went to reside in England, where she died in 1801, leaving five children, all aliens, who claimed the other half of such estate in right of their mother, under the 9th article of the treaty of peace. The court held that they were entitled to recover for son that if the mother was of full age previously to the time she left the country her birth and residence constituted her a citizen of the state while she remained in the state, and that, even if she were not of full age then, yet she was deemed to hold the citizenship of her father, as children born in a country continuing while under age in the family of the father, partake of his natural character as a citizen of that country, and for the further reason that her marriage with a British subject did not destroy her allegiance to the state.

Where the child of a British subject was itself born a British subject, but the father became entitled to citizenship of the United States by force of the treaty of 1794, and such child removed to England and married a British subject and permanently settled there, it was held, on the death of the father, that such child could not take the lands by descent from the father, as, by the laws of Kentucky, it was held that the son had elected to adhere to Britain and was therefore an alien, and no title passed by the deed of an alien claiming by descent through the father, who was a citizen, to lands situated in Kentucky. *Trimble v. Harrison*, 1 B. Mon. 140 (1840).

In *De Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642 (1890), a citizen of the United States, a resident of the District of Columbia, died intestate in 1888, the complainants, his nephews, being nonresident aliens, children of a deceased sister of the intestate, who, a resident citizen of the United States, married an alien, and resided and died abroad. The defendants were, with one exception, the brothers and sisters of the mother of the complainants, and were all resident citizens of the United States, except one sister who married a British subject and resided abroad with him. The complainants' claim for a sale of the property and a division of the proceeds among the intestate's heirs, resident citizens of France, was demurred to, on the ground that they were incapable of taking from their uncle, the supreme court of the District of Columbia sustaining the demurrer. This decision was, however, overruled, the court holding the complainants entitled to inherit under the existing laws of Maryland, there being a plain implication that property in the District of Columbia and in the territories might be acquired by aliens by inheritance under existing laws; and no property could be acquired by those in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800, between France and the United States, or under the 7th article of the convention of 1853, between the same governments.

In *Ludlam v. Ludlam*, 31 Barb. 488 (1860), affirmed 26 N. Y. 356, 84 Am. Dec. 193 (1863), it was held that a son of an American citizen born in a foreign country of an alien mother, of which country his father was only a temporary resident, was a United States citizen and therefore entitled to inherit, the duration of the father's residence in such foreign country not being material so long as it was not perpetual.

See also *De Wolf v. Middleton* (R. I.) ante, 146 (1895), from which case it would seem a person by becoming a domiciled resident of a foreign country becomes an alien within the operation of the law excluding aliens from inheritance.

hibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise only as hereinafter provided, except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years and no longer, and if at the end of such time herein limited such lands so acquired have not been sold to a bona fide purchaser for value or such alien heirs have not become residents of this state, such lands shall escheat and revert to the state of Iowa. . . . The appellants contend that this act does not apply to resident aliens, and that the determination of this case is governed by the law as announced in *King v. Ware*, 53 Iowa, 97. Some stress is also placed upon section 22 of article 1 of the Constitution of this state. That provides that "foreigners who are or who may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens." We do not think that provision has any application to the controversy in this case. It applies only to foreigners who were at the time of its adoption, or who thereafter became, residents of this state. It is conceded by the parties to this action that the decedent acquired a perfect title to the land in question, and the controversy is solely over the right of nonresident aliens to inherit land situated in this state. In the case of *King v. Ware*, *supra*, the rule was recognized that in the absence of license, by statute or otherwise, an alien cannot acquire or hold realty, and it was held that the nonresident alien children of a deceased alien, who was also a nonresident, could not inherit an interest in land in this state of which he died seised. But that decision was based upon sections 2498-2493 of the Revision of 1860, which have been held in several cases not to confer upon alien non-residents of the United States the capacity to inherit real estate.

The claim of the appellants that chapter 85 of the Acts of the 22d General Assembly does not apply to resident aliens cannot be sustained to the extent claimed. It is true it refers to the right of nonresident aliens to acquire and hold real estate, but the clause, "except that the widow and heirs of aliens who have heretofore acquired lands in this state under the laws thereof may hold such lands by devise or descent for a period of ten years," refers to widows and heirs of aliens, without restriction as to the place of residence of the widows, the heirs, or the aliens. It is not material to the acquirement of title under that provision whether the widow and heirs are aliens or are nonresidents, or whether the deceased alien was a resident. If an alien, whether living here or in a foreign country, die seised of land situated in this state, his widow and heirs, wherever they may reside, and whether aliens or not, may take title to the land by devise or descent. The words "who have heretofore acquired land in this state" refer, not to the "widows and heirs," but to "aliens." The right is given to the widow and heirs of aliens

to take title after the act took effect when the alien from whom they claim had acquired the title before the act took effect.

We conclude that the demurrer was properly overruled. The decree gave to each of the interveners an undivided one-twelfth of the land of which the intestate died seised for the period of ten years only, and provided for a supplemental decree in case the land was not sold or the interveners did not become residents of this state within that time.

The decree thus rendered appears to have been authorized by the admitted facts of the case and the law applicable thereto, and it is *affirmed*.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Appt.*,

c.

F. STARKWEATHER *et al.*

(.....Iowa.....)

A street may be opened across depot grounds of a railroad company, under general authority conferred on cities and towns for opening streets and condemning lands for such purposes without any express provision as to crossing railroads, where the inconvenience to the company will be inconsiderable as compared with the benefit to the public.

(February 1, 1896.)

A PPEAL by complainant from a judgment of the District Court of Sioux County in favor of defendant in a proceeding brought to set aside the opening of a street across complainant's depot grounds. *Affirmed*.

Statement by **Robinson, J. :**

This is a certiorari proceeding for the review of the action of the council of the incorporated town of Boyden in extending a street across the depot grounds of the plaintiff. There was a trial on the merits, and a judgment dismissing the petition. The plaintiff appeals.

Messrs. Milt. H. Allen and George E. Clarke, for appellant:

The state cannot take away the right of the individual and grant it to another individual for his good, but it must be taken for the benefit of the entire public.

Bankhead v. Brown, 25 Iowa, 540.

The use may be a public one though it be for private gain.

Stewart v. Polk County Supers. 30 Iowa, 9; *Noll v. Dubuque, B. & M. R. Co.* 32 Iowa, 66; 19 Am. & Eng. Enc. Law, p. 780.

Where property has once been subjected to the right of eminent domain and is in public use for the purposes for which it was so taken, the right of eminent domain cannot be again

NOTE.—As to right to lay out highway across railroad, see *State, St. Paul, M. & M. R. Co. v. Hennepin County Dist. Ct.* (Minn.) 7 L. R. A. 121; *Illinois C. R. Co. v. Chicago (Ill.)* 17 L. R. A. 530; *Fort Wayne v. Lake Shore & M. S. R. Co.* (Ind.) 18 L. R. A. 387.

exercised over it and the property taken from the purpose for which it was taken and is being used, and subjected to another public use, without express authority from the legislature in the form of a special statute empowering such second taking and use.

Housatonic R. Co. v. Lee & H. R. Co. 118 Mass. 391; *Re Boston & A. R. Co.* 53 N. Y. 577; *Re Buffalo*, 68 N. Y. 167; *Prospect Park & I. R. Co. v. Williamson*, 91 N. Y. 552; *Valparaiso v. Chicago & G. T. R. Co.* 123 Ind. 467; *Seymour v. Jeffersonville, M. & I. R. Co.* 126 Ind. 466; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486; *Milwaukee & St. P. R. Co. v. Fairbault*, 23 Minn. 167; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Little Miami & C. & X. R. Cos. v. Dayton*, 23 Ohio St. 510; *Hickok v. Hine*, 23 Ohio St. 523, 18 Am. Rep. 255; *Winona & St. P. R. Co. v. Watertown*, 4 S. D. 323; *Mills*, Em. Dom. chap. 5, §§ 45, 46; *Lewis*, Em. Dom. § 240; *Elliott, Roads & Streets*, p. 167.

Statutes conferring the right of eminent domain must receive a strict construction.

Field v. Des Moines, 39 Iowa, 575, 28 Am. Rep. 46; *Lewis*, Em. Dom. § 254; *Sutherland*, Stat. Constr. 388.

Messrs. Boles & Roth, for appellees:

While the construction of a street or other public highway across a railroad track is generally attended with some inconvenience to the company, yet it is not ordinarily inconsistent with the use of the railroad for the purposes for which it was constructed.

Sharon R. Co.'s Appeal, 122 Pa. 533; *Fort Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 558, 18 L. R. A. 367.

Every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its tracks whenever the public exigency demands it; and it has been held that it is not necessary that any express power be given.

6 Am. & Eng. Enc. Law, p. 537.

Though, as regards its rights of eminent domain, a railroad company is to be considered a quasi public corporation, yet in all its other powers, functions, and capacities it is essentially a private corporation not distinguishable from any other of that name or character.

Whiting v. Sheboygan & F. du L. R. Co. 25 Wis. 167, 3 Am. Rep. 30; *Annapolis & E. R. Co. v. Anne Arundel County Comrs.* 103 U. S. 1, 26 L. ed. 359; *Sloan v. Pacific Railroad*, 61 Mo. 24, 21 Am. Rep. 397; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Sreutt v. Boston, H. & E. R. Co.* 3 Cliff. 339.

Robinson, J., delivered the opinion of the court:

The plaintiff owns and operates a railway which extends from the city of Milwaukee, in the state of Wisconsin, westward, through Iowa to Chamberlain, in South Dakota. The incorporated town of Boyden is on that line, in Sioux county; and the defendants are the mayor, trustees, and street commissioner of that town. The railway extends from east to west through the town, and separates that part which contains most of the inhabitants, which is north of the depot grounds, the part which is south of it. Main R. A.

street extends from north to south on each side of the depot grounds, but prior to September, 1892, was not opened through them. In that month the council passed an ordinance which, in terms, extended the street through the grounds; appropriating for that purpose a strip of land 80 feet wide, which connected the two parts of the street, and, when opened, will make it continuous. Proceedings were then had, under section 1244 of the Code, for the assessment of the damages to the plaintiff which the opening of the street would cause. They were assessed at \$50. That sum was paid to the sheriff for the use of the plaintiff, and in December, 1892, a resolution was adopted by the council opening the street. In November, 1893, the plaintiff filed its petition in this case; alleging that the proceedings which had then been taken were illegal and void, for several reasons, and asking that they be annulled. A writ of certiorari was issued. A return thereto was made, and amendments to the petition, and an answer, were filed. A demurrer to the answer was overruled, and a trial was had, with the result already stated.

1. The plaintiff discusses the right of the defendant in a proceeding by certiorari to set out in an answer matters which do not relate to the jurisdiction to take the action of which complaint is made in the petition. We do not find it necessary to determine the question thus presented, for the reason that nothing material was set out in the answer in this case, of the character suggested, which could have prejudiced the plaintiff. We therefore express no opinion in regard to issues which may be presented by answer in certiorari proceedings. The important questions involved in this case were presented by the petition, the return, and the evidence.

2. It is claimed by the appellant that depot grounds are essentially public property; that they may be acquired by the exercise of the right of eminent domain, when they cannot be otherwise obtained; and that for these reasons they cannot be taken by means of that right. It is undoubtedly true that the railway and station grounds are operated and used in part for public purposes. The right of eminent domain rests upon the theory that property taken by virtue of it is to be used for the benefit of the public, and it cannot be exercised for any other than a public object. *Stewart v. Polk County Supers.* 30 Iowa, 19; 1 Redf. Railways, 228; 6 Am. & Eng. Enc. Law, p. 515. But it is not true that property devoted to one public use cannot be subjected to any other. It is within the power of the general assembly to make the same property subservient to different public uses, or even to take it from one public use and devote it to another. Thus, the streets of a town or city may be used for the purposes to which streets are ordinarily devoted, and also for railway purposes. *Milburn v. Cedar Rapids*, 12 Iowa, 256; *Cook v. Burlington*, 30 Iowa, 105, 6 Am. Rep. 649. It was said in *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 284, 21 Am. Rep. 643, to be unquestionable "that the legislature has the power to authorize the taking of land already applied to one public use, and devote

it to another." That doctrine is sustained by numerous authorities, among which are the following: *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *Springfield v. Connecticut River R. Co.* 4 Cush. 71; *Boston Water Power Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Re Buffalo*, 68 N. Y. 170; *Re Boston & A. R. Co.* 53 N. Y. 576; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Chicago W. D. R. Co. v. Metropolitan W. S. Elev. R. Co.* 152 Ill. 519; *St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co.* 125 Mo. 82; *Re New York*, 185 N. Y. 253; *Old Colony R. Co. v. Framingham Water Co.* 153 Mass. 561, 18 L. R. A. 332; *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273; *Seymour v. Jeffersonville. M. & I. R. Co.* 126 Ind. 466; 6 Am. & Eng. Enc. Law, p. 533; *Fort Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 565, 18 L. R. A. 367.

The doctrine is subject to the modification, however, that the power to take the property for the second public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification by most of the authorities to which we have referred. The use of the strip of ground in question for railway-depot purposes is in part for the public benefit, and therefore public. The use for which the town of Boyden appropriated it is also public; but the plaintiff has occupied and used it for railway purposes for many years, and its rights are prior, in point of time, to any which the town has acquired. It is true, the grounds were not obtained for the plaintiff through the exercise of the right of eminent domain, but by a conveyance from its owner; but it may be conceded, for the purposes of this case, that the method by which title was acquired is immaterial, so long as the use made of the land is a public one. The question remains to be determined whether, under the statutes of this state, the town was authorized to extend its street in the manner attempted, against the will of the plaintiff. It is said in *Sutherland on Statutory Construction*, § 888, that "there is a broad distinction between acts which subvert or essentially impair a prior franchise or appropriation to a public use and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose as well as the new,—and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed." Cities and incorporated towns of this state "have power to lay off, open, widen, . . . extend, establish, and light streets, . . . and to provide for the condemnation of such real estate as may be necessary for such purposes." Code, § 464. They also have power to "purchase or condemn, and pay for out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town for the use of public squares, streets," and certain other purposes. Code, § 470. Section 1244 of the 31 L. R. A.

Code provides a method by which railroad corporations may take and hold real estate necessary for their use; and section 1270 permits cities and incorporated towns to proceed in the same manner to take "private property for streets, alleys, and market-house sites." The town of Boyden proceeded, under the two sections last cited, to appropriate the land in question; but it is said that no rights were acquired by so doing, for the reason that section 1270 permits the taking of "private" property for the purposes stated, and it is insisted the property in question is not private, but public. This is not correct. It is true that the railway property is held for the public use, and, for many purposes, is subjected to legislative control; but the title thereto is vested in a private corporation, for the benefit of its stockholders and other private persons. To that extent the property is private (*Whiting v. Sheboygan & F. du L. R. Co.* 25 Wis. 167, 3 Am. Rep. 30; *Annapolis & E. R. Co. v. Anne Arundel County Comrs.* 103 U. S. 4, 26 L. ed. 360), and its use for the benefit of the public will not be materially affected by the taking in question. The extension of the street as proposed will cause some inconvenience to the plaintiff, in the operation of its trains, and will interfere with a platform of cinders which was constructed across the strip of land in question after the ordinance appropriating it was passed. But the inconvenience thus caused will be inconsiderable, as compared with the benefit to the public which will result from the opening of the street. The depot grounds are 1,400 feet in length by 300 feet in width. They are traversed by the main railway track and two side tracks of the plaintiff. The depot is near the middle of the grounds, measuring from east to west, and the proposed street will cross the grounds near the west end of the depot. No established street now crosses the right of way and the track of the plaintiff within the territorial limits of the town, although a crossing at the point in controversy was maintained and used for several years before the action in question was taken, and there is no ground for holding that the action of the council in deciding that the public interest requires the opening of the street is not conclusive. (*Cherokee v. Sioux City & I. F. Town Lot & L. Co.* 52 Iowa, 280. We are of the opinion that the statutes of this state to which we have referred authorized the opening of the street as proposed. They do not in terms provide for the taking of property already devoted to public uses, but the taking sought by the defendants would not exclude the plaintiff from its property, nor interfere materially with its use, the operation of its trains, and the transaction of its business. The exclusive right to use the railway as such will remain in the plaintiff, and the public will have the right to cross it at proper times, and by suitable means.

Our conclusion has support in the authorities. In *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, it was held that the city could not take for a street real estate which the depot company had acquired for its use, where that use was necessarily exclusive, and

it would be practically subverted by the proposed taking and use for the street. But it was said that "the power to extend streets and highways across railway tracks at suitable and convenient places is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity, wherever practicable, and may well be presumed to be contemplated in the legislation authorizing such improvements, and by corporations in accepting or acting under such legislation." See also *Little Miami & C. & X. R. Cos. v. Dayton*, 23 Ohio St. 510; *Morris & E. R. Co. v. Central R. Co.* 31 N. J. L. 213; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294.

The views we have expressed dispose of the controlling questions in the case. There does not appear to be any substantial ground for disturbing the judgment of the district court, and it is *affirmed*.

STATE of Iowa, *ex rel.* A. G. WEST, *Appt.*,
v.

City of DES MOINES.

(.....Iowa.....)

1. **Leave to a taxpayer to prosecute an action of quo warranto to contest annexation to a city,** given under Code, § 3348, is conclusive against an attack made in the quo warranto proceedings on the ground that his interest was trivial.
2. **A statute for the annexation of territory to all cities** having more than a specified population is within a constitutional provision against local legislation when there can be but one city in the state to which it can apply.
3. **An act providing for annexation to a city** is one for the incorporation of a city within the meaning of a constitutional provision against local or special laws for this purpose.
4. **The equitable claim of a city to jurisdiction over territory which a void statute has declared to be annexed to it** will not be disturbed at the instance of the state without any suggestion of anticipated benefits by so doing, where for more than four years the city has exercised authority over such territory of prior incorporations which the void statute purported to abolish.

(January 21, 1896.)

A PPEAL by relator from a judgment of the District Court for Polk County in favor of defendant in a quo warranto proceeding to test defendant's right to exercise corporate authority over certain territory. *Affirmed*.

NOTE.—For legislative power to annex territory to cities, see *note* to *State, Richards, v. Cincinnati* (Ohio) 27 L. R. A. 737; also *Kuhn v. Port Townsend* (Wash.) 29 L. R. A. 445.

31 L. R. A.

Statement by **Granger, J.** :

Quo warranto to test the right of the defendant city to exercise corporate authority over certain territory added to said city by legislative enactment. Prior to 1890 the corporate limits of the city of Des Moines embraced 8 square miles. By an act of the 23d general assembly approved March 3, 1890, it is provided "that the boundaries of all cities in this state, which had by the state census of 1885 a population of 30,000 or more, are hereby extended 2½ miles in each direction from the present boundaries of said cities,—such extension being so made as to leave the boundaries hereby created in a perfect rectangle; that all territory embraced within said extended boundaries, whether the same is contained in cities, incorporated towns, or otherwise, shall be and become a part of the city and subject to its jurisdiction and authority; and the corporate character of any annexed territory within the extended boundaries herein specified shall cease and determine." Other sections of the act provide for the payment of the indebtedness of the cities so enlarged, and of the indebtedness of the cities within the annexed territory; for the exemption from taxation of lands used in good faith for agricultural or horticultural purposes; for the reorganization of the wards of said cities, and for elections therein. By the census of 1885, only the city of Des Moines was affected by the act, and, with the territory thus annexed, it embraces 54 square miles. In the added territory were only one city and seven incorporated towns. These eight corporations embraced, including 1½ square miles of platted land not incorporated, 13 square miles, which, with 33 square miles of unplatted and unincorporated land, make the added territory to the city 46 square miles. The provisions of the act by which the municipal governments other than that of the city of Des Moines were to become extinct, and the entire territory become one corporation or municipality, were observed, so that in April, 1890, the change was complete, since which time the city of Des Moines has been thus constituted, and has exercised throughout said territory the rights and functions of a city government, including the levy and collection of taxes; establishing, opening, vacating, changing, and improving streets; the making of contracts; and the creating and payment of debts. In March, 1894, the state of Iowa, on the relation of A. G. West, filed in the district court of Polk county its information, in the nature of a quo warranto, reciting the provisions of the act of the 23d general assembly; that it has application alone to the city of Des Moines; that the act is unconstitutional and void, as being repugnant to the Constitution of the state, in that it is a local or special law amending the charter of the city of Des Moines; that it, in effect, creates a corporation by the enactment of special laws; and that, if it is to be deemed a general law, it has not had, and cannot have, uniform operation. It is alleged in the information that, because of the invalidity of the act by which the city limits were enlarged, the acts of the city, as to the added territory, are without

authority of law; and it is asked that they be so adjudged, and that the city be ousted from the exercise of such authority. To the information there was a demurrer, and the parties stipulated the facts; and the case, in that condition, was submitted to the court, which sustained the demurrer as to some parts, and overruled it as to others. By the ruling, the facts as stated in the information, together with those stipulated, were held insufficient to justify a decree for plaintiff, and from a judgment dismissing the petition the plaintiff appealed.

Messrs. Gatch, Connor, & Weaver, for appellant:

If the statute is unconstitutional, it is void, and no valid act can be based thereon.

Fleming v. Hull, 73 Iowa, 598; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Kraft v. Keokuk*, 14 Iowa, 86.

Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it.

Cooley, Const. Lim. 8d ed. p. 70.

Treating this as an action brought in the interest as well as in the name of the state, the statute of limitations would not bar the action at all.

Des Moines County v. Harker, 34 Iowa, 84; *United States v. Nashville, C. & St. L. R. Co.* 118 U. S. 120, 30 L. ed. 81.

Such an action is not barred by lapse of time unless the statute so expressly provides.

State v. Pwotuzet Turnp. Co. 8 R. I. 521, 94 Am. Dec. 123; *Catlett v. People*, 151 Ill. 16 (1894).

As this is an action at law, if the statute of limitations applies at all, the state has the full five years within which to bring its action, and no laches or estoppel will be imputed to it or its officers within that period.

2 Story, Eq. Jur. § 1520; *Bispham*, Eq. p. 347, § 280; *People, Atty. Gen., v. Stanford*, 77 Cal. 360, 2 L. R. A. 92.

Laches, acquiescence, and estoppel are not grounds for upholding an unconstitutional statute.

United States v. Beebe, 127 U. S. 338, 32 L. ed. 121; *United States v. Inoley*, 130 U. S. 263, 32 L. ed. 968; *State, Morris, v. Wrightson*, 56 N. J. L. 126, 22 L. R. A. 548; *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 402; *Parker v. State, Powell*, 133 Ind. 178, 18 L. R. A. 567; *State, Richards, v. Hammer*, 42 N. J. L. 435; *Mathews v. State*, 82 Tex. 577; *Oakley v. Aspinwall*, 3 N. Y. 547; *People v. Allen*, 42 N. Y. 378.

Mere lapse of time alone, and acquiescence by the people in their enforcement, have not been deemed a reason why laws should not be declared unconstitutional when they clearly contravert the terms of the fundamental law.

Hoicard v. Bugbee, 65 U. S. 24 How. 461, 16 L. ed. 753; *Horn v. Lockhart*, 34 U. S. 17 Wall. 570, 21 L. ed. 657; *McGehee v. Mathis*, 71 U. S. 4 Wall. 143, 18 L. ed. 314; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Webster v. Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761; *Green v. Biddle*, 21 U. S. 8 Wheat. 1, 5 L. ed. 547; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354; *Louisville Gas Co. v. Citizens'* 31 L. R. A.

Gaslight Co. 115 U. S. 683, 29 L. ed. 510; *McMillan v. McNeill*, 17 U. S. 4 Wheat. 209, 4 L. ed. 552; *Southern S. S. Co. v. New Orleans Port Wardens*, 73 U. S. 6 Wall. 31, 18 L. ed. 749; *Cannon v. New Orleans*, 87 U. S. 20 Wall. 577, 22 L. ed. 417; *Norris v. Boston*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Craig v. Missouri*, 29 U. S. 4 Pet. 410, 7 L. ed. 908; *Bagnell v. Broderick*, 38 U. S. 13 Pet. 436, 10 L. ed. 235; *Cole v. LaGrange*, 118 U. S. 1, 28 L. ed. 896; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Chenango Bridge Co. v. Binghamton Bridge Co. ("The Binghamton Bridge")*, 70 U. S. 3 Wall. 51, 18 L. ed. 137; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Peris v. Higley*, 87 U. S. 20 Wall. 875, 22 L. ed. 383; *Society for Prop. of Gospel v. New Haven*, 21 U. S. 8 Wheat. 464, 5 L. ed. 662; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238.

If the officers of the city of Des Moines had violated the Constitution by issuing bonds in excess of the constitutional limit, with the approbation or the unanimous vote of every elector in the city, and had used every dollar realized for some proper city purpose, the lawyer who would claim, in favor of an innocent purchaser of such bonds, that the city and its taxpayers were estopped to deny the validity of such bonds, would be deemed too ignorant to be listened to.

Doon Dist. Twp. v. Cummins, 142 U. S. 366, 35 L. ed. 1044; *Mosher v. Independent School Dist.* 44 Iowa, 132.

This court has never refused to enforce the Constitution, as against a statute which violated its provisions.

Kochler v. Hill, 60 Iowa, 548; *State v. Carman*, 63 Iowa, 130, 50 Am. Rep. 741.

Subsequent legislative recognition of the city as extended and reorganized by the annexation act was of no effect.

The legislature could not do indirectly what it did not have the power to do directly.

Mosher v. Independent School Dist. *supra*; *Independent School Dist. v. Burlington*, 60 Iowa, 500; *Strange v. Dubuque*, 62 Iowa, 303.

The annexation of new territory was in law an amendment of the charter of the city.

Morford v. Unger, 8 Iowa, 82; *People, Adams, v. Oakland*, 92 Cal. 611; *State, Atty. Gen., v. Cincinnati*, 20 Ohio St. 18; *Westport v. Kansas City*, 103 Mo. 141 (1891); *Gray v. Crockett*, 30 Kan. 138; *Ford v. North Des Moines*, 80 Iowa, 626; *Ex parte Pritz*, 9 Iowa, 30; *McGregor v. Baylies*, 19 Iowa, 43; *Alexander v. Duluth*, 57 Minn. 47 (1894); *Denver v. Spokane Falls*, 7 Wash. 226; *Fleming v. Hull*, 73 Iowa, 598; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178.

The annexation act is in effect a local or special law for the incorporation of a particular city.

Morford v. Unger, *People, Adams, v. Oakland*, *State, Atty. Gen., v. Cincinnati*, and *Westport v. Kansas City*, *supra*; *Wyandotte v. Wood*, 5 Kan. 603; *Ex parte Pritz*, *supra*; *Davis v. Woolnough*, 9 Iowa, 104; *McGregor v. Baylies*, 19 Iowa, 43 (1865).

The act is local and special in respect of classification by population.

Kenton v. State, Kelly, 52 Ohio St. 59; *State Atty. Gen., v. Anderson*, 44 Ohio St. 247; *Devine v. Cook County Comrs.* 84 Ill. 590; *Topeka v. Gillett* (Kan.) 4 Pac. 800; *Ayars's Appeal*, 122 Pa. 266, 2 L. R. A. 577; *State Board of Managers v. Jackson County Ct.* 89 Mo. 237; *Owen v. Sioux City*, 91 Iowa, 180; *Independent School Dist. v. Burlington*, 60 Iowa, 500.

Messrs. J. K. Macomber, A. P. Chamberlain, and Hugh Brennan, for appellee:

The relator has not sufficient interest in the question presented to authorize him to prosecute this action.

A taxpayer has no power to maintain this action.

State v. Lyons, 31 Iowa, 432; *State v. Independent School Dist.* 44 Iowa, 227; *Smith v. Saginaw*, 81 Mich. 123; 2 Dill. Mun. Corp. 4th ed. § 900; *Com. v. Jones*, 12 Pa. 365; *People v. Waite*, 70 Ill. 25; *State, Mitchell, v. Tolan*, 93 N. J. L. 195.

West, as a private relator, has so trivial an interest that he ought not to be permitted to proceed.

19 Am. & Eng. Enc. Law, p. 676; *Com., Ilite, v. Seank*, 79 Pa. 154; *Yonkey v. State, Cornelison*, 27 Ind. 236; *People, Crane, v. Ryder*, 12 N. Y. 438.

When rights are purely public a private relator cannot proceed when the matters do not specially concern him.

Com., McLaughlin, v. Cluley, 56 Pa. 270.

The state, and not a private relator, is the proper moving party.

19 Am. & Eng. Enc. Law, p. 677; *Com. v. Allegheny Bridge Co.* 20 Pa. 185; *Murphy v. Farmers' Bank*, 20 Pa. 415; *Com., Banning, v. Philadelphia, G. & N. R. Co.* 20 Pa. 518; *State v. Patterson & H. Turnp. Co.* 21 N. J. L. 9; *People v. North Chicago R. Co.* 88 Ill. 537; *Atty. Gen. v. Consumers' Gas Co.* 142 Mass. 417; *Rice v. National Bank of the Commonwealth*, 126 Mass. 300.

The act in question applies to "all cities in this state which had by the state census of 1885 a population of 30,000 or more," and is uniform in its application to all cities which come within this class, be they few or many, although the city of Des Moines in its practical application is the only city affected.

Iowa Railroad Land Co. v. Soper, 89 Iowa, 112; *Haskel v. Burlington*, 30 Iowa, 232; *State v. King*, 87 Iowa, 402; *Richman v. Muscatine County Supers.* 77 Iowa, 513, 4 L. R. A. 445; *United States Exp. Co. v. Ellyson*, 28 Iowa, 370; *Von Phil v. Hammer*, 29 Iowa, 222; *Re Pittsburgh*, 138 Pa. 401; *State, Atty. Gen., v. Miller*, 100 Mo. 439; *Re Ruan Street*, 132 Pa. 257; *Land, Log & L. Co. v. Brown*, 73 Wis. 294, 3 L. R. A. 472; *People, Grinnell, v. Hoffmann*, 116 Ill. 587, 56 Am. Rep. 793; *State, Baltzell, v. Stewart*, 74 Wis. 620, 6 L. R. A. 394; *State v. Clayton*, 53 N. J. L. 277; *Lafayette v. Jenners*, 10 Ind. 70; *Wyandotte v. Wood*, 5 Kan. 603; *Atchison v. Bartholow*, 4 Kan. 124; *Thomas v. Ashland*, 12 Ohio St. 124; *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *Clegg v. School Dist. No. 56*, 8 Neb. 178; *Corington v. East St. Louis*, 78 Ill. 548; *Welker v. Potter*, 18 Ohio St. 83; *McCormick v. West Duluth*, 47 Minn. 272; *Hunzinger v. State*, 39 Neb. 653;

1 L. R. A.;

State, Jones, v. Graham, 16 Neb. 74; *State, Board of Comrs. v. Cooley*, 56 Minn. 540.

It is a question for the legislature to decide whether or not the particular case at bar was such a one as might be made to come under a general law.

State v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; *Darling v. Rodgers*, 7 Kan. 594; *Marks v. Purdue University*, 37 Ind. 163; *Welker v. Potter, supra*; *Brooks v. Hyde*, 37 Cal. 866; *Gentile v. State*, 29 Ind. 409; *McAunich v. Mississippi & M. R. R. Co.* 20 Iowa, 338; *Thomas v. Clay County Comrs.* 5 Ind. 4; *Ilall v. Bray*, 51 Mo. 288; *St. Louis Comrs. v. Shields*, 62 Mo. 247.

Municipal corporations are within the absolute control of the legislature and may be modified at any time.

1 Dill. Mun. Corp. §§ 80, 37, 398; *People v. Morris*, 13 Wend. 331; *Memphis v. Memphis Water Co.* 5 Helsk. 495; *The Governor v. McEwen*, 5 Humph. 241; *McCallie v. Chattanooga*, 3 Head, 317; *Lynch v. Lafland*, 4 Coldw. 96; *Luehrman v. Shelby County Taxing Dist.* 2 Lea, 425; *Merchants' Union Barb Wire Co. v. Brown*, 64 Iowa, 275; *Gloan v. State*, 8 Blackf. 361; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Coffin v. State, Norton*, 7 Ind. 157.

In the construction of statutes of doubtful meaning the courts should have due regard to the construction given in long and settled practice.

Earl Buckinghamshire v. Drury, 2 Eden, 60, 74; *Rogers v. Goodwin*, 2 Mass. 477; *Puckard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123; *Bank of United States v. Halstead*, 23 U. S. 10 Wheat. 51, 6 L. ed. 264; *Bank of Union v. Mercereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Troup v. Haight*, Hopk. Ch. 239; *McFerran v. Powers*, 1 Serg. & R. 106; Co. Litt. 186a; *United States v. Richardson*, 28 Fed. Rep. 61; *Harriman v. State*, 2 G. Greene, 270.

The statute of limitations has no application to an action of this kind.

It would be wrong in principle to permit the relator, after having voluntarily paid taxes on his property annexed during the years since the annexation took effect, to now set aside an act which he has submitted to in the manner indicated; and especially is this true when is considered the slight interest the relator has in this matter compared with the vast interest to all the people of the city.

Rumsey v. People, 19 N. Y. 41; *People, Atty. Gen., v. Maynard*, 15 Mich. 463; *Lanning v. Carpenter*, 20 N. Y. 447; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 64, 6 L. ed. 552; *Dunning v. New Albany & S. R. Co.* 2 Ind. 437; *Middlesex Husbandmen & Mfrs. Soc. v. Davis*, 3 Met. 133; *House v. House*, 5 Harr. & J. 125; *State, Henderson, v. Boone County Ct.* 50 Mo. 317; *State v. Leatherman*, 38 Ark. 81; *Hamilton v. Carthage*, 24 Ill. 22; *Bird v. Perkins*, 33 Mich. 28; *People v. Riverside* (Cal.) 9 Pac. 662; *People, Kingland, v. Clark*, 70 N. Y. 518; *State, Atty. Gen., v. Cincinnati*, 20 Ohio St. 18; *State, County Attorney, v. Topeka* (Kan.) 3 Pac. 587; *State, Brown, v. Westport*, 116 Mo. 582; *Westport v. Kansas City*, 103 Mo. 141; *State, Sleeth, v. Gordon*, 87 Ind. 171; *People, Gridley, v. Farnham*, 35 Ill. 562; *Atty. Gen. v. Page*, 38 Mich. 286; *Atty.*

Gen. v. Hanchett, 42 Mich. 436; *Atty. Gen. v. Detroit*, 55 Mich. 181; *Atty. Gen. v. Detroit*, 26 Mich. 263; *State v. Batley*, 19 Ind. 454.

The doctrine of estoppel is applicable to cases where particular individuals only are interested; it certainly would be singular to refuse to allow the doctrine to be recognized in cases where entire communities have the greatest interest in the world in having the same doctrine recognized.

The principle of acquiescence or estoppel has been adopted as a part of our common law.

Cooley, Const. Lim. 4th ed. 312; *People, Atty. Gen., v. Maynard*, 15 Mich. 470; *Rumsey v. People*, 19 N. Y. 41; *Lanning v. Carpenter*, 20 N. Y. 447.

The property owner who has stood by and without objection observed the outlay of large sums of money for public improvement, and has acquiesced in annexation proceedings in pursuance of which the money was expended, is estopped to afterwards question the legality of the proceedings.

Strosser v. Fort Wayne, 100 Ind. 443; *State v. Wertzel*, 62 Wis. 184; *Cooley*, Const. Lim. 6th ed. 309, and cases cited; *Re Cooper*, 98 N. Y. 507; *Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143; *Steckert v. East Saginaw*, 22 Mich. 104; *Tone v. Columbus*, 39 Ohio St. 281; *Patterson v. Baumer*, 43 Iowa, 477; *Motz v. Detroit*, 18 Mich. 495; *Kellogg v. Ely*, 15 Ohio St. 64.

Granger, J., delivered the opinion of the court:

1. It is first said that the relator, A. G. West, has not sufficient interest to authorize him to invoke the action of the court in behalf of the state. Mr. West is not a citizen of Des Moines as enlarged; but he is the owner of land within the added territory, but not in any of the corporations as they were before the annexation. The assessed valuation of his land is \$80, and it is estimated that he pays city taxes thereon to the amount of \$1.31. This is thought to be too trifling an interest to permit him to institute the action. The law provides that when the county attorney, on demand, refuses or neglects to commence such an action, any citizen of the state having an interest in the question may apply to the court in which the action is commenced, or to the judge thereof, for leave to do so, and upon obtaining such leave he may prosecute the action to final judgment. Code, § 3348. This provision of the law was complied with, and leave granted by the district court. This action is conclusive upon us. The law does not define what the interest shall be, and, conceding that it must be a substantial one, it was a question for the district court. It was a question to be settled before the suit was commenced. The language of the law is that "upon obtaining such leave he may prosecute the action to final judgment." Certainly the question of fact, as to the extent of the interest, is one confided to the court to which application is made.

2. The constitutional questions as to the validity of the law making the annexation are important. The parties, in argument, concede that the learned judge who tried the case below held the law to be unconstitutional, but denied the relief asked on the ground of laches or estoppel. Appellee, however, in this court, insists that such a holding was erroneous, and the questions are for consideration. Logically, the first question is whether or not the act is general, or local and special, in its application. It will be seen that the act, in terms, is made to apply to all cities which had, by the state census of 1885, a population of 30,000. If the act had specified the city of Des Moines as the one whose boundaries were to be extended, there would be no question that the law is local in its application. The law, as enacted, just as explicitly confines its application to the city of Des Moines as if the city had, in words, been named, for it was the only city in the state having the requisite population. Appellee contends that because of the language of the act, by which it is to apply to "all cities in this state, which had, by the state census of 1885, a population of 30,000 or more," it is a law of general application. The constitutional language is, after stating certain exceptions, "All laws shall be general and of uniform operation throughout the state." It is not necessary to an observance of this provision that the law should operate uniformly on all the people of the state, nor, when the legislation pertains to cities, is it important that it should operate uniformly on all cities throughout the state. But if the law is made to operate upon a particular condition as to persons or property, and is operative whenever and wherever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only operates on one of the conditions or classes specified. To illustrate we may instance the laws regulating banking, insurance, agricultural societies, and the like. If the law is so framed that it does and can apply to but one bank, company, or society, in its operation, it is special legislation. General legislation looks not alone to the present, but to the future; and a law which at a given time operates as to only one bank, company, or society, because there is but one such, but is so framed as to operate on the same conditions, when and where they arise in the state, is a general law and of uniform operation. See *McAunich v. Mississippi & M. R. R. Co.*, 20 Iowa, 338; *United States Exp. Co. v. Ellyson*, 28 Iowa, 370; *Von Phul v. Hammer*, 29 Iowa, 222; *Haskel v. Burlington*, 30 Iowa, 232. This rule is one of general recognition. As applied to cities, if the act is such that it is operative, because of its terms, to but a single city, it is local legislation. *McGregor v. Baylies*, 19 Iowa, 43; *Owen v. Sioux City*, 91 Iowa, 190. Counsel for the defendant city cite the above cases, with many others announcing the same rule, and on them base the claim that the act under consideration is of general application, even though there is but one city to which it can apply. It is true that in many of the cases cited, where the law has been held of general application, there was but one city of the class intended to come within the rule of the legislative act; but it is not true that in any of the cases a law, though general in terms, where it could in

tional, but denied the relief asked on the ground of laches or estoppel. Appellee, however, in this court, insists that such a holding was erroneous, and the questions are for consideration. Logically, the first question is whether or not the act is general, or local and special, in its application. It will be seen that the act, in terms, is made to apply to all cities which had, by the state census of 1885, a population of 30,000. If the act had specified the city of Des Moines as the one whose boundaries were to be extended, there would be no question that the law is local in its application. The law, as enacted, just as explicitly confines its application to the city of Des Moines as if the city had, in words, been named, for it was the only city in the state having the requisite population. Appellee contends that because of the language of the act, by which it is to apply to "all cities in this state, which had, by the state census of 1885, a population of 30,000 or more," it is a law of general application. The constitutional language is, after stating certain exceptions, "All laws shall be general and of uniform operation throughout the state." It is not necessary to an observance of this provision that the law should operate uniformly on all the people of the state, nor, when the legislation pertains to cities, is it important that it should operate uniformly on all cities throughout the state. But if the law is made to operate upon a particular condition as to persons or property, and is operative whenever and wherever the same conditions exist, affixing the same consequences, then it is a general law in its operation, even though it only operates on one of the conditions or classes specified. To illustrate we may instance the laws regulating banking, insurance, agricultural societies, and the like. If the law is so framed that it does and can apply to but one bank, company, or society, in its operation, it is special legislation. General legislation looks not alone to the present, but to the future; and a law which at a given time operates as to only one bank, company, or society, because there is but one such, but is so framed as to operate on the same conditions, when and where they arise in the state, is a general law and of uniform operation. See *McAunich v. Mississippi & M. R. R. Co.*, 20 Iowa, 338; *United States Exp. Co. v. Ellyson*, 28 Iowa, 370; *Von Phul v. Hammer*, 29 Iowa, 222; *Haskel v. Burlington*, 30 Iowa, 232. This rule is one of general recognition. As applied to cities, if the act is such that it is operative, because of its terms, to but a single city, it is local legislation. *McGregor v. Baylies*, 19 Iowa, 43; *Owen v. Sioux City*, 91 Iowa, 190. Counsel for the defendant city cite the above cases, with many others announcing the same rule, and on them base the claim that the act under consideration is of general application, even though there is but one city to which it can apply. It is true that in many of the cases cited, where the law has been held of general application, there was but one city of the class intended to come within the rule of the legislative act; but it is not true that in any of the cases a law, though general in terms, where it could in

no event become operative on but a single city, has been held to be a general law. Had the act in question been made applicable to all cities of over 30,000 inhabitants, without a qualification that, under known facts, would exclude its operation as to any other such city, the case would be different. But because a law thus arbitrarily extending city limits could not be made of general application, because of the absence of conditions to justify it, it was made to apply only to cities of that number of inhabitants at a particular date in the past, when there was but one such city to which it could apply, so as to avoid the possibility, even, of any other city coming within its provisions. The act is singularly specific in this respect, not even permitting any chances as to what might be the actual population of other cities but making it dependent on the census return of 1885, known at the time the act was passed, which clearly proves that only the city of Des Moines was intended as the subject of such legislation. In such a case, even though the language of the act is general, it is special legislation. In *State, Richards v. Hammer*, 42 N. J. L. 435, the court, in treating this subject from a constitutional standpoint, said, as to the effect of such general language, where but two cities of the state could be affected by the law: "The result therefore is that the act was intended to apply, and that it does and must ever apply, to these two cities alone, and that the legal effect of this law, as now constituted, is the same as though it had, in express terms, declared that it was not to be operative through the state at large, but in the cities of Elizabeth and Newark only." The law was held to be local in its application, and unconstitutional. The conclusion is, unmistakably, that the act in question is local legislation.

3. With the question settled that the act is local legislation, we are next to determine whether or not it is of the class of legislation prohibited by the Constitution. The question has received extensive consideration in argument by counsel on both sides. The Constitution does not in all cases prohibit special or local legislation. It permits it in some cases. Section 30 of article 3 of the Constitution reads as follows: "The general assembly shall not pass local or special laws in the following cases: . . . For the incorporation of cities and towns: . . . In all cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." There are six of the enumerated cases. It has been thought, and it is appellant's contention here, that the prohibition of the section as to local or special legislation is absolute as to the "cases above enumerated," and as to other cases the prohibition is conditional, depending upon whether or not general laws can be made applicable. It is now urged for the first time, so far as we know, that there is no positive prohibition, but that, as to both cases or classes of laws, as designated in the section, the prohibition is conditional. Appellee, by a transposition of the last sentence, and a grammatical application of the rules

of language to it, gives the following as expressive of its meaning: "In all the cases above enumerated where a general law can be made applicable, and in all other cases where a general law can be made applicable, all laws shall be general and of a uniform operation throughout the state." This means, stripped of its verbiage, that all laws shall be general and of uniform operation throughout the state, where such a law can be made applicable. This renders meaningless more than half the words employed in the section, and nearly half of those in the sentence we are construing. If the sentence could be made clearer by a transposition, ours would be this: "In all the cases above enumerated, all laws shall be general and of uniform operation throughout the state, and in all other cases where a general law can be made applicable." By this we preserve and give a meaning to all the language employed, and observe the legal requirements as to construction. The other is a manifest disregard of the rule. To us the section is not open to serious question in the respect suggested. The prohibition as to local and special legislation is absolute, as to the enumerated cases. While this precise question has not been considered, this section has been so applied in a number of cases. *Ex parte Pritz*, 9 Iowa, 30; *Von Phul v. Hammer*, *McGregor v. Baylies*, and *Haskel v. Burlington*, *supra*; *State v. King*, 37 Iowa, 462; *Richman v. Muscatine County Supers.* 77 Iowa, 513. If the act in question is local or special legislation, and is prohibited by the section of the Constitution considered, it is not contended that the fact that it is an act merely extending the boundaries of the city will give it validity. That the constitutional prohibition extends to acts amending charters and acts creating such corporations, see *Ex parte Pritz*, *McGregor v. Baylies*, and *Von Phul v. Hammer*, *supra*. Our conclusion is that the act providing for the annexation is against the express provisions of the Constitution prohibiting the passing of local or special laws for the incorporation of cities, and is therefore void.

4. It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, makes it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed, after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which before the annexation were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the city and towns annexed, and the delivery of all public records and property to the officers

chosen for the city so enlarged. For four years taxes have been levied, collected, and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving, and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from a judgment dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case.

There are many cases where the doctrine of laches has been applied to sustain a municipal government where the organization, as attempted, was illegal. Much importance is attached by appellant to the fact that in this case the act serving as a basis for the annexation is absolutely void, and a distinction is drawn between proceedings where they are irregular, merely, and where they are void. The case of *State v. Leatherman*, 38 Ark. 81, is perhaps as directly in point on the particular question as any we have noticed. It involved a consideration of the legality of the establishment of Arkansas City, in that state. In Arkansas such corporations are established on the order of court, and it was found that the court making the order had no jurisdiction to make it, and as to that branch of the case the court said, "there was no jurisdiction, and the order was void." The court then proceeded to the consideration of the question we are now considering, and, after detailing some of the consequences to result from a judgment avoiding the corporation, it is said in the opinion, speaking of that city, with others, probably organized under similar orders: "To declare them all null, after long acquiescence on the part of the state would open a very Pandora's box of litigation, and produce incalculable hardship and confusion." In the same connection the court further said: "This impels us to the broader fields of inquiry, whether this court, in view of justice, equity, and the security of titles, can find, in recognized principles of law, sufficient warrant for refusing its aid in opening the flood gates of such unmitigable evil." The question was, in that case, presented on a demurrer to the answer; the action being by information in the nature of quo warranto, as in this case. It may also be said that the information was presented by the attorney general in behalf of the public, and not on the relation of a private prosecutor, as in this case. The opinion is concluded in these words: "The case made by the answer shows an acquiescence for nearly nine years, and a recognition by the governor, county court, county clerk,

county collector, and the whole of a population now over 1,000. If the answer be true, the corporation of Arkansas City should not now be held null and void." Barring that of time, the same facts are true in this case; the time here being, before the commencement of the suit, a little more than four years. In connection with the thought as to delay on the part of the public, it may be well to say that our law expressly authorizes such actions to be commenced by the county attorney, in the name of the state, and makes it his duty to do so when directed by the governor, the general assembly, or a court of record. The general assembly has twice convened since the annexation, in the city affected by the act, the seat of government being within its limits; and the validity of the corporation has never been, by it, nor by any public officer, questioned. These suggestions bear on the fact of a public recognition of the present corporation. The Arkansas case cites, and we refer to, *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304. That case, also, was quo warranto, in behalf of the state, to oust the officers of the town of Oquaka, because of illegality in the organization of the town. The claimed illegality was an irregularity in the manner of voting on the question of incorporating. The validity of certain bonds issued by the town depended on the existence of the corporation. The question was presented by a demurrer to defendant's pleas, corresponding to our answer, in which it was made to appear that for more than four years the corporation had been recognized by the legislature in its acts; had exercised the powers and franchises conferred on such corporations by law; had levied and collected taxes, made contracts, and incurred liabilities, and passed and enforced ordinances. The supreme court declined to consider the matter of irregularity in voting, and sustained the corporation alone on the grounds of the averments of the answer or pleas; and, while it attached much importance to the subsequent acts of the legislature in recognition of the corporation, it added, after detailing some consequences to result: "Municipal corporations are created for the public good,—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence. . . . It would seem incompatible with good faith, and against public policy, although irregularities may have intervened in the organization of the town, now to hold that it is not a body corporate; and we do not think the law requires us to do so." We realize the dissimilarity of the case, in some respects, from the one under consideration; but at the same time, in its reasoning and conclusion, it sustains the principle that laches may overcome legal defects in such organizations. *People, Atty. Gen., v. Maynard*, 15 Mich. 463, is quo warranto, and the case involved the validity of a county organization which was held void, as we understand, by a majority of the court, on constitutional grounds. The court in that case says: "Inasmuch as the arrangement there indicated had been acted upon for

ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations, the acts of parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves, under color of law, into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can be no longer open to question." The case cites *Rumsey v. People*, 19 N. Y. 41, and *Lanning v. Carpenter*, 20 N. Y. 447. Mr. Cooley, in his work on Constitutional Limitations (page 312, 4th ed.), says: "In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the state as such. . . . And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter upon any question of regularity. And the state itself may justly be precluded, on principle of estoppel, from raising such objection, where there has been long acquiescence and recognition." This, it is true, is a direct proceeding by the state. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the state directly. The learned writer sustains this text by a reference to *People, Atty. Gen., v. Maynard, Rumsey v. People*, and *Lanning v. Carpenter, supra*. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color of law. "Color of law" does not mean actual law. "Color," as a modifier, in legal parlance, means "mere semblance of legal right." Kinney, Law Dict. In some of the cases the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term "irregularity" is oftener applied to forms or rules of procedure in practice than to a nonobservance of the law in other ways, but it has application to both. It is defined as a "violation or nonobservance of established rules and practices." The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or nonobservance of that rule or law. It seems to us that the

proceeding is no less an irregularity than in the cases cited.

Importance is attached to the fact that the statute fixes the time in which a suit may be brought in such a case at five years. Notwithstanding the analogy between the law by which a right of action is limited, and that of an estoppel, where time is an ingredient, it has never been held that the time in the two cases is the same. The former goes to the right to maintain or prosecute the action, and the latter to a right of recovery. The one is determined by arbitrary date, without a reference to consequences, while the other is applied only to deny relief when, because of neglect or wrong a party has forfeited a right he might otherwise possess. The application of the rule of estoppel cannot be said to depend on a particular date. In one case a time much shorter than the period of limitation would be sufficient to invoke the rule, while in another it will be much longer. It is not to be denied but that there are very many cases where legislative acts have been adjudged unconstitutional, and hence void, where rights and interests acquired under and because of them have been defeated; and this is true where, between the enactment and the judgment long time has intervened. In *United States v. Beebe*, 127 U. S. 338, 32 L. ed. 121, the action was to set aside a patent for land obtained by fraud, and in the opinion it is said: "The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right, or to assert a public interest, is established past all controversy or doubt." Appellant cites the case, and also *United States v. Insley*, 130 U. S. 263, 32 L. ed. 968, to the same effect. It is then said that in this case the state is seeking to assert a public interest, in that it is aimed at a "usurpation by a municipal corporation of powers not conferred by a valid law." If that is the purpose of the suit it will be realized; for we hold, in as explicit terms as we can command, that the act is inoperative to confer upon the defendant corporation any power or rights whatever. Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays, and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have served as a color of law inducing the proceeding for annexation. But, aside from this, the record in no way indicates a public interest to be subserved by a judgment avoiding the present corporate existence. Not one of the 60,000 or more inhabitants of the city as now constituted makes a complaint, nor does it appear but that all are entirely satisfied with the change that has been made. The relator, but for whom the cause would not be in court, is not a resident of the city; but he is the owner of land of the assessed valuation of \$80, giving him the legal right to institute the proceedings. He in no way claims that

he is injured by the change, or is likely to be. The judgment of ouster against the city is claimed as a naked legal right. Had it been exercised with promptness, after the power was assumed by the city, we do not see why he should not have had his judgment. A thought is suggested that the delay was to permit the authorities to act. With the rapid changes made after the passage of the act (the new government being in operation in April, 1890), the tendency, as to results, was manifest; and it was apparent that to avoid great and important changes, involving many and large interests, action should be taken at once. Much less time than was taken was sufficient to apprise the relator that others did not intend to act. The way of inquiry was open to him to know the facts, if he desired to know them, and, in view of the situation, promptness was demanded.

Appellant makes a comparison of the cases as to the time intervening between the adoption of the law and judgment where laches were claimed as an estoppel. One case that we have cited is the same as this one, while in the others the time is longer. The time that will justify an estoppel, as we have said, varies with the cases; depending on what are the facts, and what is to be apprehended. Greater prejudice may result from a delay of one year in some cases than from ten or twenty years in others. In our examination we have not found a case in which, with many more years of delay, the consequences to be apprehended from a judgment of ouster were as great as in this case.

We are not unmindful of the fact that the act in question attempts to extend the limits of the city by its own operation, instead of permitting it to be done, but we do not see that such fact should change the conclusion. The conditions out of which arise the necessity for the rule we apply are not the results of the enactment alone, but of the things done by the people relying upon it. By the act it is said that the limits of such cities "are hereby extended," and that, as to corporations in the outlying territory, it provides in terms that they shall "cease and determine." The people, in making the change, acted upon what purported to be fixed conditions; and these facts strengthen the equitable claim of the city that it should not be disturbed, at the instance of the state simply asserting the invalidity of its authority.

Finally, it may be said that, aside from the necessity of maintaining the integrity of the Constitution against infractions from legislative action, there is not a reason suggested for, or a benefit anticipated from, the judgment sought in this proceeding. Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city, as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void.

The judgment of the District Court is affirmed.

ALABAMA SUPREME COURT.

SOUTHERN BELL TELEPHONE &
TELEGRAPH COMPANY, *Appt.*,

v.

Dora P. FRANCIS.

SAME, *Appt.*,

v.

Susan J. ALLEN *et al.*

(.....Ala.....)

The unreasonable cutting or trimming of trees on a sidewalk by employees who have authority to cut or trim trees so far as is necessary in removing telephone wires which they have been lawfully ordered to remove will not sustain an action of trespass by the abutting lot owners against the employer.

(February 14, 1896.)

A PPEALS by defendant from judgments of the City Court of Birmingham in favor of plaintiffs in an action brought to recover damages for trespass in cutting trees in the street in front of plaintiffs' property. *Reversed.*

The facts are stated in the opinion.

NOTE.—For master's liability on account of servant's torts or negligence to persons with whom he has no contractual relation, see *note to Ritchie v. Walker* (Conn.) 27 L. R. A. 161.

31 L. R. A.

Messrs. Hewitt, Walker, & Porter for appellant.

Messrs. Talioferro & Houghton for appellee Francis.

Messrs. Altmen & McQueen for appellee Allen.

Thorington, J., delivered the opinion of the court:

These two cases arise from substantially the same state of facts, and were submitted together in this court. Appellees, being the owners of property abutting on a public street in the city of Birmingham, brought suit in trespass against appellant to recover damages for injury to their property resulting from the act of appellant's agents or servants in cutting and trimming certain trees growing on the sidewalk in front of appellees' lots, which in one case had been planted by appellee some years ago, and in the other case it does not appear by whom they were planted. Appellant, a corporation invested with the right of eminent domain under the laws of this state, and authorized by law to erect poles and stretch wires thereon through the streets of Birmingham, was required by an ordinance of that city to remove certain of its poles and wires from the street on which appellees' property is situated, and

to place them on the sidewalk in front of such property. Appellant claims that, in order to comply with this ordinance, it became necessary to cut and remove many of the limbs of the trees which had entwined themselves about the wires, and also to cut other limbs, in order that the trees should not interfere with the wires after the poles were removed to the sidewalk and the wires suspended over the tops of the trees; that, on ascertaining this to be necessary, it so informed the mayor of the city, who promised to obtain the consent of the property owners; that afterwards, and without having obtained such consent, as appellees were informed at the time, the mayor sent an officer of the city fire department to superintend the trimming of the trees, and under his direction the work was done by appellant's employees. Besides the appellant's wires on the poles, there was also a fire-alarm telegraph wire, which was the property of the city, and used in connection with the fire department. It was also removed with the poles and appellant's wires. Its position on the poles was underneath appellant's wires, and the testimony tends to show it was this wire mainly that necessitated the cutting of the trees. The cases were tried before a judge of the city court, without a jury, and judgments were rendered in both cases for appellees, who were plaintiffs in the court below. The measure of damages adopted by the city court was the difference between the market value of the lots abutting on the street before the trees were mutilated by the alleged reckless cutting and their value after such cutting. The appeal is taken pursuant to the statute creating said court, and brings the whole case before us for review.

The two controlling questions are: First. Whether an action of trespass lies in favor of appellees, as owners of the lots abutting on the street where the trees are standing, against appellant, for the acts of its employees in cutting the trees. Second. If such liability was incurred, what is the measure of damages?

Appellant's counsel have filed an interesting and elaborate argument in support of the proposition that a telephone service does not constitute an additional burden on the public streets of a city, and they cite numerous cases which are ably reasoned; but, in our opinion, the decision of the cases presented by these appeals for our consideration does not turn on that question, and we therefore leave it undecided. Other principles to which we will presently advert must govern our conclusions.

The owner of property abutting on a public street in a city, in the absence of statutory provisions to the contrary at the time of the dedication, or of a different intention appearing from the instrument or act of dedication, owns the fee in the land to the center of such street subject to the public easement. *Western R. Co. v. Alabama G. R. Co.* (at present term) 19 So. —; *Evans v. Savannah & W. R. Co.* 90 Ala. 54; *Moore v. Johnston*, 87 Ala. 220; *Columbus & W. R. Co. v. Withrow*, 82 Ala. 190; *Perry v. New Orleans, M. & C. R. Co.* 55 Ala. 418, 28 Am. Rep. 740;

5 Am. & Eng. Enc. Law, p. 405. And, in the absence of proof to the contrary, the presumption of law is that the fee to the center of the street is in the owner of the abutting property. *Rice v. Worcester County*, 11 Gray, 283; *Terre Haute & S. E. R. Co. v. Rodel*, 87 Ind. 128, 46 Am. Rep. 164; *Weller v. McCormick*, 47 N. J. L. 897, 54 Am. Rep. 175; *Boston v. Richardson*, 13 Allen, 146. When such ownership is of the ultimate fee in land constituting a public country road, it has generally been recognized as retaining with it, subject to the easement of passage and its incidents, and for purposes of repairs, the right to the earth, timber, and grass growing between the center line of the road and the boundary of the owners' lands along the road, as well as all minerals, quarries, and springs below the surface; and such owner may maintain actions against those who interfere with these rights. But, in respect of streets in populous places, it has been said, and we think with obvious reason, that the public convenience requires more than the mere right to pass over and upon them, and that the uses to which they may legitimately be put are greater and more numerous than those which may be applied to ordinary roads or highways in the country. Mr. Dillon, in his work on Municipal Corporations, in speaking of municipal control over public streets, uses the following language: "Whether the municipal corporation holds the fee of the street or not, the true doctrine is that the municipal authorities may, under the usual powers given them, do all acts appropriate or incidental to the beneficial use of the street by the public, of which, when not done in an improper and negligent manner, the adjoining freeholder cannot complain." In this state, however, that doctrine must be accepted as limited and controlled by the constitutional provision requiring municipal and other corporations invested with the right of eminent domain to make just compensation for property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements. Ala. Const. art. 14, § 7; *Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112; Id. 84 Ala. 478; *Montgomery v. Maddox*, 89 Ala. 181. Although it should be conceded that the posts and wires comprising a telegraph and telephone service are an additional burden on the street, for which compensation must be made to the owner of the abutting property, the city, if it have legislative authority for that purpose, may grant the right to such a company to use the public streets for its business in common with, and without obstructing, the use of such street by the public. Concurrent legislative and municipal authority granted to such a company to erect its poles and suspend its wires in and over the streets of a city will protect it from being treated as a trespasser, and its works from being declared a nuisance, if its works are so constructed as not to obstruct or interfere with the use of the streets by the public or the property owners' right of ingress and egress to and from his abutting property. *Perry v. New Orleans, M. & C. R. Co.* 55

Ala. 413, 28 Am. Rep. 740. If the company, under such circumstances, is not a trespasser in its occupancy of the street, it is competent for the city to exercise whatever legislative authority it may possess in the matter of regulation and control over the streets, in order to render effective the right conferred on the company to plant its poles and suspend its wires in and over the public highway; and it therefore becomes necessary to consider the nature of the property owners' claim to the trees, and the extent of the city's authority in respect thereto, in the exercise of the powers and duties imposed on it to maintain safe and convenient highways throughout the entire width thereof. *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

Appellees' ownership of the trees, whether the latter were planted by them on the sidewalk, or acquired by devolution of title to the adjacent property, was and is a qualified and limited ownership, subordinate to the public right to safe and convenient passage, and to the rights, powers, and duties of the governing municipal body in the protection, promotion, and establishing of every public use in and upon the streets in a city. *Baker v. Normal*, 81 Ill. 108. In respect of all such matters, the private right of the owner of the abutting property to maintain the trees must yield to the paramount public right whenever the necessity may arise, although, until such necessity does arise, the owner is clearly entitled to the enjoyment of all the benefits which may result to his property from such trees, and to protection from their destruction or mutilation by others. For instance, if the roots of the trees should cause irregularities or breaks in the pavement upon the sidewalk or street, or if the shade and moisture from the trees should rot or injure a wooden pavement, or if the trees otherwise interfered with vehicles or foot passengers, it would, in our opinion, be clearly within the power and duty of the city to remove such trees, and without liability to the owner. In principle, we can perceive no substantial difference between the exercise of that right by the city in the cases above suggested and where the removal of the trees may become necessary in locating upon a street a public work authorized by law to be placed upon the street, and especially where such public work is employed by the city in so important and vital a matter as the support of wires used by the city in connection with its fire department. The location of telegraph and fire alarm wires and poles upon the streets is, in the nature of the case, necessarily within the sound discretion of the municipal governing body who hold the streets in trust for the use of the public, and who are bound in law to so maintain them as to provide safe and convenient passage to vehicles and pedestrians. It may be said to be matter of common knowledge, as well as the result of experience in such governing bodies, that the appropriate location for such poles is near and inside the sidewalk curb, where they interfere neither with pedestrians passing along the sidewalk, nor with vehicles traveling along the roadway, and where falling or trailing wires can do the least injury. The

city ordinance, therefore, shown by the record, requiring the removal of telegraph and telephone poles from that part of the street used by vehicles, and to be placed on the sidewalk within 6 or 12 inches of the curb, was not an unreasonable or unlawful regulation, but a prudent, if not necessary, requirement for a populous city, and in its enforcement, if it became necessary to trim or remove the trees in front of appellees' property, neither the city, nor appellant acting under authority of and in obedience to the ordinance, can be regarded as trespassers. *Horst & B. Mun. Ord. § 229*; 2 Dill. Mun. Corp. § 688; *Bills v. Belknap*, 36 Iowa, 588; *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175.

It is not to be inferred, however, from anything that has been said, that either the city, acting under its police power, or any corporation invested with the right of eminent domain, acting under the city's authority, is absolved from all liability to the owner in such cases; for, if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury. *Bills v. Belknap*, *supra*; *Montgomery v. Townsend*, 84 Ala. 478. But the remedy for such injury, as we have shown, is not in trespass, but for the consequential damages resulting to the adjacent property; and the liability exists by reason of the constitutional provision hereinabove quoted, which invests the owner not only with the right to damages for property taken, but also where his property is injured or destroyed under such circumstances. The injury to the abutting property of appellees in both cases is shown by the proof not to be the direct and immediate result of the cutting of the trees on the sidewalk, but indirect and consequential, and, furthermore, that appellees, in cutting the trees, were proceeding under lawful authority. If there is any liability, it is in case, and not trespass. Both suits are in trespass, and it results that the city court erred in its judgment in each case. Both judgments are reversed, and, inasmuch as it appears that neither action can be maintained in the form in which it is brought, judgment for appellant will be here rendered in each case.

It is unnecessary to consider on these appeals the question as to the measure of damages, and we will not anticipate it.

Reversed and rendered.

Head, J., concurring:

The defendant lawfully put its servants to removing telephone wires in a street in the city. The service, necessarily and lawfully, required the cutting of some of the branches of certain shade trees in the street, in front of plaintiffs' lots, growing upon those parts of the street of which plaintiffs were, re-

spectively, seised in fee. The servants, to state the case most strongly for the plaintiffs, while performing the defendant's service, went beyond their duty and authority, and wilfully cut the trees beyond any necessity to the proper removal of the wires, doing unnecessary damage to the plaintiffs' property. The only question to be considered is whether the defendant is liable in actions of trespass.

We believe it to be an undeniable proposition that a person cannot be a trespasser *vi et armis* who neither commits, authorizes, aids, or abets, nor subsequently ratifies, the wrongful act. It is observable, under this rule, that if one expressly commands another to do the wrongful act, and the same is done in pursuance of the command, he is, under familiar principles, guilty as a principal, and liable as such. Nor is it essential to liability in trespass that there be an express command to do the wrongful act. Thus, if an agent or servant, in and about the business of the principal or master, commits a trespass upon the person or property of another, in the immediate presence of the principal or master, it will be presumed that it was done by the direction of the latter, who will be liable for the trespass, unless it is affirmatively shown that he did not coerce or direct the act, but did what he lawfully should to prevent it. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168. So, also, if a principal or master direct his agent or servant to do an act which is in itself unlawful, and, in its commission, an injury is done to another, or if the act commanded, if done without injury to another, is, in itself, not unlawful, yet is of such a nature that the natural and probable effect or result of its performance is injury to another, and, in its performance, such injury is done, he who gave the command, in either case, is a trespasser. Thus, in *Gregory v. Piper*, 9 Barn. & C. 591, a master ordered his servant to lay down a quantity of rubbish near his neighbor's wall, but so that it might not touch the same. The servant laid the rubbish, and exercised due care in doing so; yet such was the character of the act that some of the rubbish naturally ran against the wall. Held, that the master was liable in trespass. When the wrong done has benefited another, or was done for that purpose and in his interest, such other, with full knowledge of the facts, may make himself a trespasser by ratification. Lord Coke stated this rule thus: "He that agreeth to a trespass after it is done is no trespasser unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment." 4 Inst. 317; Cooley, Torts, 127. To the general rule of nonliability in trespass above announced and explained, we are aware of but one exception, which is that, on principles of public policy, a public officer is liable, in that form of action, for the trespasses of his deputy, committed *colore officii*, whether, under the rules above stated, he would be liable as a principal or not. 1 Chitty, Pl. *82. In an early Massachusetts case it was held that a sheriff who was not present at the service of a writ when his deputy committed a trespass was not jointly liable

31 L. R. A.

with the deputy. *Campbell v. Phelps*, 1 Pick. 62, 11 Am. Dec. 139. But the better rule seems to be that the officer is always constructively present, and jointly responsible for the torts of his deputy committed *colore officii*. See the cases collated in note to *Kirkwood v. Miller*, 73 Am. Dec. 134, 141; Cooley, Torts, pp. 182, 185; 1 Chitty, Pl. *82. Since the decision by Lord Kenyon, in the year 1800, in the leading case of *McManus v. Crickett*, 1 East, 106, until a comparatively recent period, the rule of nonliability of the master for the wilful act of the servant, there laid down, was carried to the extent of securing immunity to the master from all liability to compensate the injury, in any form of action. As late as the case of *Cox v. Kealey*, 38 Ala. 340, 76 Am. Dec. 325, decided in 1860, the late Chief Justice Stone, delivering the opinion of the court, vigorously maintained and applied the doctrine of *McManus v. Crickett*. It was an action on the case, for negligence of the defendant's servants in operating a steamboat. There was some evidence tending to show that the injury was wilfully committed by the servants while operating the boat. The trial court was requested to instruct the jury that the defendants were not liable if the collision was wilfully caused by the acts of their agents or servants. The instruction was refused, and the ruling was held error, for which the judgment was reversed. After noticing some other cases, the court remarked: "None of them materially unsettle the great distinction, ruled in *McManus v. Crickett*, *supra*, between those injuries which are the direct result of intentional or wilful fault on the part of the servant, and those which result from his mere carelessness or want of skill. It seems to be well settled, that if the servant be in the performance of a duty intrusted to him, and from a want of either skill or diligence injure another, it will not excuse the master or employer, even if the servant, in the matter complained of, was acting contrary to instructions. Trusting the servant in the given case is an assumption by the master of all responsibility which results from negligence or want of skill in the servant. But this rule does not apply when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him and inflicts an independent wrong." The learned judge concluded his opinion with this remark: "Whether some of the principles ruled in the case of *McManus v. Crickett*, *supra*, should not be changed so as to accommodate the relation of master and servant to the very useful, yet terrible, motive agent, steam, is a question, not for us, but for the legislature." But, as is well known, the doctrine of that case has been changed, and that without legislation. Now, it must be accepted that, in promulgating this change, the courts did not intend to usurp the functions of the lawmakers, and make new law, but to correct the errors of existing doctrines. The change was made upon a principle; and what is that principle? As we have seen, and as every lawyer knows, it has ever been the rule that the master is liable in damages resulting from the negli-

gence or want of skill of the servant in the performance of the master's service. This is so, not because the master has himself committed a wrong, but upon the well-recognized principle that, in employing a servant to perform a particular duty, he guarantees to the public at large, excepting fellow servants engaged in the common employment, that the servant so employed possesses ordinary skill and carefulness, rendering him fit for the work he is appointed to do, and that he (the servant) will characterize the performance of his duties by bringing to bear upon it the exercise of that degree of skill and carefulness. If the servant does not possess these qualifications, or, possessing, fails to exercise them, in a given case, with resultant injury to another, the master is responsible, as a consequence of the servant's wrong, for failing to make good that which he has assumed, for the servant, to the general public. The change of doctrine to which we have referred (effected, as we have said, without legislation) necessarily rests upon the principle that there is no just distinction, so far as the rights of the public are concerned, between the characterization of the servant's performance of his duties, by careless or unskillful acts or omissions, and the characterization thereof by wilful or intentional acts of wrong. If it be essential to the public safety that the master shall assume, for his servant, the possession and exercise of skill and diligence, for what reason is it not essential thereto that he shall assume for him the possession of that fitness of character and disposition that will deter him from using the master's service and the master's means of executing the service, placed in his hands, for the commission of wilful and intentional wrong? The stupendous modern advance in industry and commerce, operated through the work and agencies of thousands of irresponsible underservants, fraught with frightful dangers to the public safety, through the vicious dispositions of so many of these servants, opened the eyes of the courts to the want, in reason and justice, of such a distinction; and the result is that the rule of *respondere superior* is applied to the latter, as it has ever been to the former, case. But the master is thus liable not because he himself has, by force and arms, directly committed the wrongful act, but because he has failed to make good to the party injured his assumption, for the servant, that the latter would execute the master's service in a lawful manner. His liability is therefore consequential upon the servant's unauthorized wrongful act. As expressed by Judge Metcalf in *Parsons v. Winchell*, 5 Cush. 592, 53 Am. Dec. 745: "The act of a servant is not the act of the master, even in legal intentment or effect, unless the master previously directs or subsequently adopts it. In other cases, he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor." It would be repugnant to the plainest principles of law and logic to declare that a person has directly, *vi et armis*, committed an injury when the wrongful act was done by another,

without his presence, authority, knowledge, or consent, or subsequent ratification.

We are not without other ample authority for our conclusion. Thus, in 1 Chitty on Pleading, *181, we find it stated that "though a master may be liable under the circumstances to compensate an immediate injury committed by his servant, in the course of his employ, with force, yet the action against the master, in general, must be case, though against the servant it might, for the same act, be trespass." And Mr. Redfield, in annotating his edition of Greenleaf on Evidence, uses this language: "An action on the case is an appropriate remedy for injuries caused by the wrongful acts of the servants of defendants, even though such acts were acts of force, and such that trespass would have been the only proper remedy against the servant," citing *Havens v. Hartford & N. H. R. Co.* 28 Conn. 69; 2 Greenl. Ev. p. 203, § 226, note. The above quotation is in the language of the syllabus of that case, and the opinion supports it. He gives also, in a note to section 225, an extract from an English case, wherein the court remarked: "The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skilful and careful or not, is not the blow of the master, it is the voluntary act of the servant." And, in annotating the fifth edition of his admirable work on Railways (vol. 1, top p. 534), he states the principle so clearly that we cannot as well express it as by quoting his language. He says: "It has always seemed to us that the whole class of cases which hold that the master is not liable for the wilful acts of his servant has grown up under a misconception of the case of *McManus v. Crickett*, 1 East, 106, for they all profess to base themselves upon that case. That case, we apprehend, was never intended to decide more than that the master is not liable, in trespass, for the wilful act of the servant. Lord Kenyon, Ch. J., in delivering his opinion in that case, with which the court concur, expressly says, speaking of actions on the case brought against the master, where the servant negligently did a wrong in the course of his employment for the master: 'The form of these actions shows that where the servant is, in point of law a trespasser, the master is not liable as such, though liable to make compensation for the damage consequential from his employing of an unskillful or negligent servant. The act of the master is the employment of the servant.' This reasoning," continues Judge Redfield, "certainly applies with the same force to that class of cases where the act of the servant is both direct and wilful, as where it is only negligent. The master is not liable in either case perhaps, so much for having impliedly authorized the act, as for having employed an unfaithful servant, who did the injury in the course of his employment. And whether done negligently or wilfully, seems to be of no possible moment, as to the liability of the master, the only inquiry being whether it was done in the course of the servants' employment. And the argument, that when the servant acts wilfully he *ipso facto* leaves the em-

ployment of the master, and if he is driving a coach and six, or a locomotive and train of cars, thereby acquires a special property in the things, and is *pro hac vice* the owner and doing his own business, may sound plausible enough, perhaps, but we confess it seems to us unsound, although quoted from so ancient a date as Rolle's Abridgment, and adopted by so distinguished a judge as Lord Kenyon. The truth is the whole argument is only a specious fallacy; and whether Lord Kenyon intended really to say that no action will lie against the master in such case, or only to say what the case required, that the master is not liable in trespass, it is very obvious the proper distinction in regard to the master's liability cannot be made to depend upon the question of the intention of the servant. The master has nothing to do, either way, with the purpose and intention of his servants. It is with their acts that he is to be affected, and, if these come within the range of their employment, the master is liable, whether the act be a misfeasance, or a non-feasance, an omission or commission, carelessly or purposely done. It will happen, doubtless, that when the master is under a positive duty to keep or carry things safely, as bailee, or to carry persons safely, . . . while he will be liable for the mere non-feasance of the servant, the servant will not be liable to the same party for such non-feasance, there being no privity between the servant and such party,—no duty owing to such person from the servant. But in such case the servant will be liable for his positive wrong, and wilful acts of injury, and the master is also liable for these latter acts, but not in trespass ordinarily, as the servant is, but in case. . . . This is the view taken of this subject by Judge Reeve (Dom. Rel. 358, 359, 360); and it is, we think, the only consistent and rational one, and the one which must ultimately prevail." Judge Reeve, referring to *McManus v. Crickett*, says: "The principle adopted in the case in East shows that when a servant does an injury with violence, the very doing of it is an abandonment of his master's service. It is said that there is a difficulty in framing a proper action to remedy the injury, if one exists, or that the injury was immediate, and therefore trespass, *vi et armis*, was the proper action, if any; and that this action proceeds upon the ground of criminality, which would subject the master to a fine. Certain it is that the master is not liable, *criminaliter*. It does not follow, because the injury by the servant was an immediate injury, that the action against the master must be trespass. It proves, indeed, if the action had been brought against the servant, it must have been trespass. . . . I take it that when an immediate injury, with force, is done by another, for whom his employer is liable, the action is trespass on the case; and in perfect analogy in this case with that when a man keeps a dog accustomed to bite, and on that account is liable. It is an action of trespass on the case, although the injury is with force, and as immediate as if done by a man. I apprehend that the action on the case reported in [*Savignac v. Roome*], 6

T. R. 195, was the proper action in which to try the liability of the master." [pp. 461, 462]. In that case the servant had committed a trespass *vi et armis* in the course of his employment. Wood, in his work on Master and Servant, after discussing the master's liability, says: "Thus, it will be seen that the question as to whether the master is liable in trespass or case for an injury inflicted by a servant merely affects the remedy, and not the cause of action itself, and depends upon the question whether the act is a natural, necessary, or probable incident of doing the act directed. If so, the master is liable in trespass. If not, then he is not liable in trespass, but only in case." Wood, Mast. & S. 596, 597. Judge Thompson, in his excellent discussion of all these questions, both under the old and the new doctrine, and after contending, in his vigorous style, for the correctness of the new, considers (in § 10 of his observations on *McManus v. Crickett*) the question of the proper form of action against the master. He says: "With respect to the form of the action, whether trespass or case, where the old system of pleading still prevails, the following may be stated as the fair result of the cases: If the command of the master is to do a lawful act, and the servant does it in an unlawful manner, so as to injure another, then case, and not trespass, is the proper remedy." Here when the context is considered it is evident the author meant by the term "unlawful manner" either a wilfully unlawful or a negligent act; for he had just declared the master liable for the wilfully unlawful act of the servant. He proceeds: "But where the act which the master commands the servant to do is unlawful in itself, and the wrong does not result merely from the manner of doing it, trespass will lie. It results that case, and not trespass, is the form of action for all injuries arising from the servant's negligence or unskillfulness, not authorized or commanded by the master. To illustrate: If a railway passenger refuses to pay his fare, and the conductor in ejecting him from the train, which he may lawfully do, puts him off while the train is in motion, or uses excessive force, whereby a cause of action accrues to the passenger, the action against the company will be case. But if the company directs its conductors to collect illegal fares of passengers, and a passenger resists payment, for which cause the conductor puts him off the train, the action against the company will be trespass; and the use of any excessive force beyond what was necessary to execute the unlawful order, or any carelessness on the part of the conductor, whereby the passenger is specially injured, will go in aggravation of damages." 2 Thomp. Neg. p. 890. The learned author's illustration of negligence in the foregoing extract, it seems to us, is subject to the criticism that the acts of the conductor therein stated are acts of direct force or trespass, and not mere negligence. The conclusion, however, that the master, in the case stated, is liable only in case, is, we think, correct. In *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353, 375, the court, after an elaborate discussion of a corporation's liability of the wil-

ful trespasses of its servants, and holding to the modern doctrine, says: "Much was said upon the argument of the hardship it would impose upon railroad companies should this action be sustained. It is supposed that it would authorize trespass against the company wherever it could be maintained against the servant, and that the action on the case, which is now the usual remedy, would be superseded for trespass. This apprehension is not well founded. Hereafter, as heretofore, the usual remedy for torts must be case, and not trespass. Wherever the command was to do only a lawful act, and the servant does it in an unlawful way, so as to injure another, there case would still be the proper remedy. . . . But where the act is unlawful in and of itself, and not from the mode of doing it, trespass would lie." And the court illustrated by the case in hand, which was where the conductor was required by the company to collect certain illegal fares, and to eject passengers refusing to pay. The court held the ejected passenger entitled to maintain trespass against the company, for the obvious reason, as we have already laid down, that the company itself commanded the commission of the trespass. Under the principle announced by the court, as above quoted, it is clear that if the conductor had been required by the company to collect only legal fares, and eject those who refused to pay, and the conductor had wilfully demanded an illegal fare, and ejected the passenger for his refusal to pay, or, in endeavoring to collect the legal fare, had wilfully, or even maliciously, inflicted an unnecessary and unlawful injury upon the passenger in ejecting him from the train, the remedy against the company would have been case, while, against the conductor, trespass would lie. If this be sound law, it is decisive of the question before us.

The correctness of the view we take in this opinion may be tested by a consideration of the law in respect of the liability of master and servant to a joint action. It is a familiar rule that there are no accessories in trespass. All who are guilty at all are cotrespassers, and may be jointly sued. See note to *Kirkwood v. Miller*, 73 Am. Dec. 140, 141; *Cooley, Torts*, 133. Judge Thompson, in section 11 of his work, *supra* (page 891), shows clearly that by the weight of authority, where the liability of the master arises from an unauthorized trespass of the servant, committed in the performance of a lawful duty commanded by the master, a joint action against master and servant will not lie, for the reason that the action against the master is case, while that against the servant is trespass, and for the further reason that, the wrong proceeding directly from the servant, and not directly from the master, the latter, if compelled to pay the damages, would have an action over against the former, but he would not, at common law, be entitled to such an action where the judgment went against both as joint tortfeasors.

It is only upon the principle which we here declare that the vast array of decisions in this and other courts can possibly be maintained, where the common law of plead-

ing prevails, which hold that, in actions on the case for negligence of the defendant's servants, the defense of contributory negligence is overcome by showing that the act of the servant causing the injury was wilful or intentional. It is an admitted rule of pleading that an action on the case cannot be maintained if the defendant's act was a trespass only. So that, if the unauthorized wilful act of the servant constitutes the master a trespasser, and suable as such, a replication to the plea of contributory negligence to an action on the case for the negligence of the servant, setting up that the servant wilfully committed the act, would, manifestly, be a complete departure from the declaration. The two remedies are of such different natures that, by common law, they cannot be joined in the same action even in separate counts. *Mobile & M. R. Co. v. McKellar*, 59 Ala. 458. But, when we consider the master's liability as consequential and in case, the decisions referred to are entirely reconcilable with this rule of pleading. The cases which appear to be adverse to our conclusion are either those in states where code systems have abolished common-law forms of action, or where the considerations we have adverted to were not in mind. Of the latter class is the case, in our own court, of *Louisville & N. R. Co. v. Dancy*, 97 Ala. 338 (an opinion delivered by the present writer).

The doctrines in respect of the relations of principal and agent, and master and servant, as applicable to the acts and contracts of corporations, are well established. It is not essential to an act or contract which binds a corporation that it be done or entered into or authorized by the corporate entity itself, as represented by the governing board or stockholders. It is well recognized in the law that corporations, in carrying out corporate functions, may, and of necessity do, create vice principals who, in respect of the departments of corporate business intrusted to their general control and management, partake of the corporate entity, and their acts and contracts, in execution of the functions they represent, are of the same effect and import as if done or entered into or directly authorized by vote of the governing board or stockholders. Thus, to illustrate: Suppose the defendant has confided to a general manager or superintendent the execution of its telephone business, in the city of Birmingham; endowed him with ample powers and means to carry on the business, to employ and discharge subordinate agents and servants, and generally to do what may be necessary to the general performance of its corporate functions in that district. Such a person, with reference to the public, is more than a mere agent acting under orders of a superior. He is *pro hac vice* a principal. He stands for, and represents, within the sphere of his authority, the corporate entity itself, and his acts are the direct acts of the corporation itself; and if, in his representative character, he commits a trespass, or commands or authorizes its commission by a servant under his orders, the corporation is suable for the wrong in the action of trespass. Many of her illustrations might be given. It is

thus, through agencies of this nature, that corporations may commit almost all manner of torts, such as assault and battery, malicious prosecution, libel, etc., and some classes of offenses for which they are indictable. It was never thought that a corporate vote was necessary to bind the corporations to these wrongs. As well might it be said that every contract should receive the express authority or assent of a corporate vote. But it would seem, upon plain principles, that a mere servant, working under the immediate control and orders of a superior, having no power or authority to do anything but perform the work he is employed and directed to do, can in no sense be deemed a vice principal, for whose tortious acts, as such, the corporation is responsible. The liability of the master, as we have endeavored to show,

is not for the tortious act in such case, but in consequence of the duty he owes the public, except fellow servants, to have in his employ only servants who will perform the services in a lawful way.

It is not our purpose now to undertake to lay down any general rule to govern all cases as to what circumstances or extent of power conferred are essential to constitute a vice principal, whose acts will be directly visited upon the corporation, within the principle above declared. Each case, as it arises, will be determined according to its peculiar facts.

With these views, we adhere to the opinion formerly delivered in these cases by Justice Thorington, and reverse the judgments of the city court, and order judgment to be entered in this court in favor of the defendant in each case. Reversed and rendered.

TEXAS SUPREME COURT.

TEXAS MEXICAN RAILWAY COMPANY, *Plff. in Err.*,

v.

J. A. WRIGHT *et al.*

(.....Tex.....)

1. Although a judgment of a justice of the peace is void because he has no jurisdiction of defendant, yet its execution will not

be enjoined if defendant has a right to a writ of certiorari to set the judgment aside.

2. A constable is not precluded from levying on the real estate of a railroad corporation by the fact that a car is pointed out as subject to levy, if the car is not delivered into his possession as required by Rev. Stat. art. 2287.

3. Depot grounds are subject to execution sale under a constitutional provision that "real and personal property" of a railroad cor-

NOTE.—*Injunctions against judgments for want of jurisdiction or which are void.*

- I. *In general.*
- II. *As to party.*
- III. *As to time.*
- IV. *As to venue.*
- V. *As to amount.*
- VI. *As to judge or court.*
- VII. *Matters of process and service.*
 - a. *Form.*
 - b. *Time and manner.*
 - c. *Fraud as to service.*
 - d. *Acceptance of service.*
 - e. *Party served.*
 - f. *Service on corporation.*
 - g. *Service on partners.*
 - h. *Service at residence.*
 - i. *Where there was no service as required by law.*
 - j. *Where there was no notice.*
- VIII. *On account of appearance.*
- IX. *Pleading and practice.*
 - X. *Where there was no judgment or it was set aside.*

I. *In general.*
Generally injunctions have been granted where judgments were void on account of venue, or in excess of jurisdictional amount, or if there was no service, or defective service, of process on corporations, or a return of service of process at "the residence," where the party did not live at that place, or where it was rendered without the notice required by law. But they have been refused when claimed on account of the form of the writ or summons, or time and manner of service (except when service was made on Sunday), or for enticing into the state, or for misnomer of the defendant. There is some conflict as to granting injunctions against judgments void as to the time of rendition, 31 L. R. A.

or where there was no service of process or an unauthorized appearance.

An injunction was granted where an order of a court was void because in excess of the court's jurisdiction, although the order might have been valid if confined to matters within the jurisdiction of the court. *White County Comrs. v. Gwin*, 136 Ind. 562, 22 L. R. A. 402.

And in *Landrum v. Farmer*, 7 Bush, 46, it was said that if a judgment was void and might have been reversed on appeal, the circuit court which rendered the decision had power to adjudge it void, and to enjoin proceedings under it.

And in *Eatis v. Patton*, 3 Yerg. 322, it was said that an injunction will be granted to restrain proceedings on a judgment that is void for want of jurisdiction in the court.

And in *Earl v. Matheny*, 80 Ind. 202, it was said that the execution of a void judgment will be enjoined, but the execution of a judgment merely voidable will not be enjoined.

Under Ga. Code, §§ 3319, 4063, providing for a judgment on a replevin bond for the payment of the recovery, and not for the production of the property, a summary judgment without an action upon a bond conditioned alone for the forthcoming of the property was void as to the surety, and was enjoined. *Clary v. Haines*, 81 Ga. 520.

But in *Geraty v. Druiling*, 44 Ill. App. 440, it was held that "want of jurisdiction alone was no ground for relief in equity against the judgment, unless there was also disclosed a meritorious defense, which by loss of right to appeal had become lost."

Where a judgment was void for want of jurisdiction, but did not so appear on its face, and a good defense to the action was not shown, the injunction was refused. *John V. Farwell Co. v. Hilbert* (Wis.) 30 L. R. A. 235; *Pilger v. Torrence*, 42 Neb. 903.

poration, or "any part thereof, shall be liable to execution and sale in the same manner as the property of individuals."

(June 17, 1895.)

ERROR to the Court of Civil Appeals, Fourth Supreme Judicial District, to re-

view a judgment affirming a judgment of the District Court of Duval County in favor of defendants in an action brought to enjoin the enforcement of a judgment. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dodd & Mullally, and J. O. Luby for plaintiff in error.

So, where the statute in regard to garnishment was not followed, and the judgment was void but complainant did not show that he had not an adequate remedy by appeal, certiorari, or direct application to the court. *Wingfield v. McClure*, 48 Ark. 510.

In *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) § 991, it was said that an injunction will not be granted against a void judgment in Texas. The party will be left to his remedy at law.

In *Geers v. Scott* (Tex.) 33 S. W. 587, it was said that if a judgment was void and would not support an order of sale, a seizure of property would be such a trespass as would give the complainant an adequate remedy at law; and an injunction was refused.

The Missouri cases are noted here in order to show their conflict, although some of them do not belong to this subdivision.

In Missouri, on the question of granting injunctions against judgments void for want of jurisdiction, there is a conflict of authority, which is noted as irreconcilable in *St. Louis & S. F. R. Co. v. Lowder*, 50 Mo. App. 3.

So, in *Jones v. Pharis*, 59 Mo. App. 254, an injunction was granted where the judgment was void on account of venue, and there was danger of losing all legal remedy.—distinguishing *St. Louis & S. F. R. Co. v. Lowder*, *supra*, on that ground.

So, where the judgment was void because service of process was not made on the proper officer of a corporation. *United States Mut. Acc. Ins. Co. v. Reisinger*, 48 Mo. App. 571.

But an injunction was refused against a judgment void because rendered in vacation, as there was a remedy at law. *Stockton v. Ransom*, 60 Mo. 535.

So, where there was no jurisdiction for want of notice, process, or appearance, as there was a remedy by action of trespass. *St. Louis & S. F. R. Co. v. Lowder*, *supra*; *St. Louis, I. M. & S. R. Co. v. Reynolds*, 59 Mo. 146.

And in *Bear v. Youngman*, 19 Mo. App. 41, it was said that an injunction will not be granted solely on the ground that the judgment is void.

In the main case of *TEXAS MEXICAN R. CO. V. WRIGHT*, *Affirming* 29 S. W. 1134, although a judgment was held void for want of jurisdiction of the defendant where a railway company was sued and the summons was issued against "W. H. V., agent of the Texas Mexican Railway Company at San Diego, Tex.," yet an injunction was refused because there was a remedy of certiorari.

This is in accord with the weight of authority, although there is some conflict. The majority of cases deny injunctions where there is a remedy at law; but some few cases grant injunctions although the remedy at law is clear; and some cases grant injunctions on the ground that there is no remedy at law. The weight of authority is clear that an injunction should be denied unless a valid defense to the action is shown, although some cases have granted injunctions without requiring this to be done, and some cases have allowed injunctions without reference to the question of valid defense.

The following cases in this note denied injunctions on the ground that there was a remedy at law: *Armstrong v. Cheshire*, 2 Dev. Eq. 234. 34 Am. Dec. 273; *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) § 991; *Knox County v. Harshman*, 31 L. R. A.

133 U. S. 152, 33 L. ed. 536; *Stockton v. Ransom*, 60 Mo. 535.

By an action against the attorney. *Everett v. Warner Bank*, 58 N. H. 340; *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Piggott v. Addicks*, 3 G. Greene, 427, 56 Am. Dec. 547; *Harris v. Gwin*, 10 Smedes & M. 583.

By action against the marshal. *Walker v. Robbins*, 55 U. S. 14 How. 584, 14 L. ed. 552.

By action against the sheriff. *Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135.

By suit for damages. *Connery v. Swift*, 9 Nev. 89. By affidavit of illegality. *Morris v. Morris*, 78 Ga. 733.

By affidavit of illegality or motion to set aside. *Hart v. Lazaron*, 46 Ga. 396.

By appeal. *Holman v. G. A. Stowers Furniture Co. (Tex.)* 30 S. W. 1120; *Herwick v. Koken Barber Supply Co.* 61 Mo. App. 454.

By appeal or certiorari. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47.

By appeal, certiorari, or direct application to the court. *Wingfield v. McClure*, 48 Ark. 510.

By arresting process. *Sanchez v. Carriaga*, 31 Cal. 170.

By certiorari. *Crandall v. Bacon*, 20 Wis. 640, 91 Am. Dec. 451; *Fleming v. Nunn*, 61 Miss. 603; *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364.

On a constable's bond. *Williams v. Hitzie*, 83 Ind. 303.

By defending a suit to revive. *Haynes v. Aultman*, 36 Neb. 257.

By habeas corpus. *Lance v. McCoy*, 34 W. Va. 416.

By motion. *Gooley v. St. John*, 25 Gratt. 146; *Lyon v. Bolliv*, 7 Ill. 629; *Fullan v. Hooper*, 19 N. Y. Week. Dig. 93, *Affirming* 66 How. Pr. 75; *Mason v. Miles*, 63 N. C. 584.

By motion or appeal. *Whitehurst v. Merchants' & F. Transp. Co.* 109 N. C. 344.

By motion to quash. *Stockton v. Ransom*, 60 Mo. 535.

By motion to recall the execution or motion to set aside, or by action against the plaintiff in the judgment. *Wilkinson v. Rewey*, 59 Wis. 554.

By motion to set aside. *Comstock v. Clemens*, 19 Cal. 77; *Gates v. Lane*, 49 Cal. 286; *Lasselle v. Moore*, 1 Blackf. 226; *Luco v. Brown*, 73 Cal. 3; *Partin v. Luterloh*, 6 Jones, Eq. 341.

By motion to set aside or by appeal. *Petalka v. Fitle*, 33 Neb. 756.

By motion to set aside or by writ of recordari. *Gallop v. Allen*, 113 N. C. 24.

By motion to stay the judgment. *Critchfield v. Porter*, 3 Ohio, 518.

By motion for a new trial. *Hamblin v. Knight*, 81 Tex. 351; *Woodward v. Pike*, 43 Neb. 777.

By motion for a new trial or writ of error *coram nobis*, or suit in equity for relief. *Hurlbut v. Thomas*, 55 Conn. 181.

By opening the judgment. *Hollinger v. Reeme*, 138 Ind. 363, 24 L. R. A. 46.

By remedy to correct the same. *Gould v. Loughran*, 19 Neb. 382.

By defending on a replevin bond. *Proctor v. Pettritt*, 25 Neb. 96.

By action of trespass. *Geers v. Scott* (Tex.) 33 S. W. 587; *St. Louis & S. F. R. Co. v. Lowder*, 29 Mo. App. 3; *St. Louis, I. M. & S. R. Co. v. Reynolds*, 80 Mo. 146.

Messrs. C. L. Coyner, S. H. Woods, and George B. Hufford, for defendant in error: A petition for injunction restraining the sale of real estate under a void judgment, which shows on its face that the amount of said judg-

ment was over \$20, and that at the time of making the application for injunction ninety days had not elapsed from the date of the rendition of said judgment, and which fails to show any reason why petitioner did not avail

By action of trespass or trover. *Davidson v. Floyd*, 15 Fla. 667.

By writ of error. *Alabama Ins. Co. v. Kingman*, 21 Ill. App. 493.

By writ of prohibition, or motion to set aside, or action against the sheriff. *Stites v. Knapp*, 2 Ga. Dec. 36.

The following cases granted an injunction although there was a remedy at law: *Landrum v. Farmer*, 7 Bush, 46; *Wilson v. Montgomery*, 14 Smedes & M. 205; *Propst v. Meadows*, 13 Ill. 157; *Nelson v. Rockwell*, 14 Ill. 375; *Caruthers v. Hartsfield*, 3 Yerg. 366, 24 Am. Dec. 560.

And the following cases granted an injunction on the ground that there was no adequate remedy at law: *Jones v. Pharis*, 59 Mo. App. 254; *Bornschein v. Finck*, 13 Mo. App. 120; *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 579; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523; *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47.

The following cases held that an injunction will be denied unless a valid defense is shown: *Geraty v. Druiding*, 44 Ill. App. 440; *John V. Farwell Co. v. Hilbert (Wis.)*, 30 L. R. A. 235; *Pilger v. Torrence*, 42 Neb. 903; *Gould v. Loughran*, 19 Neb. 392; *Logan v. Hillegase*, 16 Cal. 200; *Waldrom v. Waldrom*, 76 Ala. 285; *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639; *Williams v. Hitzle*, 83 Ind. 303; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552; *Wilson v. Shipman*, 34 Neb. 573; *Stewart v. Brooks*, 62 Miss. 492; *Jeffery v. Fitch*, 46 Conn. 601; *Secor v. Woodward*, 8 Ala. 500; *Sharp v. Schmidt*, 62 Tex. 263; *Masterson v. Ashcom*, 54 Tex. 324; *Cromelin v. McCauley*, 67 Ala. 542; *Colson v. Leitch*, 110 Ill. 504; *Burch v. West*, 134 Ill. 258, Affirming 33 Ill. App. 359; *State v. Hill*, 50 Ark. 458; *James v. Howell*, 37 Neb. 320; *Langley v. Ashe*, 38 Neb. 53; *Crocker v. Allen*, 34 S. C. 452; *Taggart v. Wood*, 20 Iowa, 236; *Winters v. Means*, 25 Neb. 242; *Fowler v. Lee*, 10 Gill & J. 358, 32 Am. Dec. 172; *King v. Watts*, 23 La. Ann. 563.

And the following cases granted an injunction without requiring a valid defense to be shown: *Bornschein v. Finck*, 13 Mo. App. 120; *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110; *United States Mut. Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571; *San Juan & St. L. Min. & S. Co. v. Finch*, 6 Colo. 214; *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 396; *Blakeslee v. Murphy*, 44 Conn. 188; *Mills v. Scott*, 43 Fed. Rep. 452; *Bell v. Williams*, 1 Head, 229; *White v. Espey*, 21 Or. 328; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523; *Ryan v. Boyd*, 33 Ark. 778 (Overruled in *State v. Hill*, 50 Ark. 458); *Nicholson v. Stephens*, 47 Ind. 185; *Witt v. Kaufman*, 25 Tex. Supp. 384.

II. As to party.

An injunction was granted where a judgment was fraudulently changed as to the parties after the term, and was entered against the complainant without notice. *Byars v. Justin*, 2 Tex. App. Civ. Cas. (Wilson) 1 686.

And where a judgment was rendered by a justice in favor of the plaintiff, and on a second trial the defendant obtained judgment, and the justice erased the same without notice to the defendant, at the instance of the plaintiff, and issued an execution on the first judgment. *Smith v. Chandler*, 13 Ind. 513.

And where a default judgment on a note of a *feme covert* was void as against her separate estate. *Griffith v. Clarke*, 18 Md. 457.

And in case of judgment against a married woman alone on a note in which her husband did 31 L. R. A.

not unite as where there was no statute authorizing such a judgment. *Hoffman v. Shupp*, 80 Md. 611.

But an injunction was refused in *Russell v. Interstate Lumber Co.* 112 Mo. 40, where the parties to a judgment of sale under a mechanic's lien, had no interest in the property and the court had no jurisdiction to order the sale. If void the sale would not affect the complainant.

So, in *Wilkinson v. Rewey*, 59 Wis. 554, an injunction was refused against executions upon two pretended judgments alleged to be no judgments because one had not been properly docketed and there were no parties to the other, as they could be set aside or vacated and the executions recalled on motion in the original actions, and such was a complete remedy at law, and for the further reason that it was not alleged that the judgments were in substance inequitable.

And where the Federal court had no jurisdiction to render a judgment on account of the citizenship of the parties. *Skirving v. National L. Ins. Co.* 59 Fed. Rep. 742.

And where the plaintiff at law was not a corporation as alleged, but such objection was not made or excused before judgment. *Mahan v. Accommodation Bank*, 26 La. Ann. 34.

And where one of the parties to a judgment was dead at the time of its rendition, as there was a remedy by appeal. *Holman v. G. A. Stowers Furniture Co. (Tex.)* 30 S. W. 1120.

See also the main case of *TEXAS MEXICAN R. CO. v. WRIGHT*, refusing an injunction where process was issued against and served upon an agent of a corporation defendant, as there was a remedy by certiorari.

For injunctions on account of death of party, see note to *Gum-Elastic Roofing Co. v. Mexico Pub. Co. (Ind.)* 30 L. R. A. 700, *Injunctions against judgments for errors and irregularities*.

III. As to time.

As to an injunction claimed because the judgment was void or without jurisdiction on account of time, there is some conflict of authority. But injunctions on this ground have been generally refused where there was adequate remedy at law.

An injunction was allowed against a judgment where the summons required an appearance at an impossible time, as service on the 27th day of the month to appear on the 1st day of the same month. The question of valid defense does not appear to be discussed. *Rice v. American Nat. Bank*, 3 Colo. App. 81.

And where a garnishee was notified to appear at the pending term instead of at "the next term" as required by the statute, although the complainant appeared at the pending term but did not make a defense, as the court had temporarily adjourned and he believed that the adjournment was for the term, and judgment was rendered in his absence. *Padden v. Moore*, 58 Iowa, 703.

And where the justice of the peace had no power to enter judgment as the debt was not due. *Kapp v. Teel*, 33 Tex. 811.

And where the justice lost jurisdiction of the case by an adjournment. *Iowa Union Teleph. Co. v. Boylan*, 86 Iowa, 90.

But an injunction was refused against a judgment rendered at an improper time where it was not shown that complainant had not an adequate remedy at law by a suit for damages. *Connery v. Swift*, 9 Nev. 39.

himself of the remedy of certiorari, is not sufficient to invoke the equitable powers of a district judge, and is subject to a general demurrer.

Galveston, H. & S. A. R. Co. v. Ware, 74

And where there was a remedy by motion to set aside or by appeal. *Petalka v. Fitle, 33 Neb. 756.*

And where there was a remedy in the court to correct the same, and a valid defense to the action was not shown. *Gould v. Loughran, 19 Neb. 392.*

And where there was a remedy by defense of a suit upon a replevin bond. *Proctor v. Pettitt, 25 Neb. 96.*

And where the prevailing party was not a party to any deception, and complainant did not tender the amount due, or take an appeal. *Herwiok v. Koken Barber Supply Co. 61 Mo. App. 454.*

And where there was a remedy by motion to quash the execution, and there was no allegation of fraud or accident. *Stockton v. Ransom, 60 Mo. 535.* But see the Missouri cases, *supra, I.*

And where there was a remedy in the court rendering judgment to arrest process, and the judgment was void because not rendered in term time, and one of the defendants in the injunction suit was insolvent, but nothing was said about the other. *Sanchez v. Carriaga, 31 Cal. 170.*

And where there was a remedy by certiorari against the judgment void because of an indefinite adjournment of the court prior thereto. *Crandall v. Bacon, 20 Wis. 639, 91 Am. Dec. 451.*

And where there was a remedy by motion to set aside, or by a writ of recordari, and jurisdiction was lost by a continuance, and lack of notice. *Gallop v. Allen, 118 N. C. 24.*

And in *Bear v. Youngman, 19 Mo. App. 41*, an injunction was denied where a judgment was rendered by a justice of the peace on Thanksgiving day, as the statute did not prohibit a justice from holding court on that day, and it was said that if it was void that fact alone would not entitle one to relief by injunction. See the Missouri cases, *supra, I.*

And an injunction against a judgment was denied where a justice of the peace rendered a judgment on the 4th of July, which was a legal holiday, but there was no statute prohibiting courts from sitting on that day if it did not fall on Sunday. *Hamer v. Sears, 81 Ga. 288.*

And where by the terms of a statute a garnishee was discharged by lapse of time. *Hastings v. Cropper, 3 Del. Ch. 165.*

For injunctions against judgments on account of the time of their rendition, see *note to Gum-Elastic Roofing Co. v. Mexico Pub. Co. (Ind.) 30 L. R. A. 700, Injunctions against judgments for errors and irregularities.*

IV. *As to venue.*

Where the court had no jurisdiction over the person of the defendant on account of venue, and there was a valid defense to the action, injunctions have generally been granted, but not to third parties, and have been refused on account of pleadings or where a valid defense was not shown.

So, an injunction was granted against a judgment that was void for want of jurisdiction as to venue, although the defendant had a remedy at law, and attempted to pursue it, but on account of the misapprehension of the law by the court he was deprived of the same. *Connell v. Stelson, 33 Iowa, 147.*

And the same was held in *Bornschein v. Flnck, 13 Mo. App. 120*, where an appeal would have been a waiver, and the constable was not liable because he had no authority to look beyond the execution. A defense to the merits was not required to be shown and complainant was entitled to have a threatened levy enjoined. The authority of this

31 L. R. A.

Tex. 47; Gulf, C. & S. F. R. Co. v. Rawlins, 80 Tex. 579; Anderson v. Oldham, 82 Tex. 228; Wood v. Lenox, 5 Tex. Civ. App. 318; Western v. Woods, 1 Tex. 1; Gulf, C. & S. F. R. Co. v. Bacon, 3 Tex. Civ. App. 55; Gulf, C. & S. F.

case was denied in *St. Louis & S. F. R. Co. v. Lowder, 59 Mo. App. 3*, claiming that the contrary was decided, prior thereto, in *Stockton v. Ransom, 60 Mo. 535.*

And an injunction was granted in *Jones v. Pharis, 59 Mo. App. 254*, where an application for a change of venue was filed before a justice of the peace in a detainer suit, as under Mo. Rev. Stat. 880, § 6241, the justice was divested of jurisdiction; distinguishing *St. Louis & S. F. R. Co. v. Lowder, supra*, on the ground that in *Jones v. Pharis*, if the plaintiff at law was allowed to reap the fruits of his illegal judgment, the complainants would be deprived of the legal advantage which their possession gave them, for the loss of which the law would afford them no reparation and it might result in the loss of their land. See Missouri cases, *supra, I.*

In *Grass v. Hess, 37 Ind. 193*, an injunction was granted against a judgment rendered by a justice of the peace in a county other than that in which the complainant resided. No question was made as to a valid defense. In referring to *Gage v. Clark, infra*, it was said that though the court decided that case against the applicant for an injunction on account of the imperfection in his papers, it is clearly to be understood that when a judgment is rendered without an appearance or consent of the defendant when the suit is in the wrong township, an injunction will be granted.

But an injunction was refused where a justice of the peace rendered a judgment against a resident of another township of the same county, which judgment was claimed to be void because there was at that time a justice in the township of the defendant, as it was not shown that the defendant did not consent to the jurisdiction. *Gage v. Clark, 22 Ind. 163.*

And where mortgagees had canceled their mortgages and acquired the land and claimed that on account of venue a court had no jurisdiction to render judgments against the mortgagor, which were prior to the mortgage, as the surrender of the mortgage reduced the mortgagees to the position of purchaser. And it was said that if the judgments were void they would not affect complainant, and if not void they should not be enjoined. *Blekeley v. Branyan, 28 S. C. 445.*

And where service of process was made by the deputy sheriff out of his bailiwick, and he promised to return the same *non est*, but a valid defense was not shown. *Gardner v. Jenkins, 14 Md. 58.*

And where a party having a summer residence in New York was proceeded against by an attachment and was brought into court by a curator *ad hoc* in Louisiana, which state he claimed as his residence. *Morris v. Bienvenu, 30 La. Ann. 878.*

And where the judgment was not in the parish of complainant's domicile under La. Civ. Code, arts. 162, 167, prohibiting suits except in the domicile of defendant's residence, but providing that he might be sued in the parish of his former domicile within one year after removal therefrom, unless a public declaration of intention to change the same was made. *King v. Watts, 23 La. Ann. 563.*

V. *As to amount.*

An injunction was granted against a judgment in excess of the amount allowed, under Tex. Rev. Stat. art. 4843, providing that upon the rendition of a judgment against a claimant in a trial of right to property a judgment shall be rendered for the amount of the property and legal interest. *Wills Point Bank v. Bates, 76 Tex. 333.*

R. Co. v. Henderson, 83 Tex. 70; *Smith v. Ryan*, 20 Tex. 661; *Hamblin v. Knight*, 81 Tex. 351; *Meniffee v. Myers*, 33 Tex. 690; *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) § 991; *Windisch v. Gussett*, 30 Tex. 744; *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364; *Hilliard*, Inj. p. 214, § 230; *Freem. Executions*, § 435.

And where a justice of the peace rendered a judgment in excess of that allowed under Fla. Const. 1888, art. 6, § 11, limiting the jurisdiction of the justice of the peace. No question was made as to a valid defense. *Wilson v. Sparkman*, 17 Fla. 371, 35 Am. Rep. 110.

But an injunction was refused against a judgment in the Federal court in a collateral attack by a third party on the ground that the amount was below the jurisdictional amount, where the counts together aggregated more than that amount, and twenty years' time had elapsed. *Hill v. Gordon*, 45 Fed. Rep. 276.

And where in three several actions the defendant's claim of set-off, which was in excess of the county court's jurisdiction, was allowed against each of the judgments, and the judgments were rendered by agreement. *Nichols v. Snow*, 42 Tex. 72.

And where an account beyond the jurisdiction of the justice of the peace was split into several cases, and the bill did not show how much the alleged account was, or that the objection was made before the justice. *Brundage v. Candle*, 25 Tex. Supp. 387.

And where it was not shown that complainant did not participate in such an action, or that he was thereby deprived of some right. *Pryor v. Emerson*, 22 Tex. 162.

And where a judgment was rendered against a garnishee for about \$500, under Mo. Gen. Stat. 1885, § 35, providing for garnishment proceedings, it was held that Mo. act 1858, p. 59, § 1, limiting the jurisdiction of a justice of the peace in an action on a contract to \$300, exclusive of interest, did not apply. *Davis v. Staples*, 45 Mo. 567.

VI. As to judge or court.

When the judge was incompetent to try the cause, or had no jurisdiction to render such judgment on account of a prohibitory statute, injunctions have been granted, but have been refused where complainant was guilty of fraud.

So, an injunction was granted against a judgment where a mayor had no jurisdiction to try civil cases. *Smith v. Deweese*, 41 Tex. 504.

And where the district court ordered a resale of land for the purchase money, where the purchaser had died and the county court had exclusive jurisdiction of such a case. *Cunningham v. Taylor*, 20 Tex. 126.

And where a justice of the peace could not render final judgment, under Kan. Code, § 44, providing only for an order against a garnishee, which cannot be enforced by execution. *Missouri P. R. Co. v. Reid*, 34 Kan. 410.

And where a court ordered a sale under a mechanic's lien, but lost jurisdiction by a repeal of the statute. *Holcomb v. Boynton*, 151 Ill. 294.

And where the judge was incompetent, under Tex. act May 24, 1838, § 8, providing that a judge of the district court shall be disqualified, on account of interest, from sitting in a cause. *Chambers v. Hodges*, 23 Tex. 104.

And the same was held under Tenn. Code, § 4098, prohibiting a justice who is related to the party from sitting in the case unless his incompetency is waived in writing, where such a waiver was not made. *Smith v. Pearce*, 6 Baxt. 72.

But an injunction against a judgment was refused where the party rendering the judgment in a sham case was not judge of court, but complainant was a party and privy thereto, and imposed on the supreme court, which affirmed such judgment. *Blackburn v. Bell*, 91 Ill. 434.

31 L. R. A.

VII. Matters of process and service.

a. Form.

Irregularities in regard to the form of process will not deprive the court of jurisdiction to render judgment, or authorize an injunction.

So, an injunction was refused against a judgment and execution for want of legal service of process where the writ was not stamped, as a statute provided for having the error of court reviewed, and it was supposed the court passed on the question of service before judgment was rendered. *Windisch v. Gussett*, 30 Tex. 744.

And where a revenue stamp was not attached to the process, and such defect was waived by appearance. *Wilsey v. Maynard*, 21 Iowa, 107.

And where there was no seal on the process, as there was a remedy to arrest the process or to appeal, especially where no valid defense was shown. *Logan v. Hillegas*, 16 Cal. 200. For lack of seal, see also *Jilsun v. Stebbins*, 41 Wis. 235, *infra*, d.

And where a summons was not signed or sealed by a clerk of the court in South Carolina, as under the South Carolina Code the summons does not issue from the courts, but is a notice from the plaintiff to the defendant. *Genobles v. West*, 23 S. C. 154.

And where it was claimed that a justice of the peace never acquired jurisdiction of the person of the defendant on account of the form of process, and that the judgment was void, as there was an adequate remedy at law by motion to set aside the execution. *Luco v. Brown*, 73 Cal. 3.

And where the petition and citation were not served in the French language, which was the maternal tongue of the defendant. *Ortes v. Lailande*, 4 La. Ann. 188.

And where a garnishee did not understand the English language or the purport of the process served on him. *Windwart v. Allen*, 13 Md. 196. See further, *Ballinger v. Tarbell*, under next heading.

b. Time and manner.

Injunctions have been refused where the return of service of process was defective, insufficient, or irregular, or where the process required the defendant to appear at a time before that provided by law, or where service of process was made on the Jewish Sabbath; but have been granted where the process was served by a party interested, or on Sunday, as the judgments were void.

So, an injunction was refused against a judgment where the service of process was good, but the return was defective. *Peoria, D. & E. R. Co. v. Dugran*, 32 Ill. App. 351.

And where service of process was defective and a defense was ineffectually made after the judgment in the court of law. *Graham v. Roberts*, 1 Head. 56.

And where a judgment was voidable because rendered upon a defective service, as there was a statutory mode of correcting the error by appeal or certiorari. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47.

Or where there was ambiguity in the return of the service of process, and the defendant appeared before the justice at the time, and no steps were taken by certiorari to test the service. *Fleming v. Nunn*, 61 Miss. 603.

And where the return of process by a constable was insufficient or irregular, as a bill for injunction releases all errors of law. *Moss v. Craft*, 1 Mo. 720.

And where the return of process was irregular as not showing the place of service, and the process was properly served. *Pico v. Sunol*, 6 Cal. 294.

Brown, J., delivered the opinion of the court:

The plaintiff in error presented its petition to the Honorable A. L. McLane, praying a

writ of injunction against J. A. Wright, C. L. Coyner, and John Larcade, in which it was alleged, in substance, that on the 26th day of February, 1894, J. A. Wright, by his

And where the writ was returned prior to the time named in the copy served, and the complainant knew of the mistake and did not show any valid defense to the action. *Gallup v. Manning*, 48 Conn. 25.

And where the summons was made returnable in a shorter time than that required by statute, and was so returned. *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527.

And where the process served required the defendant to appear before the justice at a time prior than that stated in the writ, but there was no allegation of accident, surprise, or fraud, or that he was misled. *Hale v. McComas*, 50 Tex. 384.

And where a summons was not duly served. *Coon v. Jones*, 10 Iowa, 131.

And where the service of process was within a less time than that required by statute, and complainant was negligent and did not show a good defense. *Waldrom v. Waldrom*, 78 Ala. 285.

And where the return of service of process on a corporation was amended during the term so as to comply with the statute, and where in such a case a default was rendered without evidence. *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646. See further, *Service on corporation, infra, f.*

And where the service of process was returned by the deputy marshal in his own name, and the execution sale was attacked by a third party; as the defendant in the action is the party to question the return, and it cannot be collaterally attacked. *Hill v. Gordon*, 45 Fed. Rep. 276.

And where service of process was made against a Hebrew on the seventh day of the week, although 2 N. Y. Rev. Stat. §§ 60-71, make it a misdemeanor for knowingly or maliciously causing process to be served on that day on certain persons. But such knowledge or malice was not established in this case. *Marks v. Wilson*, 11 Abb. Pr. 87.

See also note to *Merriman v. Walton* (Cal.) 30 L. R. A. 788, *Injunctions against judgments obtained by fraud, accident, mistake, surprise and duress.*

And where the service of process was irregular, but no injustice was done. *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) § 991.

And where the process by judicial attachment was irregular. *Bissell v. Bozman*, 2 Dev. Eq. 154.

And where the constable made a mistake indorsing on the copy of the summons delivered to the defendant a less amount than the summons called for, and made a proper return of the summons, as such summons was only voidable. In the original opinion in this case it was understood that the indorsement upon the original summons was of the same amount as the indorsement upon the copy, and the opinion was changed on rehearing as above. *Bassett v. Mitchell*, 40 Kan. 549.

But an injunction was granted against a judgment where it was void because of service of process on Sunday, and a sale on execution was about to be made, where the defendant tendered into court the amount of the judgment. *Hauswirth v. Sullivan*, 6 Mont. 203.

And where service of process was made by the sheriff, who was plaintiff in the action, and there was a good defense, as Ky. Civ. Code, § 737, provided that process in an action wherein the sheriff was a party should have been directed to the coroner, or, if he was interested, to a constable. *Knott v. Jarboe*, 1 Met. (Ky.) 504.

See also, as to officer interested, *Martin v. Parsons*, 49 Cal. 94, *infra, c.*

See further, as to manner of service, *Ortes v. 31 L. R. A.*

Lallande, 4 La. Ann. 188, and *Windwart v. Allen*, 13 Md. 196, *supra, a.*

c. Fraud as to service.

That the defendant was enticed within the jurisdiction of the court in order to serve process, or that there was an alteration of service, has been held insufficient cause for an injunction against a judgment that was not fraudulent; but where the return was fraudulently altered an injunction was granted.

So, an injunction was refused against a judgment where the defendant was enticed into the state in order to serve process, and such fact was not made a defense in the action. *Vastine v. Bast*, 41 Mo. 498.

And where the complainant removed the cause to the Federal court. *Sayre v. Harpoid*, 33 W. Va. 553.

And where a service of process was erased and another name was substituted on the return by the sheriff, and no charge was made of fraud or that the sheriff did not return the summons executed as it appeared, or that any alterations were made in the return, and no defense was shown to the action. *Gregory v. Ford*, 14 Cal. 188, 73 Am. Dec. 639.

But an injunction was granted against the use of a judgment as estoppel where the purchaser of the land thereunder was an officer of the court, and had fraudulently made a false entry, showing service of process. *Martin v. Parsons*, 49 Cal. 94.

See also, as to officer interested, *Knott v. Jarboe*, 1 Met. (Ky.) 504, *supra, b.*

d. Acceptance of service.

An acceptance of service of process will prevent an injunction on account of process. But where the party so accepting is not the defendant or duly authorized, an injunction will be granted.

So, an injunction against a judgment was refused where the defendant therein acknowledged in writing personal service of a copy of the summons and complaint, as at most it would be a mere irregularity, although it was claimed that the process was not under seal. *Jilsun v. Stebbins*, 41 Wis. 235.

But an injunction was granted where service of process was accepted by a person not duly authorized, and no showing of a valid defense to the action was required. *Mills v. Scott*, 43 Fed. Rep. 452.

And in *Finney v. Clark*, 86 Va. 354, the same was held where the service was accepted by the son of the defendant without his knowledge or authority. It was said that "when the bill presents only the question of the validity of the proceedings resulting in the judgment, and does not in any way raise the question on the merits, or bring them before the court, the court of its own motion shifts the lawsuit to the chancery side and assumes chancery jurisdiction on the merits of the case. . . . As the record presented shows no memorandum of payments or set-offs, no itemized statement of the accounts between the parties, it is impossible for this court to determine the merits, nor is it incumbent on it to consider them."

e. Party served.

A misnomer of the defendant in the process, or that the defendant was privileged from process, will not entitle to an injunction against the judgment.

So, an injunction was refused where the com-

attorney, C. L. Coyner, in a suit before James F. Mount, a justice of the peace in Duval county, recovered a judgment against the petitioner for the sum of \$100, and for \$11.70,

costs of court, with interest at 6 per cent per annum from the date of judgment; that on the 17th day of March, 1894, Coyner, as attorney for Wright, procured James F. Mount to

plainant was served with process, but was named incorrectly therein. *Genobles v. West*, 23 S. C. 154.

And where the defendant was grossly negligent in making his defense. *Graham v. Roberts*, 1 Head, 56.

And where the writ was served on D. C., Jr., who made no defense, but gave a forthcoming bond and appealed, although the suit was against D. C. Sr. *Chisholm v. Anthony*, 2 Hen. & M. 13.

And where a party summoned by a wrong name appeared, and allowed a judgment against him by his true name, where there was no allegation that he did not owe the debt, as there was a remedy on a constable's bond. *Williams v. Hitzle*, 83 Ind. 303.

And where the complainant was a member of the city council of Baltimore and in the discharge of his duties at the time of service, and claimed exemption on account of privilege. (A judgment against a privileged person is voidable, but not void.) *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622.

And where the sheriff promised to inform the complainant whether or not the process was against him or another person of a similar name, and failed to do so. *Higgins v. Bullock*, 73 Ill. 205.

And where the defendant claimed that he was not the party named in the process, but swore to an affidavit of defense, and did not know what it contained. *Burke v. Gibson*, 6 Kulp, 310.

But in *Givens v. Tidmore*, 8 Ala. 745, an injunction was granted against a judgment which was upon a note that complainant had never signed, and had had no notice of the suit, and proved that the note was made by another person of a similar name. On this showing the defendant in the equity case was required to prove that complainant was served with process.

See also *supra*, II.

f. Service on corporation.

Generally injunctions have been granted against judgments where the defendants were corporations and the service of process was not made on the officer designated by statute as the proper person on whom it should be made; but have been denied where there was an adequate remedy at law, or where the facts constituting a valid defense were not stated.

So, an injunction was granted where the service of process was upon a person not the proper officer of a corporation, and there was a valid defense. The return of service of process stating facts not within the personal knowledge of the officer may be impeached. *Chambers v. King Wrought Iron Bridge Mfrs.*, 16 Kan. 270.

And where process was not served, as required by law, at the principal office of the corporation. *Wagner v. Shank*, 59 Md. 313.

And where the citation was against an agent, and not against the corporation, and the amount was such that there was no remedy by appeal or certiorari. *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 579.

And where service was made on the clerk of the company's agent. *Southern Exp. Co. v. Craft*, 43 Miss. 508.

And where the service was upon an agent of an insurance company not authorized to receive the same, under Iowa Code, § 2613, providing that where the corporation has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency in an action growing out of that office. *State Ins. Co. v. Waterhouse*, 78 Iowa, 674.

And where a justice of the peace issued a summons to be served in another county, as *Mo. Laws*, p. 184, providing that every foreign insurance company shall designate the superintendent of insurance as its agent to accept service of process in any part of the state, does not enlarge the power of a justice of the peace. There is no statement in the case as to requiring a valid defense to be made. *United States Mut. Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571.

And where the statute required that service upon an unincorporated company should be upon certain named officers, and the service was returned served on the "within named company," which denied such service and also the indebtedness. *Grand Tower Min. & T. Co. v. Schirmer*, 64 Ill. 106.

And where service was upon a person who had ceased to be an agent of the company. *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

And where an attachment was rendered in a suit against a corporation and no summons was directed against the corporation or served on the same, and the record showed service on three individuals. No showing was required to be made that the plaintiff in the injunction suit had a good defense to the action. *San Juan & St. L. Min. & S. Co. v. Finch*, 6 Colo. 214.

But an injunction was refused against a judgment where it was claimed that the person upon whom service of process against the corporation was made was not the proper party to be served, and the facts constituting the defense were not specifically stated. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552.

And where process was served on a "late agent" of the corporation defendant, and there was a remedy by writ of error. *Alabama Ins. Co. v. Kingman*, 21 Ill. App. 483.

See also *TEXAS MEXICAN R. Co. v. WRIGHT*.

And where the return on the summons did not show service on an attorney of the corporation in the county of his residence, although W. Va. Code 1887, chaps. 50, 54, provide that failure to so return shall render the service invalid; but there was a remedy of certiorari. *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364.

And where the summons was not served on the state superintendent of insurance, but upon the proper officer, and was valid, under Taylor's (Kan.) Gen. Stat. 1889, § 4890, providing for service of process on an insurance company or its chief officer, as this statute was not repealed by implication by an act providing for service upon the superintendent of insurance. *Burlington Ins. Co. v. Mortimer*, 52 Kan. 784.

g. Service on partners.

Injunctions have been denied, where judgments were against a firm, on service of process on one of the partners when the other member was not in the state. *Winters v. Means*, 25 Neb. 242.

And where the judgment was against one member of a firm and a codefendant, instead of being against the firm and the codefendant, and was entered by agreement, and the parties were not prejudiced. *Crenshaw v. Wickersham*, 15 Iowa, 154.

But in *Purviance v. Edwards*, 17 Fla. 140, which was a suit to vacate a judgment, it was held that complainant would not be bound if he was not a member of the firm, under the Florida statute authorizing a judgment against the members of a firm, after service of process on one member, and

issue execution against petitioner, which was placed in the hands of defendant Larcade, acting as constable of precinct No. 1 of that county, and instructed the said constable to

levy upon property of the petitioner; that on the 21st day of March, 1894, the constable aforesaid demanded of petitioner's agent in San Diego a levy upon property to make the

if the service at the complainant's residence was not according to Fla. Thomp. Dig. 286, requiring information to be given to the persons with whom the copy was left, even if there was service on the other parties. It was said that the "general practice of cases of this character is for the court of law to grant a stay of proceedings and to remit the party to a court of equity where, by injunction, he can prevent and restrain the party from availing himself of such judgment."

See further, *infra*, VIII, On account of appearance.

b. Service at residence.

Injunctions have been granted against judgments rendered on a return of service of process at the "defendant's residence," where the same was not served at his residence, or where he was absent from the same and had a valid defense; but have been denied where there was a remedy at law, or complainant was negligent, or where the person with whom the process was left was a member of the family.

So, an injunction was granted against a judgment where process was returned as served by posting the same at complainant's place of abode, and the defendant and his family had removed from that house some time before and were residing in another place. The court does not discuss the question of valid defense. *Earle v. McVeigh*, 91 U. S. 508, 23 L. ed. 398.

And where service of process was made at complainant's residence during his absence from the state, and he had no notice of the suit, and had a valid defense. *Jones v. Commercial Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419; *La Piece v. Hughes*, 24 Miss. 60.

And where a sheriff returned process served "at the residence," and the complainant at that time was a nonresident of the state. The case does not show whether a defense to the action was required to be made or not. *McNeill v. Edie*, 24 Kan. 108.

And where a return of process, "executed by leaving a copy," was erased as to all but "executed" by the plaintiff's attorney, and the defendant did not reside in that county, and had no knowledge of the suit until after judgment, and had a valid defense. The injunction was granted notwithstanding he had prosecuted a writ of error. *Wilson v. Montgomery*, 14 Smedes & M. 205.

And in *Blakeslee v. Murphy*, 44 Conn. 188, an injunction was granted where process was served at complainant's residence while he was confined in an asylum in another part of the state. It was held not necessary to show a good defense to the action at law in such a case. But this latter proposition in effect was overruled by *Jeffery v. Fitch*, 46 Conn. 601, *infra*, where no process was served; but on this question neither case cites any authorities, and the latter case does not refer to the former.

In *Lucas v. Waller, Morris* (Iowa) 303, it was said that if service of process was not made at defendant's residence as shown by the return, there was a remedy in equity against proceedings on the judgment, or by motion to set aside.

But an injunction was refused against a judgment where process was served at the usual place of abode of the defendant, although complainant was absent from the state and had no notice of the pendency of the suit, and he had ample remedy at law by petition for a new trial, or by writ of error *coram nobis*, or by a suit in equity for relief. *Hurlbut v. Thomas*, 55 Conn. 181.

31 L. R. A.

And where the service was similar, and there was a remedy by motion to set aside the judgment, or by appeal, and the complainant was absent from the state at the time process against him was served on his wife as follows: "I hereby certify that I left a copy of the within in hands of Mrs. E. H. C." *Comstock v. Clemens*, 19 Cal. 77.

And where, in a suit to revive the judgment, complainant could have made his defense that in the original suit the process was left at a house where he had formerly resided. *Haynes v. Aultman*, 36 Neb. 257.

And where there was a remedy by motion, and the return of the summons did not affirmatively show that it was served on two persons in the manner prescribed by law, but stated that the service was upon one party by leaving a copy at his house with his sister and upon the other party by leaving a copy with his wife, without saying that the defendants were not found at their usual place of abode, and that these persons were members of the family and of the proper age, and that the purport of the summons was explained. *Goolsby v. St. John*, 25 Gratt. 146.

And where complainant supposed the sheriff returned process personally served, when it was in fact served at his residence while he was absent from the state, and he had moved to open the judgment within a year, under Mich. Rev. Stat. 1851, chap. 70, § 90, providing for vacating the same within one year, and the year had expired at the time of the injunction suit. *Myrick v. Edmundson*, 2 Minn. 259.

An injunction was refused against a judgment rendered on service of process at complainant's residence, where a copy was given to his mother-in-law, a member of the family, while complainant was absent from the state, although he did not know of the judgment until after it had been rendered, and the justice had admitted improper evidence on the trial, but there was no fraud; and the service was held to be sufficient under the statute. *Merritt v. Baldwin*, 6 Wis. 439.

And in *Hamer v. Sears*, 81 Ga. 288, an injunction was refused where service of process was made at the defendant's place of residence while he was known to be absent from the state, and judgment was rendered on the 4th of July, which was a legal holiday, but there was no statute prohibiting courts from sitting on that day unless it should fall on Sunday. The court does not discuss the question of service of process.

1. Where there was no service as required by law.

There is conflict of authority as to granting injunctions on the ground of no service of process. The weight of authority is that an injunction will only be granted where there is a valid defense to the action. Some cases do not refer to the necessity of showing a valid defense, and some hold that it does not have to be shown. Other cases deny relief on the ground that there is a remedy at law, and some on the ground of defective pleading in the injunction suit; and some cases hold that the return of the officer is conclusive and cannot be overcome. The proof must be clear to overcome the officer's return.

So, an injunction was granted against a judgment where the complainant was not served with process and had no notice or did not appear, and he had a good defense to the action. *Robinson v. Reid*, 50 Ala. 60; *Crafts v. Dexter*, 8 Ala. 707, 42 Am. Dec. 606; *Rice v. Tobias*, 89 Ala. 214; *Weaver v. Poyer*, 79 Ill. 417; *Wofford v. Booker* (Tex.) 30 S. W. 67; *Cobbey*

said judgment, and that petitioner's agent pointed out a box car of the reasonable value of \$300, which property the said constable refused to levy upon, but levied the execu-

tion upon certain lots described in the petition, being the depot grounds of petitioner's railroad, worth \$1,000. It was alleged in the petition that, when the said Wright filed

v. Wright, 34 Neb. 771; Walker v. Gilbert, Freeman, Ch. (Miss.) 55.

And where the record did not show service of process. Givens v. Campbell, 20 Iowa, 79.

And where the return of the service of process was false, and the defendant did not know of the judgment until after it was rendered. Raymond v. Conger, 51 Tex. 536.

And where the false return of process was procured through collusion of the sheriff and the plaintiff at law, and the judgment was not known until five days thereafter, and no objections were made to the bill for injunction on the ground of remedy at law. Hamblen v. Knight, 60 Tex. 36.

And where an old and infirm man claimed ignorance of service of process issued from another county, and that his only knowledge of the suit was through his attorney, who attended to all his business generally, and the failure to make a defense was excused on account of the delay in miscarriage of the letter from his attorney. Herring v. Winans, Smedes & M. Ch. 466.

Or where a summary judgment was taken on a sheriff's bond without service of process on the surety, after the sheriff's term of office had expired. Kinzer v. Helm, 7 Heisk. 675.

Where the application for the appointment of a guardian *ad litem*, and his answer, did not show personal service, and the order appointing the guardian *ad litem* did not show that it was filed, and the plaintiff's attorney, and the officer who made proof of service, and the infant, testified that the latter was not personally served,—an injunction was properly granted. Genobles v. West, 23 S. C. 154.

For injunctions against judgments on account of process against infants, see note to Gum-Elastic Roofing Co. v. Mexico Pub. Co. (Ind.) 30 L. R. A. 700, *Injunctions against judgments for errors and irregularities*.

Where an injunction against a void judgment was dissolved, and a judgment was recovered on the injunction bond for the amount of the void judgment, and a second bill was filed, which was sufficient to enjoin the void judgment for want of service of process,—the judgment on the injunction bond was also enjoined. Weaver v. Poyer, 79 Ill. 417.

In Bramlett v. McVey, 91 Ky. 151, an injunction was granted where the return of service of process was false, under Ky. Gen. Stat. chap. 81, § 17, providing that the sheriff's return shall be conclusive except for fraud and mistake,—distinguishing Taylor v. Lewis, and Shoffet v. Menifee, *infra*, which held that a return could not be attacked collaterally, as they were decided prior to this statute.

And an injunction was granted against a judgment, where the officer deceived the defendant and prevented a defense by reading a copy of the summons in a case to which there was no defense, and made a return of service at the same time of a summons in another action, on a claim that had no foundation. Owens v. Ranstead, 22 Ill. 161.

Some cases grant injunctions without requiring a valid defense to be shown, where the complainant was not served with process and did not know of the judgment in time to defend.

So, a judgment and execution sale were enjoined where there was no service of process or authorized appearance, and a defense to the merits was not required to be shown in the injunction suit. Mills v. Scott, 43 Fed. Rep. 452.

And in Tennessee where it is not necessary to

show a valid defense to the action. Bell v. Williams, 1 Head, 229.

And where a cloud on title was created by filing a transcript of the justice of the peace in the county clerk's office, and docketing the judgment in the circuit court, and there was no service of process or appearance, the only equitable showing required being that it would cast a cloud on complainant's title. White v. Espey, 21 Or. 328.

The record showing a return of service of process may be impeached, and an injunction granted, where there is no adequate remedy at law. Ridgeway v. Bank of Tennessee, 11 Humph. 523.

In Ryan v. Boyd, 33 Ark. 778, where the return of service of process was false, and a judgment was rendered in a magistrate's court, and a transcript filed in the circuit court, and the latter court could only act upon the record, an injunction was granted without requiring a defense to the action to be shown; and the remedy of Gantt's (Ark.) Dig. § 2619, providing for quashing an execution in the same court, is only cumulative.

But this was overruled, as to failure to show a valid defense, in State v. Hill, *infra*.

And an injunction was granted, without regard to a valid defense, where there was no service of process, notice, or appearance, and no real party plaintiff, and the record did not show any service of summons. Nicholson v. Stephens, 47 Ind. 185.

And where the only service of process was an attachment levied on land and an execution sale was about to be made. Ingle v. McCurry, 1 Heisk. 26.

And Injunctions have been granted where the return did not show such service as was required by the statute.

So, an Injunction was granted where the return upon a citation did not show that service was made by the sheriff, and there was no appearance, such judgment being void, and the amount being too small to obtain a remedy at law. In Texas a defense to an action does not have to be shown as against a void judgment before an injunction will be granted against the same. As to a judgment exceeding \$20 in amount, the remedy by certiorari prevents an injunction. Galveston, H. & S. A. R. Co. v. Ware, 74 Tex. 47.

And where the process was not served by the sheriff of the proper county. There was nothing said as to showing a valid defense to the action, but the court held that a judgment might be rendered in the injunction-suit for the debt enjoined. Witt v. Kaufman, 25 Tex. Supp. 384.

But an injunction was refused where the record showing a return of service was not overcome by the evidence. Johnson v. Jones, 2 Neb. 126.

And where the evidence as to false return of service was contradictory, and it was not shown that there was a defense on the merits or that the judgment was contrary to equity and good conscience. Wilson v. Shipman, 34 Neb. 573.

And where the evidence was not sufficient to overcome the officer's return. Duncan v. Gerdine, 50 Miss. 550.

And where the evidence was uncertain. Cairo & St. L. R. Co. v. Holbrook, 92 Ill. 297.

Generally an injunction against a judgment will be denied where there is no service of process or appearance, if a valid defense is not shown.

So, an injunction was not granted where a good defense to the action at law was not shown. Stewart v. Brooks, 62 Miss. 492; Jeffery v. Fitch, 46 Conn.

his suit before the justice of the peace, citation was issued, directing the sheriff or any constable of the said county to summon W. H. Vannort, agent of the Texas Mexican

Railway Company at San Diego, Tex.; that petitioner never appeared, nor in any way answered to the said suit, but that, service having been made upon the said W. H. Vannort,

661 (see *Blakeslee v. Murphy*, 44 Conn. 188, *supra*, h); *Rice v. Tobias*, 83 Ala. 348; *Secor v. Woodward*, 8 Ala. 500.

So, an injunction was refused where the facts stating the defense were not set out in the bill. *Sharp v. Schmidt*, 62 Tex. 263.

And where the bill in equity did not allege that complainant failed to appear, or did not show a good defense to the action. *Masterson v. Ashcom*, 54 Tex. 324.

And was refused against an action of ejectment on a decree rendered without service of process or knowledge of the defendant, where it was not made to appear that the result would be other or different from that already reached. *Cromelin v. McCauley*, 67 Ala. 542.

So, where an agent served an attachment upon himself in a suit by him against his principal who had no notice of the suit until after the time to obtain relief at law. *Spooner v. Leland*, 5 R. I. 348.

Under Ill. Rev. Stat. 1874, p. 579, § 7, providing that only so much of a judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, an injunction will not be granted against a judgment at law for want of service of process and a false return, where no defense to the action is shown. *Colson v. Leitch*, 110 Ill. 504. See also *Virginia v. Dunaway*, 17 Ill. App. 68, *infra*, J.

So, where there was a remedy by writ of error. *Burch v. West*, 134 Ill. 258, *Affirming* 83 Ill. App. 359.

And will be refused where the complainant does not deny the indebtedness for which the judgment was rendered, or charge fraud, or that the sheriff did not return the process as executed, as the remedy is against the sheriff. *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639.

Equity will relieve against a judgment obtained on a false return of service of process if the complainant shows that he did not know of the pendency of the suit; but an injunction will not be granted where he has no meritorious defense to the action. (*Overruling* *Ryan v. Boyd*, 33 Ark. 778.) *State v. Hill*, 50 Ark. 458.

In *Janex v. Howell*, 37 Neb. 320, it was said that while there is some conflict the weight of authority is that a court of equity will not enjoin a judgment at law merely on the ground that the process in the suit in which the judgment was rendered was not served on the defendant, or, in other words, that the return of the officer as to service is in fact false; it must be shown that a valid defense exists against the action.

In *Langley v. Ashe*, 38 Neb. 53, it was held that where a judgment was obtained without service of process, a statement that complainant would have alleged a good defense, without defining it, was insufficient, as the facts constituting such defense must be stated.

Some cases have denied injunctions against judgments where there was no service of process, on the ground that there was an adequate remedy at law by motion, or by affidavit of illegality, or by action against the sheriff. See *Burch v. West*, *supra*.

So, an injunction was refused against an execution sale under a judgment void for want of service of process, as there was a remedy at law. *Armstrong v. Cheshire*, 2 Dev. Eq. 234, 34 Am. Dec. 273.

So, where there was a remedy by motion in the court rendering judgment. *Mason v. Miles*, 63 N. C. 564.

And where the judgment was not shown to be unjust, or the debt not due. *Crocker v. Allen*, 84 S. C. 452.

And an injunction against a judgment was refused where there was a remedy by motion before the justice, or by appeal. *Whitehurst v. Merchants' & F. Transp. Co.* 100 N. C. 344.

And where there was a remedy by motion in the original case, especially where want of equity was established. *Fullan v. Hooper*, 19 N. Y. Week. Dig. 93, *Affirming* 66 How. Pr. 75.

And where there was a remedy by motion to set aside. *Partin v. Luterloh*, 6 Jones, Eq. 341.

And where there was a remedy by affidavit of illegality, or by motion to set aside, under Ga. Code, § 3621, providing that if the defendant has not been served and does not appear, he may take advantage of the defect by affidavit of illegality. *Hart v. Lazon*, 46 Ga. 396.

And where there was a remedy by a writ of prohibition, or by a motion to set aside the judgment, or by an action against the sheriff. *Stites v. Knapp*, 2 Ga. Dec. 36.

In *Taylor v. Lewis*, 2 J. J. Marsh. 400, 19 Am. Dec. 135, and *Shoffet v. Menifee*, 4 Dana, 150, it was held that where a sheriff falsely returned process as served, the defendant could not collaterally attack the judgment by injunction, where the plaintiff at law acted in good faith, as the remedy was against the sheriff for false return. But since these cases were decided a statute has been passed under which a sheriff's return is not conclusive in case of fraud or mistake. See *Bramlett v. McVey*, 91 Ky. 151.

In *St. Louis & S. F. R. Co. v. Lowder*, 59 Mo. App. 3, it was held that the levy on personal property under an execution on a judgment void on account of no service of process will not be enjoined where there is a remedy at law, of an action of trespass.

There is much conflict, in Missouri, as to the right of injunction, which is noted *supra*, I.

And the failure to show that it is too late to apply for a new trial will prevent relief by injunction against a judgment obtained on false return of process and unauthorized appearance. *Hamblin v. Knight*, 81 Tex. 351.

In *Sebring v. Joanna Heights Asso.* 2 Pa. Dist. R. 629, an injunction was refused against a sale under a judgment where the court had no jurisdiction on account of service of process as the sale would not pass any title if the judgment was a nullity.

In *Comstock v. Clemens*, 19 Cal. 77, and *Gates v. Lane*, 49 Cal. 286, injunctions were refused against judgments because no summons was served, and were denied on the ground that there was a remedy by motion to set the same aside, and these cases were approved in *Luco v. Brown*, 73 Cal. 5, which was an action to enjoin a judgment because the process was defective as to form.

But in *Harnish v. Bramer*, 71 Cal. 155, which was a suit to enjoin a judgment by two parties on the ground that no summons was ever served on one, and that the summons was served on the other in the wrong county, on a general demurrer, it was held: "We need only to inquire whether there is a statement of all the facts essential to a recovery."

The judgment as against W. H., who was never served with summons, and who never appeared in the cause, was in fact void, but as the record shows service and appearance, and the judgment is fair on its face, it cannot be attacked collaterally." And as to the other defendant, the judgment was held voidable because entered by default before time for answer; but it must be against conscience in order to be enjoined. "It

said justice of the peace rendered judgment against the petitioner in the said suit, as before stated, which judgment, the petitioner alleged, was void, because the said justice of

the peace had no jurisdiction to render the said judgment as aforesaid. The district judge granted the writ of injunction, which was issued as prayed for. The defendants

therefore became necessary for the plaintiffs to show that they had a good defense, . . . and this they have done by averring that at the time of the entry of the judgment complained of (the plaintiff) J. J. C. had no cause of action against them. This averment shows a perfect defense to the action,"—and the demurrer to the complaint was overruled.

In *Gates v. Lane*, *supra*, it is said that it will not be decided whether a false return of process can be controverted in a justice's or county court after a transcript from the justice's court has been filed in the county court, or whether the remedy would be by injunction or motion, where a justice's judgment is void on its face.

In *Gillam v. Arnold*, 32 S. C. 503, which was an action to enjoin a judgment because the defendant was not served with process and the record showed service, the court refused to decide whether a remedy by motion in the case or by an independent action should be pursued, where the question was not raised by answer or demurrer.

In *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586, it was said that a false return of service of process, not connected with the plaintiff, will not authorize an injunction against the judgment, where no fraud is charged or proved and there is a remedy at law. In this case the proof showed that service was on the clerk of a county, who failed to inform the county officers of the suit.

Some cases deny injunctions where a party defendant was not served with process, but had knowledge of the suit and made no defense, or where in such a case there was an unsuccessful attempt to defend.

And where, in an action upon a transcript of a foreign judgment, complainant failed to make a defense that such judgment was void for want of service of process. *Scroggins v. Howorth*, 23 Miss. 514.

And where the defendant knew that a judgment was rendered within five days thereafter, and did not move to set it aside, on the ground that it was without service of process or appearance, and the return showed service at his residence, and there was no defense to the action. *Taggart v. Wood*, 20 Iowa, 236.

In *Graham v. Roberts*, 1 Head, 56, it was said that if a default judgment was taken without service of process the court had the power to set the same aside upon a proper application, and an injunction was not granted where the complainant was fully advised of the default before final judgment and resisted the same, as this was a waiver of process.

Some cases hold that the record showing service cannot be attacked collaterally, except in cases of fraud, accident, or mistake.

So, an injunction was refused against a judgment where there was no service of process but there was no allegation of fraud, accident, or mistake, and the record showed proper service. *Gillam v. Arnold*, 35 S. C. 612.

And where complainant did not state what the record showed, and did not make the codefendants parties in the injunction suit. *Gates v. Lane*, 44 Cal. 322.

Where the record of the justice showed that the summons was served, an injunction was refused on the ground that the justice had determined the facts essential to jurisdiction, which could not be overthrown in a collateral attack, and there was a distinction between some service of process and no service, although it was claimed that in this case there was no service. The court also held that the 31 L. R. A.

return of the officer of service of process was conclusive. *Hume v. Conduitt*, 76 Ind. 508.

The common-law rule, which does not allow the sheriff's return of service of process to be contradicted, does not apply in Louisiana. *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424.

Where the record failed to show service of process on the defendants, a purchaser of land subject to the judgment was refused an injunction against a sale of such land under the judgment. *Colby v. Brown*, 10 Neb. 413.

There are cases which do not disclose whether the objection was made on the ground of lack of process, which may be found under next subhead.

J. Where there was no notice.

Generally an injunction will be granted against a judgment obtained without notice, where such notice is required by statutes and the complainant is not negligent and has a good defense. But there are some cases which deny an injunction on the ground that there is a remedy at law, or that the same is not shown to be unjust.

So, an injunction was granted to restrain proceedings on a judgment where the same was void because obtained on motion without notice. *Caruthers v. Hartsfield*, 3 Yerx. 386, 24 Am. Dec. 580.

And where the statute in regard to publication was not followed as to notice. A tender of the amount into court was not required as a condition precedent to the injunction. *Edrington v. Allebrooks*, 21 Tex. 186.

And where a resident of a state, having no notice of the action, was proceeded against improperly by publication. *Kitchen v. Crawford*, 13 Tex. 516.

And where the publication was defective although the application for injunction was made more than twelve months after the rendition of the judgment, and it was alleged that complainant knew of its rendition within twelve months, and a statute required the injunction to be sued out within that time. But the supreme court did not discuss that question, but sustained the injunction as the judgment was void. *Cooke v. Burnham*, 32 Tex. 129.

And where an appeal was taken from a judgment against the makers and indorsers of a promissory note, without the knowledge or consent of the indorsers, and judgment was rendered against him on affirmance. *Coles v. Anderson*, 8 Humph. 491.

And where no writ of error was applied for, and no notice of the proceedings on error was given, as such court had no jurisdiction to render the judgment against a party having no notice. *Wooten v. Daniel*, 16 Lea, 156.

And where a judgment in the county court allowed a claim and the executor had no notice of the application in time to contest the same or take an appeal. An attempt to obtain a remedy by certiorari, which proved abortive by reason of the unskillful manner in pleading, did not prevent an injunction against the judgment. *Propst v. Meadows*, 13 Ill. 157.

And where a judgment was signed against a defendant at the time he was in attendance as a grand jurymen, and he was not called at the trial of the action, and had a valid defense, the injunction was granted on the ground of fraud. *Manwarring v. Kouns*, 35 Tex. 171.

And where a principal was not called by a sheriff under an order of the court, on a bond for his appearance in a criminal case, and the judgment was against the surety on such bond. (On a bond

appeared, and excepted to the said petition upon several grounds, of which the following were sustained: "(1) That the petitioner had not exhausted its legal remedy of appeal

from the judgment sought to be restrained;" and "(2) that appellant had not exhausted its legal remedy of certiorari." The petitioner having refused to amend its petition, the in-

of this, kind no notice or citation is required.) *Langridge v. Judge of 21st Jud. Dist. Ct. 46 La. Ann. 29.*

And where the note upon which such judgment was obtained was barred by the statute of limitations, as this was a valid defense. *Gerrish v. Seaton, 73 Iowa, 15.*

While a judgment rendered without notice will not usually be set aside if it is upon a just claim, yet, upon a petition not admitting the indebtedness where the defendant stood on his demurrer, the judgment was enjoined. *Gerrish v. Hunt, 66 Iowa, 682.*

The execution of a judgment of sci. fa. on a mortgage was enjoined at the instance of an heir who had no notice of the judgment of the orphans' court directing the mortgage to be made, or any notice of the confirmation of the mortgage, as it was a cloud on his title. *Morgan's Appeal, 110 Pa. 271.*

And a judgment to be released on payment of a sum to be determined by referees was enjoined in favor of heirs, where the referee's report was made after the death of the debtor, without notice given to the interested parties. *Young v. Reynolds, 4 Md. 375.*

Where a judgment was enjoined as void because the defendant had no notice, the court in the injunction suit properly retained jurisdiction and rendered a judgment for the amount due. *Hickman v. White (Tex.) 29 S. W. 692.*

But where a petition on an appeal from a justice of the peace was filed after the statutory time in the district court without notice, an injunction was refused against the judgment on appeal, as *Neb. Code Civ. Proc. § 602*, allowing a new trial, afforded ample means for redress for irregularities, and there was no valid defense or charge of fraud. *Woodward v. Pike, 43 Neb. 777.*

And an injunction was refused against a judgment where proceedings were had without notice, and there was a remedy in the same court by habeas corpus. *Lance v. McCoy, 34 W. Va. 416.*

And where a justice redocketed a case, and rendered a judgment without notice, and the debt was not shown to be unjust, as *Ill. Rev. Stat. chap. 69, § 7*, provides that only so much of a judgment shall be enjoined as is shown to be inequitable. *Virginia v. Dunaway, 17 Ill. App. 68.* See also *Colson v. Leitch, 110 Ill. 504, supra, 1.*

And where there was an agreement to give notice when the case would be taken up, and none was given, but there was a remedy of affidavit of illegality. *Morris v. Morris, 76 Ga. 733.*

And where there was no notice, although a settlement of the debt had been made by complainant with an agent of plaintiff in the suit at law, but it was not shown that the agent had full authority to make such settlement. *Newman v. Taylor, 69 Miss. 670.*

VIII. On account of appearance.

There is some conflict of authority as to granting injunctions against judgments where the appearance of a party was not authorized. Some courts deny the relief on the ground of quasi authority given by one party for all; others on the ground that there is a remedy by motion, or by action against the attorney.

So, an injunction was denied against a judgment where there was an unauthorized appearance by an attorney, as the remedy was by an action against the attorney. *Everett v. Warner Bank, 58 N. H. 340; Bunton v. Lyford, 37 N. H. 512, 75 Am. Dec. 144, 31 L. R. A.*

See *Smith v. Balch, infra; Piggott v. Addicks, 3 G. Greene, 427, 56 Am. Dec. 547.*

And where there was also irregular service of process at complainant's house, as the remedy was against the attorney, but it was not shown that there was a valid defense or that such attorney was insolvent, and he was employed by one of the defendants to represent all of them. *Harris v. Gwin, 10 Smedes & M. 563.*

And where there was a subsequent demurrer by the defendant, and there was no meritorious defense and a long delay, as there was a remedy by opening the judgment. *Hollinger v. Reeme, 138 Ind. 263, 24 L. R. A. 46.*

And where there was a remedy by motion to stay the judgment. *Critchfield v. Porter, 3 Ohio, 518.*

And where there was a remedy at law by motion, as the remedy in chancery would be too dilatory and expensive. *Lyon v. Bollvin, 7 Ill. 629.*

And where the appearance of one partner was entered by the other. *Lucas v. Bank of Darien, 2 Stew. (Ala.) 280.*

And where there was an appearance for one of the members of a firm who was not served with process, and the lack of authority to appear was not shown or a valid defense was not specifically stated. *Winters v. Means, 25 Neb. 242.*

And where there was a false return of service of process upon one of the defendants, and an attorney for another defendant pleaded for all, as there was a remedy at law in the court giving judgment, or by an action against the marshal. *Walker v. Robbins, 55 U. S. 14 How. 581, 14 L. ed. 552.*

Other cases deny relief on account of the pleading or proof in the injunction suit.

So, an injunction was refused where it was sought against the whole judgment, on the ground of no service of process, unauthorized appearance by an insolvent attorney, and oppressive costs, and the debt was due and there was no tender or offer to enjoin the costs only. *Parsons v. Nutting, 45 Iowa, 404.*

And an injunction should not be made perpetual against a judgment obtained without notice on an unauthorized appearance, but should continue only until the party can have a trial of his right at law. *Campbell v. Edwards, 1 Mo. 325.*

And an injunction was refused against a judgment where there was no service of process and an unauthorized appearance although an affidavit of illegality was unsuccessful on account of a mistake of an attorney in not making a proper application. *Hambrick v. Crawford, 55 Ga. 335.*

And where it was not shown that the appearance was unauthorized or fraudulent, or that a defense was meritorious, or a tender made. *Fowler v. Lee, 10 Gill & J. 358, 82 Am. Dec. 172.*

And where no legal citation was served, but an answer was filed. *Rooks v. Williams, 13 La. Ann. 374.*

And where there was no service of process, but it was not shown that the defendant did not appear or waive service, and he afterwards caused the judgment to be stayed. *Carter v. Griffin, 32 Tex. 212.*

And where it was not shown affirmatively that the appearance was unauthorized. *Stubbs v. Leavitt, 30 Ala. 352.*

And where an attorney was authorized to appear, but was not authorized to consent to the judgment, and there was no valid defense. *King v. Watts, 23 La. Ann. 563.*

But where there is an unauthorized appearance, some courts grant injunctions against judgments

junction was dissolved and the petition dismissed, from which judgment appeal was taken to the court of civil appeals, by which court the judgment of the district court was affirmed.

on the ground of fraud, others on the ground that the remedy against the attorney is inadequate, and some on the ground that such judgments are void. In Louisiana the plaintiff at law has a remedy against the attorney for the defendant where he enters an appearance without authority,—differing from other states.

So, an injunction was granted where a plea was filed in a court by an unknown and unauthorized attorney, through the fraud of the prevailing party. *Sneed v. Town*, 9 Ark. 535.

In *Baker v. O'Riordan*, 65 Cal. 368, which was an action to set aside a judgment, it was held that the appearance of an unauthorized attorney where there was no service of process would authorize an action to set aside the same, and that the remedy of Cal. Code Civ. Proc. § 473, providing for a motion in the same court, was not intended to curtail, but to extend, relief. It was said also that equity will restrain a judgment obtained by fraud.

And an injunction was granted against a justice's judgment where the appearance was fraudulent, unauthorized, and collusive, and a statute gave the justice jurisdiction only by service of process, or personal appearance and a waiver of service, notwithstanding an abortive attempt was made to appeal by certiorari; as equity may relieve for fraud notwithstanding a remedy at law. *Nelson v. Rockwell*, 14 Ill. 375.

And where a judgment was rendered against a plaintiff, and the suit was brought by an attorney without authority, and the attorney was too poor to respond in damages. *Smyth v. Balch*, 40 N. H. 363. See *Everett v. Warner Bank*, 58 N. H. 340, *supra*.

And in a suit on a judgment rendered without jurisdiction of the person because the summons was not served and an appearance was not authorized, the same may be impeached by a suit in equity or by a cross bill in the same suit, where an equitable defense is allowed. But a showing of merits should be made although the liability need not be disproved. *Wilson v. Hawthorne*, 14 Colo. 530.

An injunction may be granted against the making of a deed on an execution sale, where the judgment was rendered on an unauthorized appearance of an attorney without any service of process or notice; but the defendant must act promptly, and he must tender what is due. *Bryant v. Williams*, 21 Iowa, 329.

And an injunction was granted against a judgment in Louisiana where there was no service of process and an unauthorized appearance, as *Pothier*, *Cour de Mandat*, vol. 5, p. 274, § 130, gave the plaintiff at law a remedy against the attorney of the defendant and the common law did not apply, and the defendant was not required to show that he had a good defense to the action. *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 Am. Dec. 424.

And where there was no appearance and a party without authority prosecuted certiorari for a defendant and an execution was issued on a judgment rendered therein. *Glass v. Smith*, 66 Tex. 548.

In *Walworth v. Henderson*, 9 La. Ann. 339, which was a suit upon a judgment against a partner on a transcript from Mississippi, and the defense was that the appearance in the original action was unauthorized, it was held that the appearance of an attorney, although not authorized, was a good appearance to the court, and the judgment was regular, leaving to the defendant his remedy against the attorney for damages. But it was said when there is an affidavit that the attorney was not employed or process was not served, and there is a good de-

The plaintiff in error presents the case to this court upon three propositions: First, that the judgment of the justice of the peace against it was void, and therefore that the injunction was properly granted; second,

fense, complainant in equity has the right to interpose that defense. It was held that "the judgment is not null and void by reason of the want of authority of the attorney, who filed the plea, but as in the case of a judgment rendered on the false return of the sheriff that he had served the process on the defendant, the judgment is still regular, leaving to the party his action at law against the officer for damages and his right in equity to enjoin the execution of the judgment establishing a meritorious defense."

But this case was distinguished in *Marvel v. Manouvrier*, *supra*, as controlled by the common law of Mississippi.

IX. Pleading and practice.

An injunction was refused where complainant alleged that he had no knowledge of the judgment, as he must allege that he was not served with summons and did not appear. *Farrington v. Brown*, 65 Cal. 320.

And where there was no service of process, and the judgment was rendered on a debt barred by the statute of limitations, and the complainant did not show that she had property subject to the lien of the judgment. *Titsworth v. Cook*, 49 Ill. App. 307.

An appeal from an order dissolving an injunction obtained on the ground that no process was served does not lie in Louisiana where the amount involved is less than \$300. *New Orleans v. De la Cuesta*, 10 La. Ann. 724.

A judgment was rendered for the debt on the dissolution of the injunction where a judgment was enjoined because there was no service of process, and because the notes sued upon were improperly described. *Willis v. Gordon*, 22 Tex. 241.

As to pleading and practice for mistake in copy served, see *Hale v. McComas*, 59 Tex. 848, *supra*, VII. b.

As to alteration on return, see *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639, *supra*, VII. c.

As to record and parties to injunction suit, see *Gates v. Lane*, 44 Cal. 382, *supra*, VII. i.

As to fraud, accident, or mistake, see *Gillam v. Arnold*, 35 S. C. 612, *supra*, VII. i.

As to fraud, see *Woodward v. Pike*, 43 Neb. 777, *supra*, VII. j.

As to tender, see *Bryant v. Williams*, 21 Iowa, 329, *supra*, VIII.

X. Where there was no judgment or it was set aside.

Injunctions have been granted where there was no judgment, or where a judgment was set aside, although some cases denied relief on the ground that there was a remedy at law.

So, an injunction was granted against an execution where there was no judgment, although there was a finding, notwithstanding the complainant did not show that there was a valid defense. *Sare v. Butcher*, 141 Ind. 146.

And an injunction was granted against a judgment where an appeal from a justice's court was dismissed by the county court and afterwards, when jurisdiction was lost, the order of dismissal was set aside and a judgment was rendered, and there was a valid defense to the action. *Byars v. Justin*, 2 Tex. App. Civ. Cas. (Willson) § 638.

And where a judgment obtained in the county court was set aside, and the plaintiff filed a transcript of the judgment in the district court, and had the same entered upon the docket. *Pollock v. Boyd*, 36 Neb. 369.

And where a judgment was obtained in violation of an injunction. *Collins v. Fraiser*, 27 Ind. 477.

that the levy upon the real estate belonging to petitioner, when a levy upon personal property was tendered by its agent, was contrary to law, and that the injunction should have been sustained upon that ground; third, because the real estate levied upon was a part of, and necessary to the use of, the depot and station of the petitioner.

The judgment of the justice of the peace, enjoined in this case, was void because the court which rendered it had no jurisdiction of the defendant. *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 581. But the court below and the court of civil appeals correctly held that the defendant in that judgment, having the right to a writ of certiorari, could not sue out an injunction to stop the execution of the judgment. The case of *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, cited and followed by the court of civil appeals, lays down the correct doctrine upon this question.

Article 2287 of the Revised Statutes requires that in case the defendant in execution shall point out, for levy, personal property, such property shall be delivered into the "possession of the officer." The posses-

sion given must be such as places the property under the control of the officer, so that it could be delivered to the purchaser. The allegations of the petition in this case do not show that such possession of the box car was given to the officer in this instance. *Ross v. Lister*, 14 Tex. 469.

Article 10, § 4, of the Constitution is in this language: "The rolling stock and all other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals." The allegations of the petition show that the land levied upon was the property of the defendant, and the Constitution makes no distinction on account of the use made of the land by the corporation. The question of the right to sell, under execution, depot grounds acquired by condemnation, in which the railroad company has only the right to use it for that purpose, is not before us in this case.

We find no error in the judgment of the court of civil appeals, and it is affirmed.

And where a new trial was awarded to some of the defendants on the ground that the debt had been partly paid, as the new trial could be taken advantage of by the other defendant, notwithstanding a remedy at law by motion to stay proceedings. *Miller v. Longacre*, 26 Ohio St. 291.

And where a judgment entered by the clerk was unauthorized by any order of court. It was said in that case that a judgment entered by carelessness, mistake, or fraud will be enjoined. *Wingate v. Haywood*, 40 N. H. 437.

But an injunction was refused where there was no judgment, as there was a remedy by motion to set aside the execution. *Lassell v. Moore*, 1 Blackf. 226.

And where there was a remedy at law of trespass or trover, and the execution on its face showed that there was no judgment. *Davidson v. Floyd*, 15 Fla. 667.

See further, note to *Gum-Elastic Roofing Co. v. Mexico Pub. Co. (Ind.)* 80 L. R. A. 700, *Injunctions against judgments for errors and irregularities*. 1. T.

WISCONSIN SUPREME COURT.

Hiram HAYES

v.

DOUGLAS COUNTY *et al.*

(.....Wis.....)

1. A specification of the items in detail which make up a general fund for which a city tax levy is made is not necessary under a charter which only requires the statement to specify the amount required, but directs the levy of only such sums as may be sufficient for lawful purposes.

2. Estimates by the board of public works and the comptroller, required by the charter of the city of Superior, under Wis. Laws 1891, chap. 124, do not limit the power of the common council in fixing the amount for which a tax levy may be ordered, as they are required to "levy such sums of money as may be sufficient."

3. An injunction against the enforcement of a tax levy because of an irregularity, even if it renders the levy void, will not be granted unless the tax is excessive or unequal and unjust.

4. Assessments upon property according to the frontage of each lot, made without actual view of the property or considering the actual benefits accruing to each parcel, are invalid where the law requires the lots to be assessed "in proportion to the benefits secured thereto," even if the property abutting or fronting on the improvement is made an assessment district.

5. The failure of an assessment made by the frontage rule to show upon its face that it was made according to the benefits accruing to each parcel, when the statute requires such benefits to be taken as the measure of the assessment, renders it void.

6. It is matter of common knowledge that property lying in the vicinity of a street improvement often derives important benefits therefrom, although not fronting upon or directly contiguous thereto.

7. An assessment for a street improvement, levied only upon property fronting thereon and made by the frontage rule, is invalid when the law requires it to be made according to benefits.

8. Payment by a property owner of his proportion of an assessment is not a condition precedent to relief against the assessment.

NOTE.—For frontage rule of assessments, see note to *Raleigh v. Peace* (N. C.) 17 L. R. A. 330. 31 L. R. A.

when that is made in entire disregard of the statute so that it is presumed to be unequal.

9. **A statute making the issue of improvement bonds conclusive of the validity of an assessment**, and permitting the issue of the bonds without actual notice to the owners of the property assessed, or on published notice only, within forty days after the assessment is finally determined, is unconstitutional as providing for deprivation of property without due process of law.
10. **An appeal from an assessment**, which permits a review only of the amount assessed, is not such a remedy as will preclude a suit to set aside the assessment when it is unequal and void.
11. **The expense of placing blocks of stone** from a county in a state building at the Columbian World's Fair cannot be made a county tax.
12. **A limitation of the amount of costs** to \$30 when the law determines their amount, under Wis. Rev. Stat. § 2918, subsec. 7, and § 2921, is erroneous.

(December 17, 1895.)

CROSS-APPEALS from a judgment of the Circuit Court for Douglas County in a proceeding to set aside certain taxes and assessments and a tax sale and certificate which had resulted therefrom; the plaintiff appealing from so much of the judgment as held certain street improvement assessments valid, and defendant appealing from so much as held certain general tax assessments void. *Reversed on both appeals.*

Statement by **Newman, J.:**

This is an action to set aside certain taxes and assessments, and a tax sale and tax certificate, in which the taxes and assessments resulted. The tax certificate is upon 80 acres of unplatted land, in the city of Superior, owned by the plaintiff, and described as the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section No. 23, in township No. 49 N., of range No. 14 W. In the year 1892 this tract of land was sold by the treasurer of Douglas county, for taxes and assessments which were delinquent upon the tax roll for the city of Superior for 1891, amounting to \$9,500.14. The common council of the city of Superior, by an ordinance of November 4, 1891, levied a city tax of \$249,000 upon the taxable property of the city. This levy was based, in part, upon estimates furnished by the board of public works and the city comptroller, and included a general item of \$61,000, designated as "general fund," without further specification of particular purpose or purposes for which it was levied, nor items of which it was composed, and was not included in the estimates so furnished. This item of the general city tax was held by the circuit court to be unauthorized by the city charter, and illegal. The portion of this general tax which was carried out against the plaintiff's land, and included in the sum for which it was sold, was found to be \$421. This sale also included a county tax of \$100 to pay the expense of placing some blocks of Douglas county stone in the Wisconsin Building at the Columbian World's Fair. This item was also held to be unauthorized and illegal. It was found that, of this item, 52 cents were

carried out and charged to the plaintiff's lands. There was also included in the sum so carried out and charged against the plaintiff's land the sum of \$4,581.32, the sum of several assessments for street improvements, and instalments of certain improvement bonds which had been issued to pay for other street improvements. These were an instalment of the Belknap avenue improvement bonds, \$1,972.10; one instalment of Grand avenue improvement bonds, \$125; assessment for grading Hill avenue, \$1,438.62; for grading Ritchie avenue, \$777.96; for grading Belknap avenue, \$267. Of these items, those for the Grand avenue improvement and for the grading of Belknap avenue were incurred under the city charter of 1889; the others, under the charter of 1891. Under the former charter, street improvements were "chargeable to the lots or parcels of land fronting or abutting upon such street or alley, in proportion to the benefits accruing to such lots or parcels of real estate by reason of such improvement." Laws 1889, chap. 152, § 143. Under the latter they were "chargeable to the lots or parcels of lands benefited thereby, in proportion to the benefits secured thereby." Laws 1891, chap. 124, § 117. In neither case are the benefits assessed to exceed the benefit actually accruing to each tract or parcel by such improvement. The plaintiff's lands are bounded on the north by Belknap avenue, on the east by Hill avenue, on the south by Ritchie avenue, on the west by an unplatted 80 acre tract, owned by the Land & River Improvement Company. It nowhere abuts upon or touches Grand avenue. In the year 1890 the city of Superior graded Grand avenue. This avenue runs diagonally across section 23. But it nowhere touches appellant's land, although it runs across a corner of the N. E. $\frac{1}{4}$ of the section. Benefits are assessed against the entire N. E. $\frac{1}{4}$ by that description. An improvement bond, covering the entire quarter section, was issued and sold. The sum of \$125.64 is included in the tax included in the tax roll of 1891, carried out against the plaintiff's land to pay the part of one instalment on the improvement bond, which the city clerk estimated to be the share appropriate to plaintiff's land. It is claimed that, as to this assessment, the action is barred, because not begun before the issuing of the improvement bond, under a provision of the charter (§ 137). This assessment the circuit court held invalid, on the ground that plaintiff's land, having no frontage upon the improvement, was not liable to assessment. In the year 1891 the city paved Belknap avenue, and assessed the whole cost of the improvement upon the lands fronting and abutting upon the avenue. The sum of \$7,585.36 was assessed against the north 40 acres of the plaintiff's tract of land, and there was no assessment against the south 40 acres. An improvement bond upon the north 40 was issued and sold to raise money to pay for the improvement. The sum of \$1,972.20, intended as one instalment of such improvement bond, is included in the sum for which the plaintiff's 80 acres were sold. It is also pleaded that the action is barred by section 137 of the charter, because not begun before the issuing of the improvement bond. The circuit court held this item good as a special assessment,

though void as a bond against the city, because in excess of the constitutional limit to municipal indebtedness. In the same year Hill avenue was graded. For this improvement benefits were assessed, as in the other cases, to the owners of property fronting on the improvement, by the front foot. The amount assessed to the plaintiff's land as benefits of this improvement was \$1,438.67. The same year Ritchie avenue was graded. For benefits of this improvement, there was assessed against the plaintiff's land \$777.96.

The circuit court found that in each case the benefits were assessed upon the basis of frontage; that the amount assessed per front foot was determined by dividing the entire cost of the improvement by the number of feet frontage on both sides of that part of the street to be improved; that the rate of the assessment was uniform and equal; that the total amount of the sums assessed was equal to the actual total cost of the improvement; that before making such assessments of benefits, in each case, the board of public works "actually viewed the premises as required by the charter;" that there is no evidence that the board of public works did not use its best judgment in respect to such improvements; that in each case the notices given were directed only to the owners of property abutting upon the proposed improved part of the street. It is not certified, either by the board of public works or by the common council, nor found by the court, that the assessment by the frontage rule alone is in proportion to the benefits conferred by the improvements, nor that the assessment of benefits was made upon actual view and consideration of benefits to be conferred, nor, in any case, upon all the property benefited by the improvement; while, on the other hand, it is claimed for the plaintiff that the evidence shows that these assessments were made without an actual view or assessment, but were made with paper and pencil only, in the city engineer's office, by the front-foot rule, and were not made on the basis of actual benefits received, but on the theory that all abutting property was benefited equally, while in truth some parcels were more benefited than others of the same frontage. There was included in the certificate an excess of interest amounting to \$41.18. The circuit court adjudged that the sale and certificate be set aside, upon the condition that the plaintiff pay all of the taxes included in the certificate except \$421, the general fund tax; the World's Fair stone tax, \$0.52; the Grand avenue grading bond tax, \$125.64; and the excessive interest included in the certificate, \$41.18,—leaving the amount to be paid \$8,911.80, with costs to the plaintiff; costs, above disbursements, not to exceed \$30. Both parties appeal,—the plaintiff from those parts of the judgment which require him to pay the amount of the assessments, and that which limits the amount of the costs to be recovered by him; and the defendants from that part of the judgment which exempts the plaintiff from the payment of the sums named.

Messrs. Spooner, Sanborn, Kerr, & Spooner, for plaintiff:

Every tax here is specially authorized by § 31 L. R. A.

statute, and the authority to levy can be exercised no further than it is clearly given.

Freeland v. Hastings, 10 Allen, 570; *Oconto County v. Jerrard*, 46 Wis. 317; *Milwaukee & St. P. R. Co. v. Kossuth County*, 41 Iowa, 57.

The taxpayer has a right to know whether the money is to be raised for a legal purpose, or for one altogether illegal, and beyond the scope of the taxing power. The levy must show on its face that the money is raised and applied to some lawful object or purpose.

State, Verhule, v. Saalmann, 37 N. J. L. 156; *State, Hance, v. Sickles*, 24 N. J. L. 125; *State, Banghart, v. Sullivan*, 36 N. J. L. 90; *State, Detmold v. Enole*, 34 N. J. L. 425; *State, Slack, v. Palmer*, 39 N. J. L. 250; *Louisville & N. R. Co. v. Com.* 39 Ky. 531; *Freeland v. Hastings*, *supra*.

These words "the remainder of the general fund," in the charter, are to be construed according to the well-settled maxim *noscitur a sociis*.

State, Lederer, v. Inter-National Invest. Co. 88 Wis. 512.

When any fund is set apart for any purpose it must be kept intact for that purpose and not diverted.

State v. Hastings, 11 Wis. 448; *State v. Haben*, 22 Wis. 660; *State, Brown, v. Slavin*, 11 Wis. 154.

The city comptroller must countersign every contract and order entered into or drawn by the city, and without such countersigning the contract or order is void. This he is prohibited from doing unless the money is provided for, or a fund on hand to which the contract applies.

Laws 1891, chap. 124, § 27; *Lee v. Racine*, 64 Wis. 231; *Superior v. Norton*, 63 Fed. Rep. 357, 24 U. S. App. 59.

The World's Fair stone tax is void, and the rule *de minimis* does not apply.

Barden v. Columbia County Supers. 33 Wis. 445, 14 Am. Rep. 762; *Baker v. Columbia County Supers.* 39 Wis. 444; *Milledge v. Coleman*, 47 Wis. 184; *Case v. Dean*, 16 Mich. 32; *Burroughs v. Goff*, 64 Mich. 464; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Bayle v. New Orleans*, 23 Fed. Rep. 843; *New London v. Brainard*, 22 Conn. 552; *Law v. People*, 87 Ill. 387.

This court has uniformly held, as a matter of public policy, a strict rule in respect to special assessments, and this is the general rule.

Liebermann v. Milwaukee, 89 Wis. 336; *Mitchell v. Milwaukee*, 18 Wis. 93; *Kneeland v. Milwaukee*, Id. 412; *Myrick v. La Crosse*, 17 Wis. 443; *Wells v. Burnham*, 20 Wis. 113; *Pound v. Chippewa County Supers.* 43 Wis. 63; *Hull v. Chippewa Falls*, 47 Wis. 267; *Dean v. Borchsenius*, 30 Wis. 237; *Gilman v. Milwaukee*, 61 Wis. 588; *State, Moore, v. Ashland*, 88 Wis. 599; *Beaser v. Ashland*, 89 Wis. 28; *Dieckmann v. Sheboygan County*, Id. 570.

The plaintiff, and all other persons assessed for special benefits, were entitled to have notice given to all persons whose lauds might be afterwards included in the district, so that they might appear before the board, if they wished to do so.

It may be that the board, upon a proper notice to the owners of lands benefited, might

decide that only the lands fronting upon the part proposed to be improved were actually benefited. But they could not do this in advance of notice and hearing.

Weller v. St. Paul, 5 Minn. 95; *Diggins v. Brown*, 76 Cal. 318; *Mock v. Muncie*, 9 Ind. 586; *Davis v. Litchfield*, 145 Ill. 313, 21 L. R. A. 563; *State, Stees, v. Otis*, 53 Minn. 318; *Municipality No. 2 for Opening Rossignac Street*, 7 La. Ann. 76; *Continental Imp. Co. v. Phelps*, 47 Mich. 289.

The statute requires, not only that the lands benefited shall be assessed, but that the board shall view the premises.

Johnson v. Milwaukee, 40 Wis. 315; *Watkins v. Zucietusch*, 47 Wis. 513; *Watkins v. Milwaukee*, 52 Wis. 98.

Of course the board must act as a body, and not proceed from the map or their general recollection of the premises individually gained. It is a deliberative body and it must act together.

Re Paradise Road, 29 Pa. 20; *McLellan v. Kennebec County Comrs.* 21 Me. 390; *State v. Coleman*, 13 N. J. L. 99.

The action of the board in assessing damages and benefits for improvements is judicial in its nature.

State, Winans, v. Crane, 86 N. J. L. 394; *Cooley, Taxn.* 454.

An assessment for the improvement of a street by which the cost is assessed upon the property bordering the street in proportion to the frontage of each lot, without reference to the degree in which the different lots may be benefited, is unconstitutional and void.

Chicago v. Baer, 41 Ill. 306; *Chicago v. Larned*, 34 Ill. 203; *State v. Hudson*, 29 N. J. L. 105; *State, Cunningham, v. Ramsey County Dist. Ct.* 29 Minn. 62; *State, New Brunswick Rubber Co., v. Commissioners of Streets & Sewers*, 38 N. J. L. 195; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Johnson v. Milwaukee*, 40 Wis. 315; *State v. Jersey City*, 40 N. J. L. 485; *Warren v. Grand Haven*, 30 Mich. 31; *Clapp v. Hartford*, 35 Conn. 66; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760.

Taxation to pay void bonds is invalid.

Bonds like those here in question are general city bonds.

Fowler v. Superior, 85 Wis. 411; *Hebard v. Ashland County*, 55 Wis. 145; *Springfield v. Edwards*, 84 Ill. 627; *Lavo v. People*, 87 Ill. 386; *Howell v. Peoria*, 90 Ill. 104; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Drheo v. Altoona*, 121 Pa. 401; *Atchison, T. & S. F. R. Co. v. Woodcock*, 18 Kan. 20; *Perrin v. New London*, 67 Wis. 416; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215; *Carter v. Dubuque*, 35 Iowa, 416.

In *Pier v. Fond du Lac*, 38 Wis. 470, the court says: "We cannot hold that the right of such appeals is an adequate remedy to the lot owner, or that the legislature intended that it should constitute his exclusive remedy."

Johnson v. Milwaukee, 40 Wis. 315; *Watkins v. Zucietusch*, 47 Wis. 513; *Watkins v. Milwaukee*, 52 Wis. 98; *Teegarden v. Racine*, 56 Wis. 545; *Harrison v. Milwaukee*, 49 Wis. 247; *Hiron v. Oneida County*, 82 Wis. 529.

The law upon the question of short limitation laws is perfectly well settled. A reasonable time must be given.

31 L. R. A.

Howell v. Howell, 15 Wis. 55; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Hughes v. Fond du Lac*, 73 Wis. 380; *Perceles v. Watertown*, 6 Biss. 79; *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304; *Hart v. Bostwick*, 14 Fla. 162; *Baker v. Columbia County Supers.* 39 Wis. 448; *Smith v. Sherry*, 54 Wis. 114; *Sherry v. Gilmore*, 58 Wis. 324; *Eaton v. Manitowish County Supers.* 40 Wis. 668; *Hyde v. Kenosha County Supers.* 43 Wis. 129; *Smith v. Morrison*, 22 Pick. 480; *De Moss v. Newton*, 31 Ind. 219; *Smith v. Cleveland*, 17 Wis. 556.

Property is specially benefited, within the meaning of the law, when the proposed improvement would increase the value of the land, relieve it from a burden, or make it specially adapted to a purpose which enhances its value.

Lipes v. Hand, 104 Ind. 508; *Kelly v. Chicago*, 148 Ill. 90; *Cincinnati v. Batsche* (Ohio) 27 L. R. A. 536.

Local assessments may be laid on property specially benefited without any constitutional restriction, save that of section 3 and its amendment, article 11. Assessments are not subject to the constitutional rule of uniformity.

Cooley, Taxn. pp. 636, 637; *Datrymple v. Milwaukee*, 53 Wis. 178; *Lumsden v. Cross*, 10 Wis. 282; *Hale v. Kenosha*, 29 Wis. 599.

An assessment based on the contract price of the work, without even a finding that the contract price was a fair price, is erroneous.

Bingaman v. Pittsburgh, 147 Pa. 353; *Travers' Appeal*, 152 Pa. 129.

An assessment of benefits is void if it rests on the cost or the estimated cost of the improvement, and not upon an actual consideration or estimate of actual benefits.

Johnson v. Milwaukee, 40 Wis. 315; *Watkins v. Zucietusch*, 47 Wis. 513; *State, Moore, v. Ashland*, 88 Wis. 599.

An assessment is void if made arbitrarily and without view of the premises.

Johnson v. Milwaukee, and *Watkins v. Zucietusch*, *supra*; *Watkins v. Milwaukee*, 52 Wis. 98; *Charter 1891*, § 119; *Hersey v. Barron County Supers.* 37 Wis. 75.

Assessments determined arbitrarily and upon a false and illegal basis, irrespective of the actual benefit to each lot, are absolutely void.

Watkins v. Zucietusch, *supra*; *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 38 N. J. L. 410; *Springfield v. Sale*, 127 Ill. 359; *Chicago v. Baer*, 41 Ill. 306; *Chicago v. Larned*, 34 Ill. 203; *State, Cunningham, v. Ramsey County Dist. Ct.* 29 Minn. 62; *Warren v. Grand Haven*, 30 Mich. 24.

Messrs. Ross, Dwyer, & Hanich, H. H. Grace, and H. C. Sloan for defendants.

Newman, J., delivered the opinion of the court:

The point made against the general tax is not, indeed, that it was not authorized to be levied at all, but that it was not authorized to be levied in the manner in which it was levied, nor unless the item criticised—that is, the item "\$61,000. general fund"—should be included, with a detailed statement of the items which enter into it, in the general statements required to be made and filed by the board of public works and by the city comptroller. It is urged that this detailed statement is a necessary pre-

requisite to a valid levy of the city's taxes. The statute which authorizes the levy of the city's taxes, and which directs the manner of this levy, is section 102 of the city charter, which is chapter 124 of the Laws of 1891. The section reads as follows: "On or before the first day of October in each year the board of public works shall file with the city clerk a detailed statement of the amount of money that will be required for the ensuing fiscal year in their departments, and the city comptroller shall likewise file a statement of the amount required by the police department, fire department, and the remainder of the general fund, and for the propose of paying interest for the ensuing year on the public debt and 5 percent of the principal thereof. The city clerk shall, not later than the second Tuesday of October, place such estimates before the city council for their consideration, and the council shall thereupon, by resolution, levy such sums of money as may be sufficient for the several purposes for which taxes are authorized, not exceeding the limit provided by law, and in making such levy they shall take into consideration the estimated amount that will be received by the city during the fiscal year from licenses." This section evidently contemplates that a fund shall be raised in the nature of a general fund, and which it will not be a misnomer to call the "general fund," for it speaks of the "remainder of the general fund." And in other sections the charter speaks of payments to be made out of the general fund. Sections 118, 125. The section seems to contemplate that at least the amounts required by the police department and fire department are parts of the fund denominated the "general fund," for they are coupled by the conjunction "and" with "the remainder of the general fund." There are other purposes for which taxes may be lawfully levied which would seem appropriately to come within the designation of "general fund." Such are moneys for the payment of salaries to city officers, the expenses of the health department, of city hospitals, of lighting and cleaning streets, of caring for the sewers, and many other like purposes. But it was contemplated that the city comptroller should make and file an estimate of the entire amount of moneys needed to be levied for such general fund. The charter only requires the statement to specify the amount required. It is not, in terms at least, required to specify in detail. Nor is it, in terms at least, required that the common council specify, in detail, the items which go to make up the sum which it levies. Nor is it in terms limited by the amount estimated by the comptroller. But it is directed to "levy such sums of money as may be sufficient for the several purposes for which taxes are authorized," up to the limit provided by law. This seems to confide to the judgment and discretion of the common council to levy such sums as, in its judgment, are sufficient for all the several purposes for which taxes may be raised, uncontrolled by the estimates of the board of public works and the city comptroller. It would seem that the statements of these officers are designed for aids to the judgment of the common council, rather than for limitations upon its power. This view seems to be re-enforced by section 112 of 31 L. R. A.

the charter, which provides: "The directions hereby given for the assessing of lands and personal property, and levying and collecting taxes, shall be deemed directory only, and no error or informality in the proceedings of any of the officers entrusted with the same, not affecting the substantial justice of the tax, shall vitiate or in any wise affect the validity of such tax or assessment." It does not appear that a larger sum or sums were levied than were sufficient for the several purposes for which taxes were authorized, nor that any error or informality intervened affecting the substantial justice of the tax; and while it is realized that there are too few safeguards around this power of levying municipal taxes, and that it is a power liable to be abused, and which, very likely is often abused, no doubt it is a subject difficult of adequate regulation. This regulation is within the province of the legislature, not within that of the court. The court can only enforce the law as it is written by the legislature. And, even if the court should be of opinion that the manner of the levy of this particular tax was so irregular as to render the levy void, still, unless it shall also appear that the tax is excessive or unequal and unjust, so as to affect its substantial justice, a court of equity will not interfere to declare it invalid or to restrain its collection, without payment of the tax. *Fisfield v. Marinette County*, 62 Wis. 582; *Wisconsin C. R. Co. v. Ashland County*, 81 Wis. 1. So no ground is apparent on which the plaintiff can be relieved from the payment of this tax as a condition of the relief which he seeks.

The special assessments for street improvements were all made in the same manner, and all have a common vice. Both charters under which they were respectively made provide that the benefits shall be chargeable to the lots or parcels to be assessed "in proportion to the benefits secured thereto." All of these assessments were made by the frontage rule. In each case the whole amount of benefits to be assessed for the entire improvement was divided by the number of feet fronting on the improvement. This found the benefit accruing to each separate front foot fronting on the improvement. The benefit to each front foot, so found, multiplied by the number of front feet in each parcel, produced the benefit which was assessed against such parcel. This so called "assessment" was made in the office of the city engineer, and without actual view and consideration, by the board of public works, of the benefits actually accruing to each parcel by reason of the improvement. It is fundamental that the assessment of benefits shall be made by the rule of apportionment prescribed by the charter; and where the rule of actual benefits is the rule prescribed, as in these charters, such benefits can be assessed only upon an actual view of all the property in the assessment district, and an impartial comparison and estimation of the benefits actually accruing to each parcel from the improvement; and it must be made to appear, affirmatively, that the assessment has been made in substantial compliance with the authority given by the charter. *Johnson v. Milwaukee*, 40 Wis. 815; *Watkins v. Zucietusch*, 47 Wis. 513; *Liebermann v. Milwaukee*, 89 Wis. 336, and cases

cited on page 346, 89 Wis.; *Springfield v. Sale*, 127 Ill. 359. In *Johnson v. Milwaukee* the court says: "We rest our decision, not upon the rule of assessment, but upon the necessity of assessment, fairly and actually made, upon actual view of the premises to be assessed, of the benefits actually accruing to the premises by the improvement. This must have rested, in the first instance, upon the judgment and conscience of the commissioners of public works, which we could not properly have reviewed; that would have been for the common council firstly, and for the circuit court secondly. But we can require the apparent exercise of such judgment and conscience, in an apparently fair and just assessment, made under the conditions of the statute, by the board of public works, as a condition precedent to a valid charge upon the property assessed for the improvement. And where it is apparent that there was none such, it is our duty to hold invalid the attempt to charge the property liable to assessment." In *Liebermann v. Milwaukee*, the court says: "The assessment must show upon its face that the board has considered and passed upon all questions made material by the statute, and the results at which they have arrived. That which the law regards as of the substance of the proceeding, we cannot treat as immaterial, nor can presumptions supply its place. . . . We must therefore hold that the assessment in question is void on its face, for a failure to show affirmatively that it was made in conformity with the authority conferred upon the board of public works by the provisions of the charter referred to." When it is required that the assessment shall be according to benefits accruing to each parcel, an assessment by the frontage rule does not show affirmatively a compliance with the statute. While such an assessment is not necessarily erroneous, it is presumed to be so, unless the return shows that the board has considered that matter, and find that the benefits are in the proportion of the frontage of each parcel. *State v. Hudson*, 29 N. J. L. 104; *State v. Jersey City*, 38 N. J. L. 410; *O'Reilly v. Kingston*, 114 N. Y. 439; *Springfield v. Sale*, *supra*.

It is evident that these assessments each fail to show upon their face that the statute which authorized them was complied with. Hence they must be held to be void.

The plaintiff's land was not liable, at all, to assessment for the Grand avenue improvement. It did not front or abut on that improvement, and so, under the charter of 1889, was not in the assessment district.

The assessments for paving Belknap avenue, and for the grading of Hill and Ritchie avenues, were made after the enactment of the charter of 1891. The former charter had constituted the frontage upon the improvement as the district upon which benefits were to be assessed. The new charter formed no assessment district, but declared the cost of the improvement to be "chargeable to the lots and parcels of land benefited thereby." The purpose of this change is manifest. It is fair and just that each parcel of property benefited by the improvement shall bear its proportionate share of the burden. It is a matter of common knowledge that property lying in the

vicinity of such improvements often derives important benefits from them, although not fronting upon or directly contiguous to them. There necessarily devolved upon the board of public works the duty to ascertain and determine what parcels of land were or would be benefited by the improvement,—in effect, to determine the assessment district. It was the duty of that board to include within the limits of the assessment district all parcels of land which, in its judgment, fairly exercised, would be benefited. In the case of these last-named assessments, the board of public works entirely disregarded this provision of the new charter, and levied the assessments, as heretofore, upon the property fronting the improvement only; and it in no way appears that the board considered the matter, or determined, in the exercise of its judgment, that no other property would be benefited. So wide a departure from the rule of the statute cannot be without important effect upon the validity of the assessment. An assessment, under this statute, which does not distribute the burden fairly upon all the property benefited by the improvement, cannot be just and equal. While mere errors of judgment do not invalidate it, it must appear to be a fair attempt at compliance with the statute. As suggested by Ryan, Ch. J., in *Johnson v. Milwaukee*, *supra*, the court may and should require an apparent exercise of the judgment and conscience of the board of public works, in an apparently fair and just assessment, in conformity with the directions of the statute. An intentional omission from the assessment of property benefited must necessarily make the assessment unequal and unjust. *Weeks v. Milwaukee*, 10 Wis. 242-264. These assessments were made in entire disregard of the statute, and are presumed to be unequal, and that the inequality is sufficient to justify the interference of a court of equity. *Hassan v. Rochester*, 67 N. Y. 528, 536, 537; *Re New York Protestant E. Public School*, 75 N. Y. 324. And because the defects go to the very foundation of the assessment, and make it necessarily unequal, the plaintiff is not required to pay his proportion of the assessment, as a condition of relief. *Hassan v. Rochester*, *supra*; *Marsh v. Clark County Supers*, 42 Wis. 502; *Meggett v. Eau Claire*, 81 Wis. 326.

In the cases of the Belknap avenue improvement and the grading of Grand avenue, the common council issued and sold improvement bonds upon the assessments. This it is authorized by the charter (§§ 131, 132) to do as soon as the amount of benefits chargeable to the real estate has been "finally determined," and the contract for doing the work has been let, after giving thirty days' notice, by publication in a newspaper, of its intention to issue such bonds, and for collecting it from the property assessed, by instalments, as special taxes (§ 136). The charter (§ 137) also provides that "no action shall be maintained to avoid any of the special assessments of [or?] taxes levied pursuant to the same," after such improvement bonds have been issued; and that "said bonds shall be conclusive proof of the regularity of all proceedings upon which the same are based." The right to question the validity of these assessments and bonds in

this action is denied, upon the authority of these provisions of the charter. So the question is presented whether the right of the owner to contest the validity of these assessments can be lawfully taken away by so short a limitation, by a statute which provides for no actual notice. The assessments of benefits must be finally complete before the contract for doing the work can be let. § 127. The contract may be let after publication of notice for bids for one week. After the contract has been let, the improvement bonds may be issued after thirty days' notice by publication in a newspaper. No actual notice is provided for, and the bonds may be issued before the work has commenced. So that, if the statute is sustained as a valid limitation, its bar may be complete within forty days after the assessment is finally determined, and regardless of the fact whether the owner has acquired actual knowledge of the proceedings against his property. These are proceedings whereby property is to be taken *in writum*. No man's property can be lawfully taken or taxed but by due and regular process of law; nor forfeited except by his own omission seasonably to assert his right. It has been already demonstrated that these assessment proceedings are not due process of law, and are invalid to deprive the plaintiff of his property. So the plaintiff's property has not been effectually taken by these proceedings unless the plaintiff has debarred himself from contesting the validity of the proceedings by his own laches; and this depends upon the validity of this statute as a statute of limitations. All statutes of limitation proceed upon the theory that the party has forfeited his right to assert his title, in the law, by lapse of time and omission to assert it. This necessarily presupposes that a full and fair opportunity has been afforded him to try his right in the courts; for it cannot justly be considered that he is in default and laches until such just opportunity has been afforded him, and he has failed to avail himself of it. Any attempt to cut off his right without having afforded him such just and reasonable opportunity is not properly a statute of limitations at all. It savors rather of spoliation and plunder. Cooley, Const. Lim. 6th ed. 449. No doubt under a statute which provides for actual notice to the owner, a shorter limitation could be held reasonable than where constructive notice only is provided. Under this statute, many an owner may, without fault, be without actual knowledge of the pendency of proceedings against his property, until the bar of this statute has foreclosed his right; and this may all well happen before any work, such as might arrest the attention of resident owners, is actually commenced under the contract. It is not questioned that all the proceedings relating to the assessment may be supported on notice by publication only; but the fact that the notice provided for is constructive only is an element proper to be considered in determining whether the time limited affords reasonable opportunity for the owner to assert his right. No doubt such time should be allowed as would give a reasonable chance to acquire actual knowledge of the pendency of proceedings against his property, and to ascertain and assert his rights.

31 L. R. A.

No absolute rule can be laid down as to what length of time will be deemed reasonable for the government of all cases alike. Different circumstances require different rules. What would be reasonable in one class of cases would be entirely unreasonable in another. *Wheeler v. Jackson*, 137 U. S. 245, 255, 34 L. ed. 659, 663. While it is no doubt convenient and desirable, on the part of the municipality, that all questions in respect to the validity of such proceedings shall be put at rest as soon as may be, still there is no such exigency as to justify even an apparently unfair abbreviation of the rights of property owners or undue advantage taken. The time allowed should be ample to afford a reasonable probability that he would become informed of the proceedings against his property, and be fairly able to assert his right, before it is finally barred. It is considered that, plainly, this statute does not afford such reasonable opportunity, and cannot be sustained as a valid limitation. A short statute of limitation is not an allowable substitute for due process of law. It is utterly subversive of that constitutional protection to private rights of property. The fact that such short limitations have been sustained by some courts does not persuade the court that they are just and supportable on principle.

But it is said the plaintiff's remedy is limited to an appeal from the assessment. It is true that an appeal is given to the owner who feels aggrieved by the determination of the board of public works; but this appeal does not stay the progress of the work if the contract has been let, nor the issuing of the certificate against the lot for the benefit assessed; and, in case the appellant succeeds on his appeal, the only remedy given him is that "the difference between the amount charged in the certificate so issued and the amount adjudged to be paid as benefits accruing to the real estate described in the certificate shall be paid by the city out of the general fund." Section 125. It is also declared that the appeal so given "shall be the only remedy of the owner of any parcel of land . . . for the redress of any grievance he may have by reason of the making of such improvement." Section 126. It is obvious that upon this appeal only the proper amount of benefits to the particular lot can be investigated. No remedy appropriate to any other wrong is given. It furnishes no remedy by which to avoid an unequal and void assessment. Clearly, the appeal is no adequate remedy for the lot owner in this case; and it will not be presumed that the legislature intended the appeal given to be the exclusive remedy, except as to matters which can be redressed upon the appeal. *Pier v. Fond du Lac*, 38 Wis. 470.

The Columbian Fair stone tax was altogether unauthorized and void.

It was error to limit the amount of costs to be recovered to \$30. The court had exhausted its power over the matter of the costs when it had determined that the plaintiff should recover them. The law determines their amount. Rev. Stat. 2918, subsec. 7; Id. § 2921; *Re Carroll's Will*, 53 Wis. 228.

The judgment should be reversed on both appeals. On payment of the sum of \$421 the taxes for general fund hereby held valid, and

the sum of \$4,497.80, for taxes and assessment conceded by both parties to be valid,—in all, the sum of \$4,968.80, with legal interest; that is, with interest at the rate of 7 per cent per annum up to March 27, 1893, and 6 per cent per annum thereafter up to the time of payment (*Pierce v. Schutt*, 20 Wis. 424; *State v. Guenther*, 87 Wis. 675).—the tax certificate and the several special assessments, hereby de-

clared void; and the tax for the Columbian Fair, should be vacated and set aside.

The judgment of the Circuit Court is reversed on both appeals, and the cause remanded, with directions to render a judgment in accordance with this opinion.

Marshall, J., took no part.

Petition for rehearing denied March 10, 1896.

CALIFORNIA SUPREME COURT.

Grace E. LEWIS, *Appt.*,

v.

Joseph T. TERRY *et al.*, *Respts.*

(.....Cal.....)

One who sells a folding bed, representing it to be safe for use when he knows it to be dangerous, is liable for injuries caused by the defects in the bed to any person who uses it, although there may be no privity of contract between them.

(January 21, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by a defect in furniture sold by defendants under a warranty of fitness for the use to which it was to be applied. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Clement, Cannon, Kline, & Stradley, for appellant:

Where a manufacturer sells an article which is so defectively constructed as to render it dangerous to human life, and a third person is injured by reason of such defective construction, the manufacturer is liable in damages to such third person for his injury, for the reason that a duty devolves upon the manufacturer toward third persons, independently of any privity of contract, to use care in the construction of such article; and this rule applies to vendors having knowledge of the defects.

Heaven v. Pender, L. R. 11 Q. B. Div. 506; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Coughtry v. Globe Woolen Co.* 56 N. Y. 124, 15 Am. Rep. 387; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Davidson v. Nichols*, 11 Allen, 519; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 498; *Hourigan v. Nowell*, 110 Mass. 470; *Whittaker's Smith*, Neg. pp. 10-17, note; *Callahan v. Warne*, 40 Mo. 131; *Thomp. Neg. p. 232, § 2*; *Shearm. & Redf.*

NOTE.—As to liability to third persons for sale of dangerous article, see also *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818; *Heizer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821; also, as to sale of dangerous food or drug, see note to *Craft v. Parker* (Mich.) 21 L. R. A. 139.

31 L. R. A.

Neg. 4th ed. § 117; *Davis v. Guarnieri*, 45 Ohio St. 470; *Fleet v. Hollenkemp*, 13 B. Mon. 219.

Respondents are liable for the injury complained of because of their false representations as to the safety of the bed.

Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 387; *Shearm. & Redf. Neg. 4th ed. § 117*; *Wellington v. Downer Kerosene Oil Co. supra*; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821; 1 Wait, Act. & Def. pp. 137, 138.

Mr. George E. Lawrence, for respondent:

Without the warranty or representations defendants would not be liable to their vendees.

Civil Code, § 1764.

The principle applying would be that of *causent emptor*.

Civil Code, § 1767; *Johnson v. Powers*, 65 Cal. 179; *Byrne v. Jansen*, 50 Cal. 624.

This action, being based upon the contract, cannot be maintained for the reason that the complaint shows there was no privity of contract between plaintiff and defendants.

Winterbottom v. Wright, 10 Mees. & W. 109; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 548; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Maguire v. Magee*, 22 W. N. C. 159; *Necker v. Harvey*, 49 Mich. 518; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Deford v. State*, 30 Md. 195; *Martin Safe Co. v. Ward*, 46 N. J. L. 19; *Sproul v. Hemmingway*, 14 Pick. 1, 25 Am. Dec. 350; *Munn v. Chicago, R. I. & P. R. Co.* 86 Mo. 350; *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376; *Gordon v. Livingston*, 12 Mo. App. 267; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 13 L. R. A. 746; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322 (1891); *Rapson v. Cubitt*, 9 Mees. & W. 710; *Martin Safe Co. v. Ward*, 46 N. J. L. 19; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185; 1 Thomp. Neg. pp. 232-238; *Whart. Neg. 2d ed. pp. 367-369*; *Boswell v. Laird*, 8 Cal. 466, 68 Am. Dec. 345; *Panjoy v. Seales*, 29 Cal. 249; *Albany v. Cuntiff*, 2 N. Y. 171; *Bailey v. New York*, 3 Hill, 531.

This action cannot be maintained on the ground of negligence for the reason that duty is an essential element, and defendants owed no duty to plaintiff.

Shearm. & Redf. Neg. 4th ed. § 8; *National*

Sar. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Marcia Safe Co. v. Ward*, 46 N. J. L. 19; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 38 Am. Rep. 1; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Heaven v. Pender*, L. R. 9 Q. B. Div. 303, L. R. 11 Q. B. Div. 503; *Thomas v. Winchester*, 6 N. Y. 387, 57 Am. Dec. 455; *Curtin v. Somerset*, 140 Pa. 80, 12 L. R. A. 322; 2 Thomp. Neg. p. 1227, § 2.

An action which in substance depends upon a breach of contract cannot be brought by any person not a party to the contract, even though it be presented in the form of an action for tort.

Longmeid v. Holliday, 6 Exch. 761.

This folding bed cannot with any regard to the accurate use of language be termed a dangerous instrument.

Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 615, 15 L. R. A. 821; *Roddy v. Missouri P. R. Co.* 104 Mo. 284, 12 L. R. A. 746.

Plaintiff occupied the bed at the request and invitation of Mr. and Mrs. Apperson, and not at the request of defendants, and therefore she is not entitled to recover.

Blakemore v. Bristol & E. R. Co. 8 El. & Bl. 1035; Whart. Neg. pp. 367-370.

Fraud in misrepresentations can only be sued on by the person to whom, or to whom it is intended, the statement shall be made, and who in consequence thereof, and confiding therein, has been injured.

8 Am. & Eng. Enc. Law, p. 643; *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Blakemore v. Bristol & E. R. Co. supra*; Wood's Mayne, Damages, 1st Am. ed. § 83, p. 116.

Britt, C. filed the following opinion:

It is alleged in the complaint in this case, among other things, that defendants were engaged as copartners in the business of selling household furniture, and that among the wares dealt in by them were certain folding beds, which were represented and warranted by defendants to their customers and the public to be safe for use; that defendants, in the course of said business, sold and delivered one of said beds to a Mr. Apperson and his wife, and expressly represented and warranted to them that such bed was so constructed that it would stand upright against the wall during the daytime, inclosing necessary bed furniture, and at night its front could, with little effort, be lowered to a horizontal position, by means of hinges at the bottom; that a solid piece of iron inclosed in framework at the back of the bed acted as a balance to the front part while being lowered, and rendered it easy to raise or lower the same with perfect safety; that, as soon as the front part was lowered, the legs of the same would automatically descend, and securely lock themselves, so that the outer end of the bed would be firmly supported in its horizontal position upon its said legs. It is further alleged that there was an inherent and latent defect in said bed, so that the said legs would sometimes fail to adjust and secure themselves, with the result that, if any weight should be placed on the bed, the heavy upright frame would be precipitated with

such force upon the lowered portion of the bed as to crush, wound, and even kill any one reclining thereon, and that such defect rendered the bed dangerous to all who might use it; that defendants, with full knowledge of such defect and of such danger, sold the bed to the Appersons, without warning them thereof, and assured them that it was perfectly safe; that plaintiff rented a room from the Appersons, and, on the day the bed was purchased from defendants by them, it was placed in such room for plaintiff to sleep on; that a few days later the plaintiff, being about to retire for the night, opened and let down the bed, and, the legs thereof being apparently secure, she, in the course of her preparations for retiring, leaned with her left arm, upon the side of the bed; and, while she was in this attitude, the heavy upright framework of the bed fell forward and downward, upon the horizontal part, and upon the plaintiff, breaking her arm, and otherwise injuring her, to her damage, etc. A demurrer to this complaint, on the ground that it fails to state facts sufficient to constitute a cause of action, was sustained, and judgment passed for defendants.

The complaint is faulty in not stating directly that the fall of the bed was caused by the latent defect described, but, as the argument of the parties has proceeded on the theory that such was the fact, we may join in that assumption. *Schubert v. J. R. Clark Co.* 49 Minn. 335, 15 L. R. A. 818. We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. *Coughtry v. Globe Woolen Co.* 56 N. Y. 127; 15 Am. Rep. 387; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821; *Winterbottom v. Wright*, 10 Mees. & W. 109 (the leading case); *Shearm. & Redf. Neg.* § 116; 1 Beven, Neg. pp. 60, *et seq.* But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts. "It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other, who is not himself in fault." *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, per Gray, J.; *Schubert v. J. R. Clark Co.* 49 Minn. 331, 15 L. R. A. 818; *Elkins v. McKean*, 79 Pa. 498; *Shearm. & Redf. Neg.* § 117. See Civil Code, §§ 43, 1708. The liability of the wilful wrongdoer in like instances is recognized in several cases cited

in support of the judgment. *Longmeid v. Holliday*, 6 Exch. 765; *Heizer v. Kingsland & D. Mfg. Co.*, *supra*.

The fact insisted upon by respondents that a bed is not ordinarily a dangerous instrumentality is of no moment in this case. If mere non-feasance or perhaps misfeasance were the extent of the wrong charged against defendants, that consideration would be important (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455); but the fact that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use when known to be really unsafe, for the danger is thus rendered more insidious.

Nor is the further point that the chain of causation implicating defendants in the injury was broken by the intervention of the Appersons, as the persons who furnished

the bed immediately to plaintiff, available to defendants on this appeal. To have that effect, it must appear that the Appersons knew of the defect in the structure of the bed, and so were a culpable intervening cause, and this does not appear on the face of the complaint. *Pastene v. Adams*, 49 Cal. 87: 1 Beven, Neg. p. 76. The judgment should be reversed, with instructions to the court below to overrule the demurrer.

We concur: **Haynes, C.; Belcher, C.**

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment is reversed*, with instructions to the court below to overrule the demurrer.

Rehearing denied.

MISSISSIPPI SUPREME COURT.

QUEEN CITY MANUFACTURING COMPANY, *Appt.*,

P. E. BLALACK,

(.....Miss.....)

1. **The objection that the ground of an attachment** sued out on a large demand consisting of many items, some of which are due and others not, is maintainable only as to a few of them as representing debts fraudulently contracted, must be made in the trial court to be available on appeal.
2. **A reversal will not be awarded** for the granting of erroneous instructions to the appellee if the appellant has himself asked and received the same instructions.
3. **A defendant in attachment who appears in open court and consents that judgment may be entered** for the full sum demanded cannot on appeal, where the declaration, notes, and open accounts sued on are absent from the record, without exception taken at the trial on the ground that they were not filed, assert that the debt sued for was not due, or that the notes and accounts were not filed.
4. **The shipping by an insolvent corporation of its manufactured products out of the state** to fill orders by which the goods were to be delivered in other states, so that they remain its property when sent out of the state, is a removal of its property beyond the state which constitutes a ground for attachment, although its business cannot be successfully conducted unless the property is sent outside the state for sale.

(January 6, 1896.)

NOTE.—Decisions as to the right of attachment for removal of property from the state in regular course of business seem not to be numerous. The subject is somewhat developed by the present decision.

For fraud which will sustain an attachment, see *note to Weare Commission Co. v. Druley* (Ill.) 30 L. R. A. 466.
31 L. R. A.

A PPEAL by defendant from a judgment of the Circuit Court for Lauderdale County in favor of plaintiff in an attachment proceeding to collect a debt. *Affirmed*.

The facts are stated in the opinion.

Messrs. McIntosh & McIntosh and Hamm, Witherspoon, & Witherspoon for appellants.

Messrs. Miller & Baskin for appellee.

Cooper, Ch. J., delivered the opinion of the court:

The appellee sued out an attachment against the Queen City Manufacturing Company to recover the sum of \$7,500, claimed to be due "on an open account and notes." The grounds of attachment stated were: (1) That the defendant had removed, or was about to remove, its property out of the state; (2) that it had assigned or disposed of, or was about to assign or dispose of, its property or rights in action, or some part thereof, with intent to defraud its creditors; (3) that it had property or rights in action which it concealed and unjustly refused to apply to the payment of its debts; (4) that it fraudulently contracted the debt or incurred the obligation for which suit was about to be brought. The defendant, by its plea in abatement, traversed the grounds of suing out the attachment as set out in the plaintiff's affidavit, and on this plea the case was submitted to a jury, which found that the attachment was rightfully sued out. The defendant, having lost on the issue thus made, declined to plead to the merits, but consented in open court that the debt sued for was correct and owned by it to the plaintiff, and that judgment might be rendered therefor, which was accordingly done.

The fourth ground of attachment alleged by the plaintiff, *viz.* that the defendant fraudulently contracted the debt sued on, is the only one stated in the affidavit upon which, under our statute, an attachment may be issued on a debt not due. Counsel for appellant earnestly contends for a reversal of the judgment.

appealed from on the ground that a large part of the demand sued on was not due when the attachment was sued out, and because as to no part of the debt except the sum of \$300, arising in a distinct transaction, is there a suggestion in the evidence tending to show it to have been fraudulently contracted. The argument is that to maintain the verdict and judgment will be to permit the plaintiff to have recovery on a large part of his demand, for which, on the most favorable interference for him which can be drawn from any view of the evidence, he was not entitled either to sue out an attachment or to sue in the common action. The difficulty against which the appellant contends in this respect is, (1) that a case is sought to be here tried which was not tried in the lower court; (2) that the defendant, by its own instruction (the sixteenth), submitted to the jury the proposition that the attachment was maintainable if any one or more of the grounds alleged was true; and (3) because it does not certainly appear from the record that any part of the debt was not due when the writ was sued out. We fully appreciate the disadvantage to which a defendant may be subjected when an attachment is sued out on a large demand, consisting of many items some of which are due and others not, and the ground of attachment is maintainable only as to a few of them as representing debts fraudulently contracted. But the defendant should object in the trial court to such proceeding, in order that, the court's attention being directed to the matter, the correction may be there applied. It is settled by several distinct decisions in this state that a reversal will not be awarded here for the granting of erroneous instructions to the appellee if the appellant has himself asked and received the same instructions, for we cannot say that the jury was misled by the instructions of the appellee rather than by those of the appellant, and one may not complain of action which he has himself invoked. *Liverpool & L. & G. Ins. Co. v. Van Os*, 63 Miss. 431, 56 Am. Rep. 810.

No declaration appears in the record, but the clerk certifies that one was on file, which has been lost from the files. The notes and open accounts upon which the suit was brought are also absent from the record, but no exception was taken in the court below to the trial of the cause on the ground that they had not been filed, and the defendant appeared in open court, and consented that judgment might be entered for the full sum demanded. Under these circumstances the defendant cannot now assert that the debt sued for was not due, or that the notes and accounts were not filed in the cause.

The principal controversy in the court below seems to have been over the proposition that the general assignment made by the defendant the day after the attachment was sued out, and which it was confessedly about to make at the time the writ was issued, was a fraudulent assignment, and to this issue the instructions were chiefly directed. But upon

another of the issues presented by the pleadings we think the law, on the facts disclosed by the record, was with the plaintiff, and entitled him to the verdict. The plaintiff introduced in evidence the books of the railroads doing business at Meridian, and the clerks and employees of said roads, and by them proved that the defendant, at times when the other evidence shows it to have been insolvent, was engaged in shipping its manufactured products out of the state. To meet this evidence the defendant introduced evidence to show that the goods sent out of the state were shipped out to fill orders sent from other states, and that in fact the goods shipped were, when shipped, the property of the consignees. But this evidence shows that in several instances the goods were to be delivered by the defendant in the other states, and so remained its property when sent out of the state. The consignments to the Hatcher Manufacturing Company, so far as can be gathered from the record, were under a contract requiring delivery of the property at Columbus, Ga., and, since the goods remained the property of the defendant until delivered, the shipment thereof was a removal of the property of the defendant beyond the state, and subjected it to attachment. We say this appears to have been the case, for, although the contract under which these shipments were made seems to have been introduced in evidence, we have been unable to find it copied into the record; but the terms of the contract as testified to by the witness Price show that it and certain other contracts required the delivery of the goods at points beyond the limits of this state, and such delivery was the consummation of the contract. *Pearson v. State*, 66 Miss. 510, 4 L. R. A. 835. Mr. Price testified that certain of the goods consigned to one Grolock at Milledgeville, Ga., were at the risk of the shipper until actually delivered at that point. In this condition of the record, and assuming, as we must, that the contracts testified to by the witness were such as he says they were, the court should have given a peremptory instruction for the plaintiff. *Stephenson v. Swan*, 65 Miss. 407. In *Louvenstein v. Bew*, 68 Miss. 265, we repudiated the proposition that an insolvent debtor might lawfully send his property out of the state because such was the usual course of business. It is immaterial that the business cannot be successfully conducted unless the property may be sent to markets outside the state for sale. When the concern becomes insolvent, it must go into liquidation, or take the consequences of so acting as to subject itself to attachment.

The points made by the claimant on appeal are without merit. There is no bill of exceptions to what occurred on the trial of the claimant's issue. The attachment was sued out and levied before the execution of the assignment, and nothing that was done in execution of the assignment can displace the lien lawfully secured by the attachment.

Affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Hugh HEARNS, *Appt.*,
v.
WATERBURY HOSPITAL.

(.....Conn.)

A charitable corporation maintaining a hospital is not liable for injuries caused by personal, wrongful neglect of servants who have been selected with due care.

(April 5, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant in an action brought to recover damages for negligent treatment of plaintiff while a patient in the defendant hospital. *Affirmed.*

The facts are stated in the opinion.

Messrs. Webster & O'Neil and William Kennedy, for appellant:

It may be that the law does not impose upon a hospital any duty towards the patients therein receiving public aid, or the aid of trust funds, more than an expenditure of the fund; but it seems that a hospital owes a very different duty to a patient who pays than to a non-paying patient.

Gooch v. Association for R. of A. I. F. 109 Mass. 558.

It cannot be said, on looking into this record, that this defendant is in any sense a "public charity."

American Asylum v. Phenix Bank, 4 Conn. 172, 10 Am. Dec. 112.

A corporation for business purposes may incidentally contemplate benevolent results; but this does not make it a public charitable corporation.

People, Blossom, v. Nelson, 46 N. Y. 477.

It is very doubtful if a devise to this corporation could be held valid as a gift to "public and charitable uses," unless the words of the devise limited the use to which the funds could be put.

Bristol v. Bristol, 53 Conn. 242; *Adye v. Smith*, 44 Conn. 60, 26 Am. Rep. 424; *Hughes v. Daly*, 49 Conn. 34.

Even if it could be said that this hospital is such as all would agree was a "public charity," why is it that the funds of such an institution should be exempt?

In *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223, s. c. 1 Thomp. Neg. 541, extensive note, it was held that the private corporation operating a public canal, must pay damages to any one injured by reason of such canal being out of repair.

Mersey Docks & Harbour Board v. Gibbs, L. R. 1 H. L. 93, s. c. 1 Thomp. Neg. 581, extensive notes, held that a corporation en-

trusted with the performance of a public duty, receiving no profits, is liable to one injured.

This *Docks Case* has been affirmed, and liability insisted upon in every instance where there is a corporate body charged with a duty to perform.

Winch v. Thames, L. R. 7 C. P. 458 (1872); *Smith v. West Derby*, L. R. 3 C. P. Div. 423 (1878); *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795 (1896); *Geddis v. Bann Reservoir Proprs.* L. R. 8 App. Cas. 430; *Coe v. Wise*, L. R. 1 Q. B. 711; *Nitro-Phosphate & O. C. M. Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503; *Queen v. Williams*, L. R. 9 App. Cas. 418; *Lyme Regis v. Henley*, 3 Barn. & Ad. 77; *Hill v. Metropolitan Asylum Dist.* L. R. 4 Q. B. Div. 433, L. R. 6 App. Cas. 193; *Morton v. New York*, 140 N. Y. 207, 22 L. R. A. 241; *Jones v. New Haven*, 34 Conn. 1; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 109; *Weed v. Greenwich*, 45 Conn. 170; *Greenwood v. Westport*, 63 Conn. 587.

Heriot's Hospital v. Ross, 12 Clark & F. 513, was founded on *Duncan v. Findlater*, 6 Clark & F. 908; and *Duncan v. Findlater* was expressly overruled in the *Mersey Docks Case*, *supra*.

It has been decided in England that whenever a duty is imposed by statute upon public officers, and costs incidentally arise in questioning the propriety of acts done in the fulfillment of that duty, the public officers have a right to defray those expenses out of the funds they are authorized to administer.

King v. Tower Hamlets Comrs. 1 Barn. & Ad. 232; *Rez v. Essex*, 4 T. R. 591; Addison, Torts, 733.

And whenever necessary expenses are incurred in the execution of a trust, or in performance of the duties thrown on any persons, and arising out of the situation in which they are placed, such persons are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust.

Atty. Gen. v. Norwich, 2 Myl. & C. 425; *Lewis v. Rochester*, 30 L. J. C. P. 169; Addison, Torts, 733.

Expenses incurred through blunders or negligence may always be charged upon a public or trust fund.

Company of Proprs., etc. v. Local Bd. of Health, 8 El. & Bl. 812.

A trustee employed a servant to fell trees upon the trust estate, and the servant carelessly felled a tree upon a third person, who recovered a judgment against the trustee for the injury. The amount was allowed to the trustee in his account.

Bennett v. Wyndham, 4 De G. F. & J. 259; *Duncan v. Findlater*, 6 Clark & F. 894; *Heriot's*

NOTE.—The decision in the above case reinforces the doctrine of the nonliability of a charitable institution for negligence of its employees, as stated in the note to *Williamson v. Louisville Industrial School* (Ky.) 23 L. R. A. 200. For later cases see also *Downs v. Harper Hospital* (Mich.) 25 L. R. A. 602; *Elghy v. Union P. R. Co.* (Iowa) 27 L. R. A. 206; *Union P. R. Co. v. Artist* (C. C. App. 8th C.) 23 L. R. 31 L. R. A.

A. 581 (the two last cited being cases of railroad hospitals); and *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan* (Ind.) 27 L. R. A. 840 (this being a case of charitable employment of physician for an employee).

For liability of such a charitable corporation for maintaining a nuisance, see *Herr v. Central Ky. Lunatic Asylum* (Ky.) 28 L. R. A. 204.

Hospital v. Ross, 12 Clark & F. 517; *Mersey Docks & Harbour Board v. Gibbs*, 11 H. L. Cas. 686, 13 L. R. 1 H. L. 93.

Want of funds with which to repair is no defense to an action for negligence.

Hartnall v. Ryde Comrs. 4 Best & S. 861; *Orby v. Ryde Comrs.* 5 Best & S. 743; *Walsh v. New York & B. Bridge*, 96 N. Y. 427.

If the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.

Bennett v. Whitney, 94 N. Y. 302.

There are offices which, though created for the public benefit, have duties which are due to individuals exclusively. In these cases instead of individuals being benefited by the performance of public duty, the public is to be incidentally benefited by the performance of duties to individuals.

If the duty has been neglected the individual injured may have his action.

Hayes v. Porter, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Tardos v. Bozant*, 1 La. Ann. 199; *Teall v. Pelton*, 1 N. Y. 537, 49 Am. Dec. 352, 53 U. S. 12 How. 284, 13 L. ed. 990; *Bishop v. Williamson*, 11 Me. 495; *Christy v. Smith*, 23 Vt. 663; *Ford v. Parker*, 4 Ohio St. 576; *Brown v. Lester*, 13 Smedes & M. 892; *Bank of Mobile v. Marston*, 7 Ala. 108; *Amy v. Barkholder*, 78 U. S. 11 Wall. 136, 20 L. ed. 101.

Messrs. Stephen W. Kellogg and John P. Kellogg, for appellee:

There is no question that a hospital like this is a charitable institution.

American Asylum v. Phoenix Bank, 4 Conn. 177, 10 Am. Dec. 112; 1 Bl. Com. 471; 2 Kent, Com. 275; *Ould v. Washington Hospital*, 95 U. S. 303, 24 L. ed. 450.

A charitable institution like the defendant is not liable for the negligence or faults of its agents, physicians, or attendants.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436; *Maxmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Van Tassel v. Manhattan Eye & Ear Hospital*, 39 N. Y. S. R. 781; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L. R. A. 417; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Richmond v. Long*, 17 Gratt. 375; *Harris v. Woman's Hospital*, 27 Abb. N. C. 43; *Laubheim v. De Koninklijke Nederlandsche S. B. Maatschappij*, 107 N. Y. 228; *Glavin v. Rhode Island Hospital*, 12 R. I. 425, 34 Am. Rep. 675; *Union P. R. Co. v. Artist*, 60 Fed. Rep. 865, 23 L. R. A. 581; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, note; *Heriot's Hospital v. Ross*, 12 Clark & F. 507.

There can be no recovery against a charitable corporation like this defendant, for any wrongful act or negligence of the agents or employees of the corporation and the officers or managers of the same.

Shearm. & Redf. Neg. § 381; *Beach, Corp. § 751*.

The defendant cannot be made liable in this case by reason of the fact that the complaint is in the form of contract instead of tort.

Downes v. Harper Hospital, 101 Mich. 555, 25 L. R. A. 602.

31 L. R. A.

Hamersley, J., delivered the opinion of the court:

The Waterbury Hospital was incorporated, by special act of the legislature, "for the purpose of establishing and maintaining a hospital in the town of Waterbury." Under this authority it was organized "for the purpose of furnishing medical and surgical care, nurses, medicines, and food, to patients suffering from disease or from injuries." It has no capital stock, and its members can derive no profit from the corporation. These features clearly indicate a "charitable corporation," within the meaning of our law. *American Asylum v. Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112; *Bishop's Fund v. Eagle Bank*, 7 Conn. 476; *Hamden v. Rice*, 24 Conn. 350. To this hospital the plaintiff applied for treatment of a fractured kneecap, and brings this action to recover damages for injuries caused, as he claims, by the unskillful and negligent treatment which he received at the hospital. The complaint, after stating the incorporation of the hospital, and the adoption of certain by-laws, alleges that the plaintiff requested of the proper officers admission to the hospital, and promised to pay the defendant such reasonable compensation as it should demand; that the defendant, in consideration thereof, agreed to treat him with care and skill, and furnish him with surgical care, etc., for that purpose; that the defendant was guilty of negligence in the manner specified, and thereby violated its said agreement and duty, whereby the plaintiff was injured, etc. The defendant's answer denies the negligence and injury, and sets up a special defense to the action, reciting the purposes of its incorporation, and alleging that its by-laws provided that "neither the medical and surgical staff, nor physician or surgeon designated by them, nor any officer of the corporation, shall receive compensation from the hospital in any form for the duties performed in its behalf." To this special defense the plaintiff demurred. The court below overruled the demurrer, and gave judgment for the defendant, and the plaintiff appealed from that judgment.

The demurrer to the defendant's answer cannot entitle the plaintiff to judgment if his complaint is insufficient. We therefore pass over the question which might have been raised, as to the special defense alleged being a strictly legal way of presenting the defendant's claims, and consider the only question argued before us, namely, Does the negligence alleged in the complaint entitle the plaintiff to recover damages from the defendant? The negligence which caused the injury is stated to have been that of the attending surgeon and attending nurses while in performance of their duties, and in order to confine the issue as closely as possible, it was stipulated by the parties that, solely for the purpose of the disposition of this appeal, and without prejudice to any future proceedings, the court should assume, upon the record, that the defendant exercised due care in the selection of nurses, physicians, and surgeons, by whose alleged negligence or want of skill and attention the plaintiff was injured. Possibly it might be claimed that

the complaint raises the further question of the defendant's liability for its own negligence in failing to perform its alleged duty of appointing a house physician, or "intern," so called; but such claim has not been made, and we do not think it can properly be made upon this appeal. Even if the question were not excluded by the stipulation of the parties, the record fails to show that it was raised on the trial and decided by the court below. It is not specified in the reasons of appeal, and in the argument before us was not discussed. The only question with which we have to deal is the liability of the defendant for the negligent conduct of physicians and nurses employed by it, and in the selection of whom it has exercised due care. The conclusion we have reached makes it unnecessary to pass upon the question whether the hospital's attending physicians can really be regarded as standing to the corporation in the relation of servant to master, or to discuss the nature and extent of the corporate liabilities of an eleemosynary corporation. All questions essential to the disposition of the case presented by this appeal are settled by deciding upon the liability of the defendant for the negligence of its servants,—i. e. when a corporation like the defendant employs a servant who does not represent it in the way that every corporation must be represented by its directors or managers, but is simply employed for a special work in the same manner as if employed by an individual for the same work, is such corporation liable for an injury caused in the course of his employment by such servant, and due solely to his negligent conduct?

This question has never been decided in this state. It has, however, arisen in other states and in England, and has been so intermingled with the different one of the corporate liability of eleemosynary corporations for their own corporate negligence that the review we make of cases illustrating the treatment the subject has received from other courts will necessarily include some cases bearing more directly on the latter question.

The question arose in England in 1824, in the court of common pleas, in the case of *Huli v. Smith*, 2 Bing. 156. Commissioners for the town of Birmingham ordered a tunnel through a public street. The surveyor and contractor appointed by them to build it failed to put up guard rails or to provide lights. The court held that the commissioners were not liable,—not because such a corporation or quasi corporation for public purposes was not liable for its negligence; not because the surveyor and contractor were not the servants of the corporation (the early case of *Bush v. Steinman*, 1 Bos. & P. 404, had not then been overruled); but because the rule of *respondent superior* did not apply. Best, Ch. J., said: "The maxim of *respondent superior* is bottomed on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which a third person may sustain from it." And so the reason of the rule does not apply to trustees for public purposes, acting according to their best judgment and with the best advice.

31 L. R. A.

In 1839, *Duncan v. Findlater*, 6 Clark & F. 894, was decided by the House of Lords. It was a Scotch case,—an action against the trustees of a turnpike road for injuries caused by the negligence of a surveyor appointed by them. The only question actually decided in this case was that the trustees were not liable for an injury caused by the neglect of a person not standing in the relation of a servant to the trustees. But the language of Lord Cottenham went further, and stated the principle that unpaid trustees for public purposes can in no case be liable in their corporate or quasi corporate capacity. This statement was rejected in subsequent cases, and in *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93, was distinctly held unfounded in law.

The same year *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223, was decided, and held that when a statute of incorporation authorized a company to construct a canal, and did not in special terms impose any duty in reference to its use, the general law imposed upon the company the duty to use reasonable care in making navigation secure. The case is pertinent only because it defines the principle of implied corporate duty corresponding to granted corporate powers, which principle subsequent cases hold applicable to powers granted to trustees for public purposes and corporations for charitable purposes, as well as to corporations organized for profit.

Heriot's Hospital v. Ross, 12 Clark & F. 507, decided in 1846, has been frequently cited in American cases. The action was an attempt to apply trust funds given by a private donor for founding a hospital for the maintenance of fatherless boys, to be governed in pursuance of statutes established by him, towards the payment of damages caused by a refusal of the trustees of the fund to obey the statutes of the founder in respect to an applicant for admission to the hospital. The Scotch court of session ordered damages to be assessed against the fund, and upon appeal to the House of Lords two questions were presented: Did the statutes of the founder give to every eligible person a right to admission on application, without any discretion in the trustees as to selection? And, second, can the damages caused by the wrongful refusal of trustees to admit an applicant entitled of right to admission be recovered from the trust fund? The house refused to consider the first question, and reversed the order of the court of session on the ground that the wrong, if any, done to the applicant, was done by the individual trustees who voted against his admission, and that they were liable in an action, and the trust fund was not. In *Duncan v. Findlater*, *supra*, the claim had been made that the Scotch practice of using trust funds to pay damages for injuries caused by their managers was authorized by Scotch law, and the House of Lords had decided that it was not authorized by Scotch law; and now, within a few years of that decision, when a Scotch court again holds that the condemned practice is authorized by Scotch law, the house makes short work of the case, refuses to consider a doubt-

ful and important question involved, or to discuss an authority, except *Duncan v. Findlater*, which had not been duly respected. The pith of the case appears in the remarks of each of the law lords in reference to *Duncan v. Findlater*. Lord Brougham says: "It would have been better had the court paid more attention to the high authority of that case as decided in this house than here appears to have been paid to it." The main significance of *Heriot's Hospital v. Ross* is in the assertion of the supremacy of the house of lords in determining questions of Scotch law. The uniform severity with which the case has been ignored by the courts at Westminster, in the cases which have since dealt elaborately with the question of the liabilities of corporations for public and charitable purposes, indicates that it is not regarded as an authority on the subject in that jurisdiction, and certainly there is nothing in the case that can aid the courts of other jurisdictions.

Holliday v. St. Leonard's, 11 C. B. N. S. 192, decided in 1861, held that the defendants, the vestry of a parish, were not liable for the negligence of servants in the performance of a public duty with which they were intrusted by statute. The case is decided on the ground that trustees for public purposes are exempt from the application of the rule of *respondent superior* which would apply to private persons under like circumstances. It was afterwards claimed that the opinion of Erle, Ch. J., seemed to favor the erroneous dictum of Lord Cottenham in *Duncan v. Findlater*, that the exemption rested on the immunity of such corporations from all corporate liability, and not the exemption from the application of the rule of *respondent superior* as stated by Best, Ch. J., in *Hall v. Smith*; but when this claim was pressed in argument of *Coe v. Wise*, 5 Best & S. 440, Erle, Ch. J., said, "I certainly never intended so wide a proposition."

In 1863, the court of queen's bench, in the case of *Hartnall v. Ryde Comrs.* 33 L. J. Q. B. 39, held that trustees for public purposes charged with not having performed a duty cast on them by statute were liable for special damage; and the court distinguished the case from *Metcalfe v. Hetherington*, 11 Exch. 257, where such trustees were held not liable, because in that case the duty alleged to have been neglected did not clearly appear to have been imposed.

In 1864, *Coe v. Wise*, *supra*, was tried in the court of queen's bench. Commissioners were directed by statute to make a cut, and maintain at its opening a sluice to exclude tidal waters. The sluice was properly made; but, owing to want of care in the persons employed to maintain it, it burst, and flooded adjoining lands. There was no proof of negligence in employing unskilful agents. A majority of the court (Mellor, J., and Cockburn, Ch. J.) held the defendant not liable. Blackburn, J., dissented. Mellor, J., places the exemption from liability on the ground that the statute in this case did not impose an absolute duty to maintain the sluice, but that the real duty imposed on the trustees was bona fide to employ such agents as they

believed to be skilful. He assumes the corporate liability for violation of corporate duty in all cases, irrespective of the objects of the corporation, and classifies the cases maintaining the liability of trustees for public purposes as follows: (1) Individual liabilities, where trustees exceed or abuse powers; *i. e.* where the wrongful act is individual and not corporate, the individual and not the corporation is liable. (2) Where a duty imposed on trustees has been violated by reason of orders given by them for doing the acts from which damage resulted; *i. e.* liability follows when the negligence is strictly corporate negligence, and not the collateral negligence of servants. (3) Where trustees are authorized to maintain works of a trading character, *i. e.*, works to be supported by selling the right to use them (in their nature a substitution on a large scale for individual enterprise), in such cases, although the quasi corporation is organized for public purposes, yet its corporate liability is not confined to negligence resulting from its direct corporate act, but includes negligence resulting from conduct of its servants, apparently on the ground that the duties imposed by statute on such quasi corporation towards the persons to whom it sells the use of the works it is authorized to maintain cannot be distinguished from those of a railroad or canal company in dealing with those who purchase the use of their works, and are not affected by the charitable object of the corporation. There is no such element of trading use in the works maintained by the defendant. Cockburn, Ch. J., places the exemption from liability on the ground that the negligence complained of is that of servants only, and also that, upon proper construction of the statute under which the trustees act, there is no fund at their disposal for the payment of damages resulting from negligence, and that it is absurd to hold that an action will lie where judgment cannot possibly be satisfied. Blackburn, J., dissents, and holds that the defendant is liable on the ground that the jury has found that the injury was in fact caused by want of due care on the part of the defendant in maintaining the sluice. The question whether such a corporation is liable, not only for its direct corporate negligence, but also for the negligence of its servants, does not arise. The verdict of the jury that the negligence was the corporate negligence of defendant is conclusive. In referring to the cases which hold that trustees for public purposes are exempt from liability where there has been no direct corporate negligence, but the only negligence is due to the wrongful conduct of persons to whom they stand in the relation of master and servant, he says: "These decisions, or at least the greater part of them, might be supported on the ground that the relation of master and servant did not exist; . . . but this explanation does not apply to *Holliday v. St. Leonard's*, the *ratio decidendi* of which seems to me to express that there is an exception from the general rule that masters are responsible for the negligent acts of their servants, when the master falls within the class somewhat indefinitely styled 'trus-

tees for public purposes;’ but the doctrine in question has, as it seems to me, no bearing on the present case, since the drainage commissioners are not sought to be charged for the collateral negligence of their servants, but for the nonfulfilment of a duty which was, it is alleged, imposed by act of Parliament on the drainage commissioners themselves.” He also holds that the question raised by Cockburn, Ch. J., as to the power of the trustees to apply the funds in their control to the payment of damages, does not arise in the case, and is not sufficient ground to deny the right of the plaintiff to a judgment. An appeal was taken from the judgment of the majority of the court to the exchequer chamber. In that court the appeal was held to await the decision in *Mersey Docks & Harbour Board v. Gibbs*, then pending before the House of Lords, and after the decision in that case was announced, the judgment of the court of queen’s bench was reversed on the grounds stated in the dissenting opinion of Blackburn, J., as delivered in the court below. *Coe v. Wise, supra*.

In 1866, *Mersey Docks & Harbour Board v. Gibbs, supra*, was decided. The Mersey Docks Trustees were a corporate body, created by act of Parliament, charged with the care of the Liverpool docks, and with the collection of the rates levied for their use. The funds so collected, after defraying the expenses of maintenance, were to be applied to the payment of debts incurred in construction, with a view to the reduction of the rates. The purpose was public, and the motive was charitable. Two actions were brought against the trustees by owners of vessels injured in entering the docks. The wrong charged in each action was that the trustees, knowing the entrance of the dock to be unfit for use, neglected to repair it, and knowingly suffered it to continue in a condition unfit for use while it was used by vessels with their permission. Judgments were given against the trustees. Upon appeal to the House of Lords, the two cases were heard as one, and the judgments below were sustained. In the House of Lords the unanimous opinion of the common-law judges was submitted by Blackburn, J., and was adopted by the house as the ground of its decision. This is the leading and best-considered English case on the subject; but to understand the bearing of the opinion it must be read in connection with the opinions of Mellor and Blackburn, JJ., in *Coe v. Wise*. The judges of the queen’s bench, who had differed in the latter case, agreed in the opinion in *Mersey Docks & Harbour Board v. Gibbs*, and that opinion, as given by Blackburn, J., is plainly drawn on the lines of the opinion of Mellor, J., as well as of his own dissenting opinion in *Coe v. Wise*. And immediately after the decision of *Mersey Docks & Harbour Board v. Gibbs*, the same judges who had participated in that decision (except the judges of queen’s bench), sitting as judges of the exchequer chamber, reversed the judgment of the queen’s bench in *Coe v. Wise*, on the grounds of the dissenting opinion of Blackburn, J., and in the course of argument Erie, Ch. J., affirmed the authority of the decision in *Holliday v.*

St. Leonard’s, which had been discussed and not dissented from in *Mersey Docks & Harbour Board v. Gibbs*. Only by considering the two cases of *Coe v. Wise* and *Mersey Docks & Harbour Board v. Gibbs* together, can we ascertain the true bearing of the opinion in the latter case. The precise questions presented and answered are: Was the duty imposed on the trustees an absolute duty to maintain the docks in a state fit for use? Can the trustees be guilty of negligence without actual knowledge that the docks are unfit for use? Both are answered in the affirmative. In answering the first question the court holds that the rule of corporate duty and liability laid down in *Parnaby v. Lancaster Canal Co.* depends on the nature of the corporate powers and duties, and not on the fiduciary or beneficial purpose of the corporation; and these powers and duties must be determined upon a true interpretation of the statute creating it. When the legislature imposes on trustees for public purposes the duty of maintaining works by trading in their use, so that they are in their very nature a substitution for private enterprise, it will be presumed, in the absence of something to show the contrary, that the legislature intends “that the body created by statute shall have the same duties, and its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same thing.” And so, in this case, the legislature intended to impose upon the trustees the absolute duty of maintenance to the same extent as the general law imposes such duty on an individual carrying on a similar enterprise. In answering the second question the court holds that, although the duty of keeping the dock in a fit state for use could be performed by a corporate body only through servants, yet if the corporation had means of knowing, by its servants, that the dock was in an unfit state, and was negligently ignorant of its state, such negligent ignorance is the neglect of the corporation. In one of these actions the fact of such corporate negligence is admitted by the demurrer. In the other, it is found by the jury. The question whether the negligence of the persons actually in charge of the docks was only the collateral negligence of the servants of the corporation, and whether a charitable corporation is liable for the collateral negligence of its servants, is not involved in the decision. The trustees, however, while not admitting the rule of construction adopted by the court as determining their duty and liability, mainly relied on the broader claim that such bodies as theirs are, by the general law of the country, trustees for public purposes, and, being such, they are not, in their corporate capacity, liable for damages caused by the neglect of their servants to perform the duties imposed on the corporation; or, at all events, that the duty of such corporations is limited to due care in the choice of officers, and, such care being exercised, redress must be sought against the officers alone. The court treats this claim elaborately and holds that it has no foundation in law; that the cases supporting the principle that one who is a public officer, in the sense that he

is a servant of the government, and as such manages some branch of government business, is not responsible for the negligence of those in the same employment, have no application, because they are decided on the ground that the government is the principal and the public officer its servant, and therefore not liable on general principles of the law of agency. This principle is laid down by Story in his work on Agency (sec. 313). Here the defendants are not servants of the public in that sense. The class of cases cited, which depends on the principle that when the legislature directs a thing to be done, and damage results merely from doing that thing, the person acting under such authority is not liable, but compensation can be recovered only under special provisions of the statute legalizing the wrong, has no application. The cases apparently bearing in favor of the defendant's claim were decided either on the ground that the injury was caused by a person not standing in the relation of servant to the defendant, or upon the ground that, in the case of corporations organized to carry on an enterprise in the nature of a public charity, there is an exception to the rule making a master liable for the collateral negligence of his servant. In such a case as the present the liability does not depend on the relation of master and servant, but on the existence of a corporate duty, and the liability for a direct corporate negligence in the failure to perform that duty. *Duncan v. Findlater*, 6 Clark & F. 894, was properly decided on the ground that the relation of master and servant did not in fact exist, and this was all that was actually decided. The dictum of Lord Cottenham, that in no case can such a body be liable for negligence in its corporate capacity, has been rejected in subsequent cases, and is unfounded in law. While much that was said in the judgment in *Holliday v. St. Leonard's* is based on the opinion of Lord Cottenham in *Duncan v. Findlater*, and open to the same objections, it does not support that dictum; but the point actually decided was that there is an exception from the general law making a master liable for the negligence of his servant where the servant is employed by a public body. This point, which the case decides, does not now arise. And the court significantly says: "It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work." In the case of the latter liability, *i. e.*, the liability of a master for the collateral negligence of his servant, it has been decided that there is an exception from the general law when the servant is employed by a public body, and that point does not arise in this case. In respect to the former liability, *i. e.*, the liability of a corporation for corporate neglect in the performance of a corporate duty, there is no case which decides there is an exception from all liability in favor of public or charitable associations; and the dictum of

Lord Cottenham in *Duncan v. Findlater* is not law.

Levingston v. Lurgan Union, 2 Ir. C. L. Rep. 202, decided in Ireland in 1868, is of interest as showing one bearing given to the decision in the above cases at the time. The action was against the poor-law guardians in their corporate capacity. It was held that where a corporation or public trustees, acting gratuitously for public purposes, cause damage by a tortious act, without having funds with which to compensate the party injured, they are responsible in their corporate capacity. Whiteside, Ch. J., says (page 219): "Upon the ultimate decisions in these two cases (*Mersey Docks & Harbour Board v. Gibbs* and *Coe v. Wise*), it must, I think, be now taken as established: First, that unless the provisions of the legislature, by express enactment or necessary implication, otherwise determine, an action for such a wrong as that which is the subject of the present suit lies against a corporation or public trustee acting gratuitously for public purposes; secondly, that they are not exempted by the legislature from this liability because the legislative provisions which regulate them do not provide funds out of which damages recovered in an action against them can be paid, or because these provisions specially apply their funds to purposes not including the payment of such damages; and, thirdly (what, indeed, may be considered as, in principle, comprised in the second proposition), that this liability subsists, although no property, whether provided by act of Parliament or otherwise, be shown to exist, liable to execution upon a judgment."

In 1871, the court of queen's bench, in the case of *Foreman v. Canterbury*, L. R. 6 Q. B. 214, undertook to overrule the decision of the court of common pleas in *Holliday v. St. Leonard's*. The opinion is given by Blackburn, J., and he says that *Holliday v. St. Leonard's*, as an authority for the principle that there is an exception to the rule of *respondent superior* when the servant is employed by a corporation for public or charitable purposes, was overruled by the decision of the House of Lords in *Mersey Docks & Harbour Board v. Gibbs*; forgetting that in the opinion in that case delivered by himself, and in which the chief justice of the court of common pleas, who delivered the opinion in *Holliday v. St. Leonard's* concurred, he said that the point decided in the latter case "does not arise in the present case, so that it is unnecessary directly to decide anything upon it." *Foreman v. Canterbury* is not a well-considered case on this point. Indeed, the point is not at all discussed on principle, and the decision rests wholly on an assumption of the action of the House of Lords which the record proves to be untrue. The authority of *Holliday v. St. Leonard's* on this point was distinctly and carefully left unquestioned, both in *Mersey Docks & Harbour Board v. Gibbs* and in *Coe v. Wise*. The most that can be said is that in *Foreman v. Canterbury*, the court of queen's bench differs from the court of common pleas. The influence of the decision, however, is to be plainly noticed in subsequent cases.

In *Queen v. Williams*, L. R. 9 App. Cas. 418, decided in 1884, the rule in *Mersey Docks & Harbour Board v. Gibbs* was applied where similar powers and duties had been given by act of Parliament to the executive government of New Zealand. The action was brought under authority of the Crown suits acts of 1881.

In *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 795, decided in 1886, the defendant was a private guild or corporation, established some 500 years ago, for charitable and public purposes, such as the relief of the poor, maintenance of religious services, promotion of the interests of mariners, etc. In very early days, when beacons along the coast were mainly private property, it undertook their maintenance, at first, perhaps, as a charity, and gradually acquired rights and powers to collect tolls. Such funds, however, were devoted wholly to the original charity and relief of poor mariners. Under recent statutes the powers and duties of the corporation in reference to lighthouses and beacons were largely increased. The corporation was sued for damages caused by negligence in the removal of a beacon, leaving a portion of it under water. The broad claim made in behalf of trustees for public purposes, in former cases, was again made in behalf of this private corporation. The question was: "Are the defendants liable to be sued at all in respect of injuries caused by reason of the negligent condition in which beacons, or the remains of beacons, vested in them, are kept?" The court held that the recent legislation enlarging the powers of the defendant did not make it an agent or servant of the government, or alter the character of the corporation. It remained a private corporation as before. The principle of *Mersey Docks & Harbour Board v. Gibbs* was applied to this corporation, and stated more broadly and with less discrimination than it was stated in that case twenty years before. Day, J., says: "The law is plain that whosoever undertakes the performance of, or is bound to perform, duties, whether they are duties imposed by reason of the possession of property or by the assumption of an office, or however they may arise, is liable for injuries caused by his negligent discharge of those duties. It matters not whether he makes money as a profit by means of discharging the duties, or whether it be a corporation or an individual who has undertaken to discharge them. It is also immaterial whether a person is guilty of negligence by himself or by his servants. If he elects to perform the duties by his servants, if in the nature of things he is obliged to perform the duties by employing servants, he is responsible for their acts in the same way that he is responsible for his own."

The English rule was recently (1890) applied in New Brunswick to trustees incorporated for the maintenance of a public hospital. *Donaldson v. General Public Hospital Comrs.* 30 N. B. 279. The action was for injury caused to a person admitted to the hospital, by negligent failure to supply the necessary medical and surgical attention. The questions were raised by a demurrer to 31 L. R. A.

the declaration. The court held that the duty the defendant owed the plaintiff, as alleged, was admitted by the demurrer, and a breach of that duty by the negligent failure to supply any medical or surgical attendance, which he had the right to have supplied, was also admitted, and therefore the claim that the duty imposed on the defendant was in fact fulfilled by exercising due care in selection of physicians, and in having necessary appliances, etc., was not in the case, for such facts, if they are an answer, should be set forth by way of plea; that, admitting the defendant to be a public charitable institution, that fact does not exempt it from this action for negligence. A public charitable institution is liable to be sued for negligence.

The first case in the United States to which our attention has been called was decided in Virginia in 1867. *Richmond v. Long*, 17 Gratt. 375. It was an action for the value of a slave lost by negligence on the part of servants of a hospital. Liability was denied on the ground that the managers of the hospital exercised governmental powers, that under the Virginia laws the managers of the hospital were exercising governmental powers, and the government was the principal or master, and therefore the rule of *respondent superior* did not apply.

Marmilian v. New York (1875) 62 N. Y. 160, 20 Am. Rep. 468, was an action against the city. The only question decided was that under the New York statute the commissioners of public charities were not the agents or servants of the city, and therefore the city was not responsible for the negligence of a servant employed by the commissioners.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529, was decided in 1876. It was an action against the hospital for negligent surgical treatment. The court distinctly held that a hospital, being a public charitable institution, is not liable for the negligence of a servant when it has exercised proper care in his selection. But the *ratio decidendi* is not entirely clear. Apparently the decision is based on the authority of *Holliday v. St. Leonard's*, and if so, it is an authority for the principle that there is an exception to the rule of *respondent superior* when the negligent servant is employed by a public charitable corporation. Subsequently a similar question arose in *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436. The accident was caused by the negligence of the superintendent of a building owned by the city of Boston and used as a hospital under the management of corporate trustees appointed by the city. The court said that, if the trustees could be regarded as trustees of a public charity, the case came within *McDonald v. Massachusetts Gen. Hospital*, but held that, under the statute incorporating them, the trustees were agents for the city; that the city, in the performance of the duty of maintaining the hospital, was not liable for negligence, because the case came within the principle of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, where Judge Gray, in an elaborate opinion

and exhaustive review of the cases, defended the Massachusetts doctrine of nonliability of municipal corporations, and also of *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, which somewhat extends that doctrine. And in *Donnelly v. Boston Catholic Cemetery Assn.*, 146 Mass. 163, the court states that *McDonald v. Massachusetts Gen. Hospital* was decided on the ground "that the defendant was a public charitable institution under the laws of the commonwealth," and *Benton v. Boston City Hospital*, on the ground that the real duty was imposed by statute on the city for public benefit, and that the city would not be liable under the rule stated in *Tindley v. Salem*, and *Hill v. Boston*, and therefore a mere statutory agent without property, intervening between the city and the actual wrongdoer, was free from liability.

In 1880, the question came up in Rhode Island, in *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675. The plaintiff claimed damages—First, on the ground of negligence of the corporation in the selection of an interne who was employed as a surgeon, and to whose surgical care the plaintiff was committed. The court held that the defendant was liable for its corporate negligence in the selection of its physicians. Second, on the ground of the negligence of the interne while acting as a surgeon, in his careless and unskillful treatment of the plaintiff. The court held that the defendant was not liable on this ground, and that the hospital does not undertake to treat the patient through the agency of the surgeon, but only to procure his services, and therefore the relation of master and servant does not exist, and the hospital is only liable for a breach of its duty to use proper care in the selection of the surgeon. Third, on the ground that the plaintiff, being in a critical condition, it was the duty of the interne, under a hospital rule, to send immediately for an attending surgeon, and the duty of the corporation, under a special provision of its charter, to put the rule in execution. The court held that, while the interne acts as surgeon, and, when so acting, he may not be the servant of the corporation, yet he also is appointed to perform other duties, and when acting in such capacity the relation of master and servant exists; that the corporation undertakes in critical cases to send for one of its staff of surgeons. This duty is imposed upon it in pursuance of the special terms of its charter, and can only be performed by the corporation through an agent. The interne is its agent for that purpose, and his neglect is that of the corporation, and for such neglect the defendant is liable. The broad claim was also made that the defendant, by reason of being a public charitable corporation, was exempt from all liability. The court held: That this broad claim was not supported by any cases cited, discussing the English and Massachusetts cases. That the theory of a public policy which forbids the use of corporate funds in any case to compensate for injuries inflicted is not sound. There is no such public policy, and the establishment of such a policy is a question for the legislature. That the theory that the corporate

funds are trust funds, and their use to pay a judgment would be a violation of trust, is unsound. That the result of the English cases is: (a) Where there is a duty, there is a prima facie liability for neglect; and a corporation being created for certain purposes which cannot be executed without the use of care or skill, it becomes the duty of the corporation to exercise such care, and funds acquired for the purposes of its creation will be applied to satisfy a judgment for its default in this respect. (b) The corporate funds can be applied, notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them. That these rules for corporations for public purposes apply equally to corporations like the Rhode Island Hospital.

Fire Ins. Patrol v. Boyd, 120 Pa. 624, 1 L. R. A. 417, was decided in 1888. This was an action against a corporation organized to aid the city government of Philadelphia in preservation of life and property at fires, for an injury caused by the negligence of its servants employed at a fire. The court held that under the laws of Pennsylvania the defendant, in the performance of its duties, was acting in aid of the municipal government in the performance of a governmental duty, and in such case the rule of *respondere superior* has no application, for the state, and not the defendant, is the superior. The court further held that the funds of a public charity cannot be taken to compensate injuries by negligence of agents, and says: "It would be carrying the doctrine of *respondere superior* to an unreasonable and dangerous length. That doctrine is at best, as I once before observed, a hard rule."

In 1891 the question was somewhat discussed in the New York court of common pleas, in *Harris v. Woman's Hospital*, 27 Abb. N. C. 37. But the case was decided on questions of fact. No actual negligence or want of care was found on the part of the hospital authorities, the surgeons, or the nurse.

During the past year the question has arisen in three cases: In Kentucky, in the case of *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L. R. A. 200, where the liability of the defendant for injuries committed by its agents was denied, on the sole ground that this corporation was a mere agent of the state exercising governmental functions. In Michigan, in *Downes v. Harper Hospital*, reported in 101 Mich. 555, 25 L. R. A. 602, a hospital for the insane was sued by the representatives of a patient who had escaped from the strong room of the hospital, jumped from a window, and so was killed. The negligence alleged was that of the trustees in the construction of the building, and of the employees in the care of the patient. Judgment was given for the defendant. Perhaps the decision might be sustained on other grounds, but the reasoning of the court fairly tends to support the extreme claim of the defendant in this case. There is, however, a distinction that may have strongly influenced the language of the court. The Harper Hospital was originally

a private foundation by deed conveying property to trustees on a specific trust. These trustees were subsequently incorporated under a general statute. It is possible that by the act of incorporation the corporate powers were limited to administration of the original trust in accordance with the laws established by the founders. If this were so, the corporate capacity would be reduced to the minimum, and the defendant might be held not liable upon a construction of the terms of its charter, without questioning the liability of an eleemosynary corporation for injuries committed in pursuance of its corporate powers. The case of *Union P. R. Co. v. Artist*, 9 C. C. A. 14, 60 Fed. Rep. 365, 23 L. R. A. 581, decided by the United States circuit court of appeals, does not deal at all with the relation of a corporation, whether business or eleemosynary, to its corporate funds, nor directly with the nature of the duties imposed on a public or charitable corporation by its charter. The only question considered or decided in respect to a corporation is that any corporation, when it undertakes an act of charity not within the purposes of its incorporation and which it is under no legal obligation to perform, assumes the same personal duties, neither more nor less, than an individual assumes who undertakes a similar act of charity, and that a corporation, in administering a trust fund distinct from its corporate funds, held by it on a specific trust, stands in the same position as an individual who administers a trust fund for a similar purpose. But the case is of peculiar interest as maintaining the proposition that an individual establishing hospital accommodations as a charity undertakes no duty towards those who accept them as a free gift, except the duty of using reasonable care in providing such accommodations, and that if one is injured through negligence, not of the individual in the performance of his personal duty, but of the servants employed by him, the principal is not liable, because such case does not come within the reason of the rule of *respondent superior*, and such rule has no application. As this proposition is true of a corporation as well as of an individual, the court held that the railroad corporation which had established hospital accommodations as such a charity was not liable in a suit to recover for injuries caused through the negligence of the servants it had employed; that the doctrine of *respondent superior* has no just application, and "it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employees." This is the most direct application we have found in an American case of the doctrine which, in *Hall v. Smith* and *Holliday v. St. Leonard's*, was applied to corporations established for public and charitable purposes.

It is apparent that there are marked differences in these cases, both as to results and the process by which results are reached. These differences mainly appear in the tests adopted for ascertaining in each case what is a corporate duty and what is a corporate neglect; in the confusion of the quasi trust, arising from the restriction which binds every

corporation to apply its corporate funds to the purposes for which it was organized, with the relation of a strictly legal trustee to his trust funds; and especially in the various means by which courts have sought to escape the patent injustice of applying the extreme doctrine of *respondent superior* to the personal defaults of employees of charitable institutions. But we think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury due only to the neglect of a servant, and not caused by its corporate negligence in the failure to perform a duty imposed on it by law, and we are satisfied that this general conviction rests on sound legal principles. The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim, *Qui facit per alium facit per se*, is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy. The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distinguished as the doctrine of *respondent superior*, although that phrase is used broadly in reference to any relation of principal and agent, thereby causing much confusion. Here we use it in the narrow meaning suggested by its origin. The phrase is taken from the words of the statute of Westm. II. (Car. II.). *Si custos gaolre non habeat per quod iusticietur vel unde solvat, respondeat superior suus qui custodiam huiusmodi gaolre sibi commisit*. As Lord Coke tells us (2 Inst. 382), this law was intended only for those who "having the custody of gaols of freehold or inheritance commit the same to another that is not sufficient." As sheriffs originally profited through the appointment of their subofficers, the rule of the statute was applied to sheriffs, although they were not included in its letter. This statute was passed before the first Year Book was kept, at a time when the English law was "without form." It recognized an injustice, and declared a rule of public policy, i. e. an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument that superior has given the wrongdoer the opportunity of committing the injury. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency, depending, not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which, under certain circumstances, estops one from showing that the act in question was not his own. This view is suggested by the opinion of Best, Ch. J., in *Hall v. Smith*, *supra*, and is the occasion of his emphatic declaration that *respondent superior* is bottomed on the principle that he who expects to derive the advantage from an act done for him by an-

other must answer for any injury which a third person sustains from it. The reasons for the rule have been differently stated by others. In *Maxmilian v. New York*, *supra*, the rule is based upon the right which the employer has to select his servants, to discharge them if not competent, and to control them while in his employ. In Dicey, Parties, rule 102, p. 446, the liability is stated as "analogous to the liability of an owner for injuries committed by animals belonging to him. Neither the master nor owner is liable because he has himself done the particular act complained of. He is responsible because the wrong is the result of his having in the one case employed the incompetent servant, and in the other kept an animal of habits injurious to his neighbors." Here the policy stated seems to be that the master should not only be liable for his negligence in the employment of servants, but should be held as a guarantor that none employed by him should abuse their opportunities. And a similar notion is expressed in Wood, Mast. & S. § 277, *i. e.* that the penalty of liability is imposed in order to secure in the master "the exercise of proper care and diligence in the selection and retention of his agents." Whart. Neg. § 157, gives, as the reason of the policy, that "he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts," relying on Lord Brougham's statement in *Duncan v. Findlater*, 6 Clark & F. 894: "I am liable for what is done for me and under my orders by the man I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This defendant does not come within the main reason for the rule of public policy which supports the doctrine of *respondent superior*. It derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not "set the whole thing in motion," in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction. He is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Sure-
81 L. R. A.

ly, those who accept the benefit, contributing also by their payments to the public enterprise, and not to the private pocket of the defendant, assist as truly as the defendant in setting the whole thing in motion. But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned. We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule, and to declare a new public policy, and say: On the whole, substantial justice is best served by making the owners of a public charity involving no private profit, responsible, not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule of *respondent superior*. It is perhaps immaterial whether we say the public policy which supports the doctrine of *respondent superior* does not justify such extension of the rule, or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong. This result is justified by the opinions in *Hall v. Smith*, *Holliday v. St. Leonard's*, and *Union P. R. Co. v. Artist*, *supra*, substantially on the grounds above stated, and is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes.

There is no error in the judgment of the Superior Court.

The other Judges concur.

ALABAMA SUPREME COURT.

ANNISTON LOAN & TRUST COM-
PANY, Appt.,v.
R. H. STICKNEY, Jr.

(.....Ala.....)

An option indorsed upon the back of a negotiable note for its extension for a definite time by giving a new note at the option of the makers and indorsers similar to the original does not destroy its negotiability.

(January 9, 1896.)

A PPEAL by plaintiff from a judgment of the Anniston City Court in favor of defendant in an action brought to enforce his alleged liability as indorser on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. Knox, Bowie, & Pelham, for appellant:

The place of payment is sufficiently certain. *Rudolph v. Breuer*, 98 Ala. 189; *Boit v. Corr*, 54 Ala. 112; *Potter v. Sheets*, 5 Ind. App. 506; *Brown v. First Nat. Bank*, 103 Ala. 123.

The uncertainty as to the time when the note or bill is payable is not a defect, provided the time described in the paper must come sooner or later; nor is remoteness of time material.

Tiedeman, Com. Paper, § 25; *Conn v. Thornton*, 46 Ala. 587; *Brewster v. Williams*, 2 S. C. N. S. 455; *Nelson v. Manning*, 53 Ala. 549; *Gaines v. Dorsett*, 18 La. Ann. 563; *Mortee v. Edwards*, 20 La. Ann. 236; *Knight v. McKey-*

nolds, 37 Tex. 204; *Atcheson v. Scott*, 51 Tex. 218; *Chicago R. Equip. Co. v. Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349; *Riker v. Sprague Mfg. Co.* 14 R. I. 402, 51 Am. Rep. 413; *Independent School Dist. v. Hall*, 113 U. S. 140, 28 L. ed. 956; *Morton v. New Orleans & S. R. Co. & Immi. Asso.* 79 Ala. 590; *First Nat. Bank v. Slaughter*, 98 Ala. 602; *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464.

A note payable twelve months after date, "or before if made out of the sale of a machine," was held to be negotiable in *Ernst v. Steckman*, 74 Pa. 13, 15 Am. Rep. 542.

A promise to pay on or before a day mentioned states the time of payment with sufficient certainty.

Walker v. Woolen, 54 Ind. 164, 23 Am. Rep. 639; *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *Jordan v. Tate*, 19 Ohio St. 596; *Sagory v. Metropolitan Bank*, 42 La. Ann. 627; *Seymour v. Farquhar*, 93 Ala. 292; *Makepeace v. Harvard College*, 10 Pick. 298.

If the event upon which the instrument is to become payable must inevitably happen, it is no objection that it is uncertain when it will happen, nor is it of any importance how long the payment may be in suspense.

Sackett v. Palmer, 25 Barb. 179; *Chitty*, Bills, 8th Am. ed. from the 8th London ed. pp. 155, 156.

A note payable "on or before" a certain date is not rendered non-negotiable by reason of an option in the maker to pay at any time before ultimate maturity of the note.

First Nat. Bank v. Skeen, 101 Mo. 653; *Lamb v. Story*, 45 Mich. 489; *Chitty*, Bills & Notes, § 161.

NOTE.—*Provision for renewal as affecting negotiability of note.*

There seems to be only one case which is in conflict with *ANNISTON LOAN & T. Co. v. STICKNEY*, and there may be ground for distinguishing even that one. In it a note by an agent for the sale of merchandise payable one year after date, but containing the clause that if the agent does not sell enough in one year one more is granted, was held not to be negotiable, upon the ground that it implied that it was payable out of a particular fund, and for this reason and because payable only on the happening of a condition, it is not negotiable during the first year. *Miller v. Poage*, 56 Iowa. 96, 41 Am. Rep. 82. The court adds: "It is true it is payable absolutely at the expiration of two years. But we think it must have been negotiable when executed, and continuously from that time, or not at all."

The fact that the court interpreted the note as requiring payment out of a particular fund is, however, sufficient to make a difference in the decision. For that alone would under many authorities make the note non-negotiable. Notwithstanding that, however, the ruling on the other branch of the case is in conflict with the *STICKNEY CASE*.

In the cases of the other notes which have been held non-negotiable because of an agreement for renewal, the agreements have been for indefinite renewal, and there is much ground for distinction between an agreement for an indefinite renewal, which under the rules regarding negotiable paper could not fail to destroy negotiability, and an agreement for one renewal for a definite time which would make the time of payment one of two

dates known from the inception of the paper. As to whether or not the uncertainty caused by such alternative is sufficient to destroy negotiability, the two courts which have passed upon the question do not agree, and it will require further consideration to settle the question.

An agreement for extension from time to time indefinitely, as the payee may see fit, renders the note non-negotiable. *Woodbury v. Roberts*, 39 Iowa, 348, 44 Am. Rep. 685.

A provision that the payee or his assigns may extend the time of payment from time to time indefinitely, as he or they may see fit, renders the note non-negotiable. *Glidden v. Henry*, 104 Ind. 278, 54 Am. Rep. 316.

A stipulation in a note that the holder may renew or extend the time of payment from time to time as often as required, and without prejudice to his rights to enforce payments against the makers, sureties, and indorsers, at any time when the same may be due and payable, renders the note non-negotiable. *Coffin v. Spencer*, 39 Fed. Rep. 262. The court places its ruling upon the ground that every successive taker of the paper is bound to take notice of this stipulation, and instead of looking only to the face of the paper for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not an agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder.

In *Second Nat. Bank v. Wheeler*, 75 Mich. 548, a note containing a clause that the holder may renew or extend the time of payment from time to time, as often as required, without notice and without prejudice to his rights, was held not to be negoti-

L. R. A.

Messrs. Matthews & Whiteside, for appellee:

Said agreement was a part of said note before the issuance of it, and it never was an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money to any one; but this is one of the requisites of a negotiable instrument.

Altman v. Rittershofer, 68 Mich. 287; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Maryland Fertilizing & Mfg. Co. v. Norman*, 60 Md. 584, 45 Am. Rep. 750; *Garrison v. Purdy*, 3 Dak. 178; *Sterens v. Johnson*, 28 Minn. 172; *Iron City Nat. Bank v. McCord*, 139 Pa. 52, 11 L. R. A. 559; *Costello v. Correll*, 127 Mass. 293, 34 Am. Rep. 867; 1 Randolph. Com. Paper, p. 319, note 1; *Miller v. Poage*, 56 Iowa, 96, 41 Am. Rep. 82 (1881); *Humphrey v. Beckwith*, 48 Mich. 151 (1882); 1 Dan. Neg. Inst. § 41; *Chandler v. Carey*, 64 Mich. 237.

A printed stipulation on the back of a note is as much a part of the instrument as if set out in its body.

Seymour v. Farquhar, 93 Ala. 292.

If when it is made the payment is to depend on a condition, contingency, or uncertain event, the subsequent happening of that event or contingency will not change its character.

Blackman v. Lehman, 63 Ala. 547, 35 Am. Rep. 57; *Second Nat. Bank v. Wheeler*, 75 Mich. 546.

If the note had purported to be payable at "Anniston Loan & Trust Company" this alone, if there were no other defects in the paper, would have brought it within the influence of § 1756 of Ala. Code of 1886, as there is no averment in the complaint that that is the name of the bank or banking house or the name of any place, and the name itself does

not import or imply that it is the name of a place or bank or banking house.

Rominger v. Keyes, 78 Ind. 376; *Tiedeman, Com. Paper*, p. 82, note 4; *Muse v. Dantzier*, 85 Ala. 359.

There was never any suit brought against the maker of the note, and no excuse was shown, either in the complaint or by the evidence, for not bringing it.

Cook v. Mutual Ins. Co. 53 Ala. 39; *Mobile Sav. Bank v. McDonnell*, 83 Ala. 595; *Seymour v. Farquhar*, *supra*; *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190.

On petition for rehearing.

By reason of said memorandum on the back of the note it was optional with the maker and indorsers either to pay it or, in lieu thereof, to give a new note similar to it.

This note does not provide that the day or time of its payment might be extended to a day when this particular paper should certainly be honored. On the contrary it provides expressly for its own dishonor.

Commercial Bank v. Crenshaw, 103 Ala. 497.

How can it be said to be negotiable when it is apparent that the party taking it must inquire into an extrinsic fact in order to ascertain if it be payable.

Hartley v. Wilkinson, 4 Maule & S. 25 (1815); *Leeds v. Lancashire*, 2 Campb. 205; *Cook v. Satterlee*, 2 Cow. 108, 16 Am. Dec. 432; *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190; *Second Nat. Bank v. Wheeler*, 75 Mich. 546; *First Nat. Bank v. Carson*, 60 Mich. 432; *Barnard v. Cushing*, 4 Met. 231.

Brickell, Ch. J., delivered the opinion of the court:

The suit was founded on the defendant's

able, and from the authorities cited it would seem that the ruling was placed on the ground that the time of payment was not certain.

Provision for indefinite extension of time of payment destroys negotiability. *Smith v. Van Blarcom*, 45 Mich. 371.

In *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190, the question was as to the liability of the indorser, and the court held that the agreement indorsed on the note that it would be renewed at maturity destroyed its character as negotiable paper, and that therefore the defendant's liability was not that of an indorser of commercial paper. The court said: "The obligation of the note therefore is uncertain, depending on whether the maker chooses to pay it or give a new note in place of it. This uncertainty destroys its negotiability, and for that reason relieves the indorser."

There are several cases in which there have been collateral agreements for renewal which have been set up to control the note. Such agreements could rarely affect the question of negotiability and in most cases they have been held to be without effect upon the contract as expressed in the note.

A parol promise to extend, made after the inception of the note, will not bar an action on it. *Allen v. Kimball*, 23 Pick. 478.

A parol agreement not to negotiate the note, and to renew it at maturity, is unavailing, and will not affect the note in the hands of a purchaser with notice. *Heist v. Hart*, 73 Pa. 280.

The law will not enforce a contemporary parol agreement that the note is to be renewed at maturity. *Hoare v. Graham*, 3 Campb. 57.

In *Flight v. Gray*, 3 C. B. N. S. 320, 27 L. J. C. P. 31 L. R. A.

13, 4 Jur. N. S. 13, the defendant was not permitted to file as a defense to an action upon a bill of exchange a plea setting up that plaintiff had agreed to renew upon conditions which defendant had complied with. The court held that under the statute which was relied on as authorizing the plea, only such facts could be pleaded as would entitle defendant to absolute and unconditional relief in equity, where in that case there could be no relief unless the tender was kept good, and the court of law had no power to compel that to be done.

In *Bowerbank v. Monteiro*, 4 Taunt. 844, a collateral agreement in writing was taken that the holders of the bill would renew from time to time until sufficient effects should be received from a certain source to pay it, and the case turned upon the construction of the agreement, rather than upon its effect on the negotiability of the instrument.

An agreement in a note to one who had advanced money for carrying on estates, that should the crops not come forward in time to provide for the notes, "I shall expect to have them renewed for such period as shall be found necessary," was held to provide but for one renewal. *Innes v. Munro*, 1 Exch. 473, 17 L. J. Exch. 71. But although the action was brought by an indorsee, the question of the negotiability of the note did not arise.

Maillard v. Page, L. R. 5 Exch. 312, 39 L. J. Exch. 235, 23 L. T. N. S. 80, was an action by the drawer against the acceptor, in which the question of negotiability did not arise, but the court says, that as between the original parties to a bill it is clear that the effect of the bill can be controlled by a written contemporary agreement. H. P. F.

indorsement of a promissory note, which is in these words and figures:

Anniston, Ala., February 11th, 1893.
\$1,100.00.

Six months after date, I promise to pay, to the order of Benjamin Micou, eleven hundred dollars. Value received. Negotiable and payable at Anniston Loan & Trust Company, of Anniston, Ala. And in case this note is not paid at maturity, and suit is brought for its collection, we agree to pay 10 per cent attorneys' fees; and each of us, whether maker or indorser, hereby waive and renounce for myself and family any and all homestead or exemption rights we may have guaranteed to us by the Constitution or statute laws of the state of Alabama or any of these United States.

V. H. Marshall.

Due Aug. 11-14.

Certificate No. 42, for 31 shares of the capital stock of the Anniston Transfer, attached as collateral.

Indorsed on back:

It is hereby agreed that this indebtedness is to be extended for six months from the maturity of this note, if so desired by the makers and indorsers, upon their giving a new note similar to this.

John H. Noble, Sec.

Benj. Micou.

R. H. Stickney, Jr.

Demand, notice, and protest waived. Aug. 14, '93.

Benj. Micou.

R. H. Stickney, Jr.

The trial was had before the judge of the city court, without the intervention of a jury. The pleadings are voluminous, but the case involves only one question of merit and importance; and, as that was directly presented and decided by the city court, we shall consider and determine it, without reference to any matter of mere pleading. That question is whether the instrument indorsed has the essential qualities and properties of a promissory note governed by the commercial law.

Though, according to the law merchant, a promissory note is not confined by any set form of words, whatever are the words employed, they must import an unconditional promise to pay to another's order or to bearer a certain sum of money at a time therein specified. Story, Prom. Notes, § 1. To these essential requisites of a promissory note, certainty in obligation, certainty in the money to be paid, and certainty in the time of payment, the statute adds certainty of the place of payment. To be negotiable and governed by the commercial law, the statute requires that the note be payable "at a bank, or private banking house, or a certain place of payment therein designated." Code, § 1756.

At the time of the making and indorsement of the instrument, the Anniston Loan & Trust Company was a corporation engaged in the business of banking, having a known place of business in the city of Anniston. This

fact was shown affirmatively by extrinsic evidence, rendering certain the place at which the instrument was payable, whether we read it as payable at a bank "or at a certain place of payment therein designated." When a promissory note is made, having a place of payment expressed, the place may be distinguished, individualized, and rendered certain by extrinsic evidence, for the same reason that when the description in an instrument of writing of persons or things or places is vague and general, or is applicable to several persons or several species of things or several places, extrinsic evidence may be received to give application to the description. 1 Greenl. Ev. § 288; *Rudolph v. Brewer*, 96 Ala. 189. The note and the agreement thereon indorsed must be read and construed as if they were embodied in and formed a single writing. So reading and construing them, the contention is that the note was not payable in money, but payable in another similar note, or, in any event, that the time of payment was uncertain, and of consequence the note is wanting in the essential qualities of an obligation to pay money, and of certainty in the time of payment. The error of the contention in the first respect seems obvious. It is not payment—satisfaction of the obligation resting upon the makers and indorsers—which the indorsement contemplates, or which, upon any just construction, can be deduced from its words. All that was contemplated was that the maker and indorser should have the option or privilege of extending the debt, not of paying it, by giving a new note similar to the existing note. The giving of a promissory note or bill of exchange, without more, is not satisfaction of a pre-existing indebtedness. The only effect of taking such note or bill is, ordinarily, to suspend the creditor's remedy upon the original indebtedness, until the maturity of such note or bill. 1 Brinkell's Dig. p. 287, §§ 501, 502. In *Keel v. Larkin*, 72 Ala. 493, it was said: "The giving of the debtor's own note or bill, even though negotiable, does not, according to what is deemed the better doctrine as settled in this state, operate to discharge such debt unless accepted in absolute payment." In *Lee v. Green*, 83 Ala. 491, it was also said: "It is the settled doctrine in this state that when a debtor gives his own security, of no higher nature, for a pre-existing debt, it is considered, in the absence of an agreement, express or implied, as collateral or additional security, or a conditional payment, which does not operate an extinguishment of the original debt, but an extension of the time of payment." In 3 Daniel on Negotiable Instruments, § 1226, it is said: "It is a general principle of law that one simple executory contract does not extinguish another for which it is substituted, and negotiable securities form no exception. And by the general commercial law, as well of England as of the United States, a bill of exchange drawn or promissory note made by the debtor does not discharge the precedent debt for which it is given, unless such be the agreement of the parties." The same author, in volume 2, § 1266a, further says: "The delivery or sur-

render to the maker of the old note upon its being renewed does not in itself raise a presumption of its extinguishment by the new, it being considered as a conditional surrender, and that its obligation is restored and revived if the new note be not duly paid." To the same effect is *Crocket v. Trotter*, 1 Stew. & P. (Ala.) 446. And in *3 Randolph, Com. Paper*, § 1511, it is said: "The renewal of a bill or note is not in general payment."

But it is insisted that reading the indorsement, as it must be read, as if it was incorporated in the body of the note, the time of payment is contingent, uncertain, and the contingency or uncertainty is destructive of its negotiability. The authorities to which we have been referred in support of the proposition have been carefully examined and considered. *Citizens' Nat. Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190; *Second Nat. Bank v. Wheeler*, 75 Mich. 546; *First Nat. Bank v. Carson*, 60 Mich. 432. In the first case, a promissory note had on its margin a memorandum in these words: "this note is given for advancements, and it is the understanding it will be renewed at maturity." The court, after declaring that it is a necessary quality of negotiable paper that it should be single, certain, unconditional, not subject to any contingency, said it was manifest "that the only inquiry necessary to determine the question of negotiability is the effect of the memorandum upon the terms of the note. As we have seen, it makes an important change in the note, in that, instead of the note being a distinct contract to pay a fixed sum of money at a day certain, the holder has agreed to accept, instead of payment in money, another note, payable at another time, which is not fixed. The obligation of the note, therefore, is uncertain, depending on whether the maker chooses to pay it or give a new note in place of it." In the second case, on its face, the note contained this stipulation. "And the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time when the same may be due and payable." In the last case the note contained a stipulation that the sale or removal of the property, the price of which was the consideration of the note, should cause it to mature. The court said the time of payment was not certain. "It is made dependent, until the contract matures, upon the fact of whether the defendant shall sell or remove the property for which the contract was made." These cases are manifestly distinguishable from the present case. In the first two cases, the stipulation for a renewal of the note was vague, indefinite. There was no time fixed beyond which it should not, or to which it should, extend. This material element was left to future negotiation and the future agreement of the parties; and, as it was dependent on future negotiation and agreement, the result of which could not be known or anticipated, the time of payment of the renewed note was necessarily contingent and

uncertain. Apparently, this was present in the mind of the Pennsylvania court when rendering the decision in the case first cited. But in this case there can be no occasion, as there is no room, for future negotiation. If the maker and indorser exercise the option or privilege of renewing the note, of extending the day of payment, the indorsement declares the precise time of the extension, in clear, certain, and precise words: "His indebtedness is to be extended for six months from the maturity of this note, if so desired by the maker and indorsers." The argument is that, as it cannot be known until the maturity of the note whether the makers and indorsers will exercise the option or privilege of renewal, the payment is contingent. The renewal or failure to renew is an event which must necessarily happen, and happen at a precise, fixed day. Certainty of the time of payment is an essential quality of negotiable paper, by which is intended that there must be a period fixed by the parties, or by implication or construction of law, or an event prescribed, which must necessarily happen. *Story, Prom. Notes*, § 27. It would serve no useful purpose, and would necessarily prolong the opinion, to notice the cases in which there was a contingency of payment, destructive of the negotiability of the paper, and cases in which such contingency was pronounced not to exist. It is the contingency of payment which destroys negotiability. In 1 Chitty on Bills, top page 173, it is said: "With respect to the time when payment is to be made, it depends entirely on the agreement of the parties, and there is no limitation in point of law, though the payment must not be contingent." In *Clayton v. Gosling*, 5 Barn. & C. 360, the note was payable twelve months after notice, with lawful interest. It was said by Abbott, Ch. J.: "There is not any contingency as to the debt, for that is admitted to be due. Nor is the time of payment contingent, in the strict sense of the expression; for that means a time which may or may not arrive; this note was made payable at a time which we must suppose would arrive." In *Cota v. Buck*, 7 Met. 588, 41 Am. Dec. 464, it was said by Shaw, Ch. J.: "The true test of the negotiability of a note seems to be whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund or upon a contingent event." This is the true test of negotiability. If the paper be for the payment of a sum certain, absolutely, at a time which must certainly come, or on an event which must inevitably happen, it is negotiable. It was not payment of the debt the indorsement contemplates; it was but an extension of the day or time of payment. Not a vague, indefinite extension, the time of which rested in the future negotiation or agreement of the parties, but an extension the duration of which is precisely fixed and declared. If there was not renewal, the note was payable at its maturity. If there was renewal, the time of payment was fixed and certain. Renewal, or the failure to renew, was an event which must inevitably happen. There is no force in the suggestion that whoever might acquire the

note after maturity could not know or ascertain without inquiry whether there had or not been a renewal. It is not contemplated that negotiable paper shall pass current after maturity, and whoever might take the note after maturity would take it at his own peril. But whoever acquires it before maturity would read on its face, in connection with the indorsement, that there was no contingency about its payment,—no uncertain event, which might or might not happen, on which the duty and obligation to pay depended. In respect to the renewal, or failure to renew, an event which must happen at the day of payment fixed by the note, and would determine no more than whether the day of payment should be extended to a future day and time certain, I am not aware of any authority or principle which would justify a declaration that there is that want of certainty in the time of payment, or that contingency of payment, which deprives the note of negotiability. The time of payment is precise; the money is demandable six months after the date, or twelve months there-

after. By the terms of the note and indorsement, which are inseparable, it was to be the one or the other; and the means of ascertaining or determining whether it was to mature at the one day or the other were definitely and conclusively provided. No holder could ever be involved in doubt or uncertainty as to the happening of any contingency on which payment depended, or as to the time of payment. Under this view, the note must be regarded as payable absolutely in money at a bank or private banking house, at a time certain, fulfilling all the conditions and having the qualities requisite to commercial paper.

The city court erred in rendering judgment for the defendant. Its judgment is reversed, and a judgment will be here rendered in favor of appellant (plaintiff in the lower court for the amount of the note sued on, with interest from August 11, 1893, together with the costs of suit and costs of the appeal in this court and in the court below.

Reversed and rendered.

Rehearing denied February 11, 1896.

NORTH DAKOTA SUPREME COURT.

William BRAITHWAITE, *App't*,

v.

Walter B. JORDAN *et al.*

(..... N. D.)

- *1. A libel in a possessory action in rem was filed in the district court of the territory of Dakota, sitting as a court of admiralty. The plaintiff herein defended the action as claimant of the vessel, and was successful. On appeal by the libelants to the territorial supreme court, the undertaking sued on was given to secure a stay of proceedings. The judgment of the district court being affirmed, plaintiff, who was respondent on the appeal, brought suit on such undertaking. Held, that the action was not an integral part of the original admiralty case, and that therefore the Federal district court for the district of North Dakota, as the successor in admiralty cases of the territorial district court, did not have exclusive jurisdiction of the proceedings to enforce such undertaking, although the plaintiff might have secured in that court, in the very action in which the undertaking was given, a summary judgment against the persons who signed such undertaking,—the defendants herein,—but that an action on such undertaking would lie in the district court of this state.**
- 2. Also, held, that this action on the undertaking is not a proceeding to enforce the judgment in the admiralty case, within the meaning of the rule that the court, whether state or Federal, in which a judgment is rendered, has exclusive jurisdiction to enforce it.**

- 3. Also, held, that no principle of comity requires the state courts to refuse**

*Headnotes by CORLISS, J.

to take cognizance of the case. It is no objection to the jurisdiction of the court in entertaining a common-law action of debt, that the plaintiff has in another tribunal a remedy more speedy and simple in its character, and equally efficacious. Especially should this be the doctrine where to compel him to resort to the summary remedy would deprive him of the right to a trial by jury.

- 4. The judgment from which the appeal was taken merely adjudged that the claimant was entitled to possession, and ordered the marshal, who was legally in custody of the property, to deliver it to him. Held (by CORLISS, J.), that this was not a judgment directing the delivery of personal property, within the meaning of section 416 of the Code of Civil Procedure, under Revision of 1877 (Comp. Laws, § 5221), assuming such statute to be applicable to admiralty cases, and that therefore, on this assumption, the appellants could have secured a stay of proceedings on the giving of a mere cost bond, Code Civ. Proc. § 422, Revision 1877. The undertaking, therefore, so far as it was more than a mere cost undertaking, was without consideration, and void as a statutory undertaking. But the majority of the court thought that the undertaking would be valid, even under the statute. But, held, that the practice on appeal in the admiralty case to the territorial supreme court was not regulated by the territorial statutes, but by the rules and usages of courts of admiralty, and that as the appellants had no absolute right, under such rules and usages, to perfect an appeal to the territorial supreme court and secure a stay of execution pending such appeal on the giving of a mere cost bond, and as the respondent in the appeal did in fact treat the undertaking as entitling the appel-**

NOTE.—While admiralty cases are of interest to limited class of lawyers, the above case by reason of its elaborate discussion of the exclusiveness of jurisdiction as between admiralty and common-

A. R. A.

law courts is of interest to a much wider class of lawyers. The questions are too fully developed in the briefs and opinions of the court to need annotation.

lants to a stay, by abstaining pending the appeal from all attempts to enforce the judgment in his favor.—*Held*, further, that the undertaking was valid as a common-law obligation supported by a sufficient consideration.

5. It is no defense to an action on a statutory undertaking on appeal, that the court has not fixed the amount thereof under the statute. Such provision is for the benefit of the respondent, and if he waive it, and treat the undertaking as sufficient to accomplish the purpose for which it was given, the undertaking may be enforced by him, the same as if the statute had been complied with.

(On rehearing.)

6. The vessel at the time the appeal was taken was in the actual possession of the appellants, and this appeared from the record in the case. The bond recited that the judgment was against them for delivery of possession to claimant. It was for \$15,000. Having been given to secure a stay of proceedings under these circumstances, it was necessarily given to enable the appellants to retain possession pending the appeal. Therefore, *held*, that it was in the nature of a stipulation for value, and claimant having, in reliance thereon, actually refrained from disturbing the appellants in their possession of the vessel pending the appeal, the instrument was valid as a voluntary bond.

7. Unlike stipulations for value in other cases, a stipulation for value in a possessory action can be enforced in any court having jurisdiction of an action of debt, for the amount due on the stipulation.

(October 28, 1896.)

APPEAL by plaintiff from a judgment of the District Court for Burleigh County in favor of defendants in an action upon an appeal bond. *Reversed*.

The facts are stated in the opinions.

Mr. George W. Newton, for appellant:

Section 416 of the Code of Civil Procedure of 1877 requires an undertaking in such amount as the court judge thereof shall direct.

It was competent for the respondent to waive any mere formality of procedure, and by not objecting he did waive it. It takes effect, then, in all regards as tendered by the obligors.

Shaw v. Tobias, 3 N. Y. 188; *Wolcott v. Mead*, 12 Met. 517; *Decker v. Judson*, 16 N. Y. 439.

The burden was on the appellants in *Rea v. The Eclipse* ("The Eclipse") 4 Dak. 218, on appeal, 135 U. S. 599, 34 L. ed. 269, to obtain the direction of the court as to the amount of the undertaking. They gave the undertaking in question and thereby obtained a stay, and they will not now be heard to allege a want of a mere detail to escape liability.

Buck v. Lewis, 9 Minn. 814.

To render an appeal effectual for any purpose, an undertaking for costs and damages was required.

Civil Code Proc. 1887, § 414.

Assuming that the costs awarded in the district court were not a "judgment directing the payment of money" (sec. 415), then no undertaking by the provisions of that section was required.

McCallion v. Hibernia Sav. & L. Soc. 98 Cal. 31 L. R. A.

442; *Daly v. Litchfield*, 11 Mich. 497; *Prosser v. Whitney*, 46 Mich. 407.

The undertaking was in effect to perform the judgment of the district court if affirmed.

Dunteman v. Storey, 40 Neb. 447.

In attaching and surrounding the boat, the marshal in a sense was acting as the agent of the libelants and interveners. He was conforming to and carrying out their wish and direction.

Douglass v. Douglass, 88 U. S. 21 Wall. 98, 22 L. ed. 479.

The affirmance of the judgment fixed the liability of the signers of the undertaking, and the sureties are bound to the same extent as the principals. Indeed they are all principals.

Dunteman v. Storey, *supra*; *Babbitt v. Shields*, 101 U. S. 7, 25 L. ed. 820; *Karthaus v. Owings*, 6 Harr. & J. 134; *Gillette v. Bullard*, 87 U. S. 571, 22 L. ed. 387.

The undertaking secured all damages on account of the delay.

Wood v. Fulton, 2 Harr. & G. 71.

The boat, in the sense of section 416, was never in the hands of the court. In a sense it was, until the marshal parted with it, in the possession of the law and under the jurisdiction of the court.

Cooper v. Reynolds, 77 U. S. 10 Wall. 308, 19 L. ed. 931; *Flannagan v. Cleveland*, 44 Neb. 58; *The Rio Grande v. Otis* ("The Rio Grande"), 90 U. S. 23 Wall. 458, 23 L. ed. 158.

The statute contemplates that the undertaking shall secure the respondent against loss and damage by virtue of the supersedeas of the execution of the judgment from which the appeal is taken.

United States v. Hodson, 77 U. S. 10 Wall. 395, 19 L. ed. 937; *Omaha Hotel Co. v. Kountze*, 107 U. S. 378, 27 L. ed. 609.

Immediately upon the affirmance, the duty of the undertakers became fixed and active, not passive and indifferent. They were required to see that the judgment was obeyed, executed, and performed, and not wait to be coerced, much less to take an adverse and hostile position.

Jennison v. Haire, 29 Mich. 208; *Douglass v. Douglass*, 88 U. S. 21 Wall. 98, 22 L. ed. 479.

But they have failed to perform what they undertook to perform, and the appellant asks to be reimbursed his loss and damages suffered by virtue of such default.

Gillette v. Bullard, 87 U. S. 20 Wall. 571, 22 L. ed. 387; *Cobbey*, *Replevin*, p. 735; *Murfree*, *Official Bonds*, §§ 36, 48, 82.

(On rehearing.)

The courts of admiralty, both in England and in the United States, exercise a dual jurisdiction: (a) as instance courts, (b) as prize courts.

3 Bl. Com. 108, note 14, by Coleridge; *Percival v. Hickey*, 18 Johns. 257, 9 Am. Dec. 210; *Doane v. Penhallour*, 1 U. S. 1 Dall. 218, 1 L. ed. 108.

The jurisdiction of admiralty as a prize court has no bearing on any question before this court on this record.

3 Bl. Com. p. 108; *Percival v. Hickey*, *supra*; 2 Browne, *Civil & Admiralty Law*, 29; *Henderson v. Clarkson*, 2 U. S. 2 Dall. 174, 1

L. ed. 387; *Slocum v. Maberry*, 15 U. S. 2 Wheat. 1, 4 L. ed. 169; *Notion v. Hallett*, 16 Johns. 327; *Doane v. Penhallow*, *supra*; *Ross v. Rittenhouse*, 2 U. S. 2 Dall. 160, 1 L. ed. 381, 1 Yeates, 443; *Sasportas v. Jennings*, 1 Bay, 470; *Simpson v. Nadeau*, N. C. Conf. Rep. 115, 2 Am. Dec. 634; *Tazier v. Sweet*, 2 U. S. 2 Dall. 81, 1 L. ed. 298; *Findlay v. The William*, 1 Pet. Adm. 12; *Jecker v. Montgomery*, 54 U. S. 13 How. 498, 14 L. ed. 240.

The common-law courts have jurisdiction of all causes cognizable upon the instance side of the court, except when a vessel is proceeded against as the offending thing, *i. e.* in all cases except where the proceeding is *in rem* to enforce a maritime lien.

The Belfast v. Boon ("The Belfast"), 74 U. S. 7 Wall. 624, 19 L. ed. 266; *The Moses Taylor v. Hammons* ("The Moses Taylor"), 71 U. S. 4 Wall. 411, 18 L. ed. 397.

The territorial district courts, under the provisions of the statute investing them with the jurisdiction of cases arising under the Constitution and laws of the United States, etc., were invested with jurisdiction in causes cognizable in the district courts of the United States as courts in admiralty.

The City of Panama v. Phelps ("The City of Panama"), 101 U. S. 453, 25 L. ed. 1061; *Reynolds v. United States*, 99 U. S. 145, 25 L. ed. 244; *United States v. Beebe*, 1 Dak. 292.

There was a judgment in the territorial district court as to the ownership and right of possession of the boat in question.

In order to effect an appeal at all, an undertaking for costs was required.

Code Civ. Proc. 1877, § 414.

And if a supersedeas of the judgment was sought, a further undertaking must be executed in compliance with section 416 of the Code of Civil Procedure of 1877.

The statute of the territory governs the privileges of the undertaking in question.

United States v. Ames, 99 U. S. 35, 25 L. ed. 295.

Even if an undertaking of the character under review had been put up in an admiralty action strictly, in the ordinary courts of admiralty jurisdiction, nothing short of an action could have enforced it.

2 Foster, Fed. Prac. §§ 402-405; *The Palmyra*, 25 U. S. 12 Wheat. 1, 6 L. ed. 531; *Barlett v. Spicer*, 75 N. Y. 528; *The Ann Caroline v. Wells*, 69 U. S. 2 Wall. 538, 17 L. ed. 838; *The William H. Webb v. Barling* ("The Webb"), 81 U. S. 14 Wall. 406, 20 L. ed. 774.

Summary judgment by motion is never deemed an exclusive remedy. It is cumulative.

1 Enc. Pl. & Pr. p. 1018; *Trent v. Rhomberg*, 66 Tex. 252; *Loddell v. Lake*, 32 Conn. 16; *Cande v. Hayward*, 37 N. Y. 653; *State v. Boies*, 41 Me. 344; *Mestling v. Hughes*, 89 Ill. 389; *Hester v. Keith*, 1 Ala. 316; *Rowlet v. Eubank*, 1 Bush, 477; *Burroughs v. Louder*, 8 Mass. 372; *Legate v. Marr*, 8 Blackf. 404; *Ellis v. Hull*, 23 Cal. 161; *Philbrick v. Buxton*, 40 N. H. 384; *McConnel v. Swailes*, 3 Ill. 571; *Karthaus v. Owings*, 6 Harr. & J. 138; *Hobart v. Hilliard*, 11 Pick. 143; *Ashley v. Brasil*, 1 Ark. 144; *State v. Montgomery*, 74 Ala. 226; *non v. Levins*, 6 Port. (Ala.) 414; *Curry v.*

L. R. A.

Barclay, 3 Ala. 484; *Tarver v. Nance*, 5 Ala. 712; *Hinson v. Preslor*, 27 Ala. 643.

This undertaking is ancillary to the case of *Rea v. The Eclipse* ("The Eclipse"), 4 Dak. 218, on appeal, 135 U. S. 599, 34 L. ed. 269, not so as to give any court of admiralty exclusively the right to enforce it.

The case at bar is entirely distinct from the judgment in *Rea v. The Eclipse* ("The Eclipse"). At the best that judgment is a mere incident. A purely personal contract without relation to any maritime service is not within the admiralty jurisdiction.

Alberti v. The Virginia, 2 Paine, C. C. 115.

The damages recoverable under this undertaking have nothing essentially maritime in their composition. It is only a question of damages.

The Paola R., 32 Fed. Rep. 174.

Ancillary proceedings to be sustained irrespective of citizenship must be:

(1) In the same court as the original proceedings.

Winter v. Swinburne, 8 Fed. Rep. 49; *Freeman v. Howe*, 65 U. S. 24 How. 450, 16 L. ed. 749; *Milwaukee & M. R. Co. v. Chamberlain*, 73 U. S. 6 Wall. 748, 18 L. ed. 859; *Jones v. Andrews*, 77 U. S. 10 Wall. 327, 19 L. ed. 935; *Dunn v. Clarke*, 33 U. S. 8 Pet. 1, 8 L. ed. 845; *Hatch v. Dorr*, 4 McLean, 112; *Hatfield v. Bushnell*, 1 Blatchf. 393; *Re Sabin*, 18 Nat. Bankr. Reg. 151.

(2) In reference to the same subject-matter as the original proceedings.

Conwell v. Whitewater Valley Canal Co., 4 Biss. 195; *Dunn v. Clarke*, 33 U. S. 8 Pet. 1, 8 L. ed. 845; *Myers v. Dorr*, 13 Blatchf. 22; *Wickliffe v. Eve*, 58 U. S. 17 How. 468, 15 L. ed. 163; *Christmas v. Gaines*, 81 U. S. 14 Wall. 69, 20 L. ed. 762; *Hubbard v. Bellevue*, 3 Fed. Rep. 447.

(3) And, as a general rule, between the same parties as in the original proceedings.

U. S. Rev. Stat. Gould & Tucker's notes, p. 109.

The court in which the action of *Rea v. The Eclipse* ("The Eclipse"), 4 Dak. 218, on appeal 135 U. S. 599, 34 L. ed. 269, was commenced and prosecuted to final judgment is no longer in existence. This action is not in regard to the same subject-matter as that. This action is not between the same parties.

Ancillary jurisdiction generally is quite another thing from ancillary jurisdiction under the judicial system of the United States.

Milwaukee & M. R. Co. v. Souther, 69 U. S. 2 Wall. 609, 17 L. ed. 886; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Barrow v. Hunton*, 99 U. S. 80, 25 L. ed. 407; *The Moses Taylor v. Hammons* ("The Moses Taylor"), 71 U. S. 4 Wall. 429, 18 L. ed. 401; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 288, 20 L. ed. 577; *Milwaukee & M. R. Co. v. Chamberlain*, 73 U. S. 6 Wall. 748, 18 L. ed. 859; *Freeman v. Howe*, 65 U. S. 24 How. 451, 16 L. ed. 749; *Reilly v. Golding*, 77 U. S. 10 Wall. 56, 19 L. ed. 858; *Dunn v. Clarke*, 33 U. S. 8 Pet. 1, 8 L. ed. 845; *Wickliffe v. Eve*, 58 U. S. 17 How. 468, 15 L. ed. 163; *Christmas v. Gaines*, 81 U. S. 14 Wall. 69, 20 L. ed. 762; *Hubbard v. Bellevue*, 3 Fed. Rep. 447; *Ober v. Gallagher*, 98 U. S. 199, 23 L. ed. 829; *Metcalf v. Watertown*, 128 U. S. 586,

32 L. ed. 543; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123; *Devey v. West Fairmont Gas Coal Co.* 123 U. S. 329, 31 L. ed. 179; *Gumbel v. Pitkin*, 124 U. S. 131, 31 L. ed. 874; *Morgan's L. & T.R. & S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820.

Whenever the proceeding is such that a new subject-matter is involved or new parties necessary to its complete determination, jurisdiction is in the Federal or state courts exclusively or concurrently, according to the existence or nonexistence of other jurisdictional facts.

Hawes, Jurisdiction of Courts, § 46.

The undertaking in question did not in any sense take the place of *The Eclipse Case*. It is not a stipulation for value in admiralty to stand in the place of the *res*, or any part or interest in it.

Hagan v. Lucas, 85 U. S. 10 Pet. 400, 9 L. ed. 470; *Abbott, Forms of Fed. Proc.* p. 571, No. 596; *Bartlett v. Spicer*, 75 N. Y. 528; *Ramsey v. Allegre*, 25 U. S. 12 Wheat. 611, 6 L. ed. 746; *Fox v. Patton*, 22 Fed. Rep. 746; *Meyers v. Isaacs*, 120 U. S. 206, 30 L. ed. 642; *Block v. Myers*, 35 La. Ann. 221.

In *Meyers v. Isaacs*, *supra*, the court upheld the jurisdiction of the state court in an action upon an injunction bond given in a Federal court. In *Lacaze v. State*, Add. Rep. 59, the court sustained a common-law action upon a bond put up in a court of admiralty that had become extinct.

Mr. Edgar W. Camp, for respondents:

No appeal bond was required to obtain a stay, except a \$200 bond.

No order for release was made; no stipulation approved by the court was furnished; the boat, therefore, at all times after the seizure was in contemplation of law in the custody of law, in the possession of the marshal.

It is a common, almost a necessary, proceeding on the part of officers who have property in custody, to deliver it to some person or persons who receipt to the officer therefor. This the officer does on his own responsibility.

The possession of the receptor is the possession of the officer.

The decree was simply a command to the marshal, in whose hands the law deemed the boat to be, to deliver her to, Braithwaite.

Section 416 cannot apply to a case where the thing in controversy is already in court, —already out of the power of the litigants and in the custody of the marshal of the court so completely that no writ was necessary to carry out the decree of the court.

Hayne, New Trial & Appeal, § 223.

The order of the district court not being one which defendants were to obey, the mere affirmance of that order did not make an order for appellants to obey.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624.

So that the \$15,000 bond had no greater effect than a \$250 bond would have had, conditioned to pay all damages and costs which might be awarded against appellant on the appeal.

Re Schedel's Estate, 69 Cal. 241; *Pennie v.* 31 L. R. A.

San Francisco City & County Super. Ct. 89 Cal. 31; *Born v. Horstmann*, 80 Cal. 452.

The recovery on appeal bonds is limited to those conditions of the bond which are required by statute, and the statute did not authorize any condition to "obey the order of the court."

Kountz v. Omaha Hotel Co. 107 U. S. 378, 27 L. ed. 609; *Post v. Doremus*, 60 N. Y. 371; *McCollion v. Hibernia Sav. & L. Soc.* 98 Cal. 442; *Powers v. Crane*, 67 Cal. 65; *Powers v. Chabot*, 93 Cal. 267; *Steele v. Crider*, 61 Fed. Rep. 484; *Pacific Nat. Bank v. Minter*, 124 U. S. 721, 31 L. ed. 567; *Shunk v. Miller*, 5 Pa. 250; *Hall v. Cushing*, 9 Pick. 404; *Sanders v. Rives*, 8 Stew. (Ala.) 109; *Woods v. State*, 10 Mo. 698.

As securing costs the bond is good, but the costs are only those incurred in the supreme court.

Janeway v. Haft, 46 N. Y. S. R. 917; *Concordia Sav. & Aid Assn. v. Read*, 124 N. Y. 189; *Com. v. Wistar*, 142 Pa. 378; *Michie v. Ellair*, 60 Mich. 73.

On rehearing.

At any time during the progress of the case, even after appeal, and whether the appeal bond operated as a supersedeas or not, Mr. Braithwaite could have compelled the libelants to file the usual stipulation for value, or have had the boat sold under the well-established admiralty practice.

2 Conkling, Admiralty, pp. 167-169; United States Sup. Ct. Rules of Practice in Admiralty, No. 11.

After the admission of the state the United States district court in admiralty matters proceeds to do whatever remains to be done in admiralty cases pending in the territorial courts.

Hamilton v. The Walla Walla, 44 Fed. Rep. 4; *The Blanche Page*, 16 Blatchf. 1.

In *The Blanche Page*, *supra*, Justice Blatchford said: "The fact that the libelants could not recover judgments on the stipulations or bonds in any other court than the admiralty court does not prevent their resorting to other courts, where they have obtained judgments in the admiralty court, to enforce such judgments."

Ex parte Phillips, 25 L. ed. 781; *The Baltic*, 1 Blatchf. & H. 149; *The Wanata v. Avery* ("The Wanata"), 95 U. S. 600, 24 L. ed. 461; *Campbell v. Hadley*, 1 Sprague, 470; *The Aligator*, 1 Gall. 145; *Nelson v. United States*, Pet. C. C. 285; Dunlap, Admiralty Practice, 164; *McLellan v. United States*, 1 Gall. 227; *The Octavia*, 1 Mason, 150; 2 Conkling, Admiralty, 2d ed. p. 105; *Holmes v. Dodge*, 2 Abb. Adm. 60; *Gaines v. Travis*, Id. 422; *Benedict*, American Admiralty, 2d ed. p. 290, 3d ed. p. 637; *Re Sawyer*, 88 U. S. 21 Wall. 235, 22 L. ed. 617.

Stipulations are enforced in our courts of admiralty by summary process of execution. 2 Conkling, Admiralty, p. 114.

A stipulation or bond is in admiralty regarded as a fund in court to be distributed by that court.

The Tolchester, 42 Fed. Rep. 180; *De Lovio v. Boit*, 2 Gall. 398.

After a two years' search I have found but

one case holding that an action at common law would lie on a bond taken in admiralty.

Lacaze v. State, Add. Rep. 59; *Respublica v. Le Caze*, 1 Yeates, 55.

Admiralty, having jurisdiction of the main case, has jurisdiction of all incidental and ancillary proceedings.

De Lovio v. Boit, *supra*; *Munks v. Jackson*, 66 Fed. Rep. 571; *Jackson v. Munks*, 58 Fed. Rep. 596; *Ramsay v. Allegre*, 25 U. S. 12 Wheat. 611, 6 L. ed. 746; *Seymour v. Phillips & C. Constr. Co.* 7 Biss. 460; *Arnold v. Frost*, 9 Ben. 267; *Hatch v. Dorr*, 4 McLean, 112; *Bobyshall v. Oppenheimer*, 4 Wash. C. C. 482; *Rio Grande R. Co. v. Vinet*, 132 U. S. 478, 33 L. ed. 400; *Thompson v. McReynolds*, 29 Fed. Rep. 657; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368; *Dunlap v. Stetson*, 4 Mason, 349; *Miller v. Rogers*, 29 Fed. Rep. 401; *Babcock v. Millard*, Fed. Cas. No. 699; *Winslow v. Leland*, 128 Ill. 304; *Wade v. Wortsman*, 29 Fed. Rep. 754; *McDermott v. Doyle*, 11 Mo. 443; *Burtus v. McCarty*, 13 Johns. 424; *Davis v. Packard*, 6 Wend. 327, 32 U. S. 7 Pet. 276, 8 L. ed. 684; *Penhallow v. Doane*, 3 U. S. 3 Dall. 54, 1 L. ed. 507; *Jennings v. Carson*, 8 U. S. 4 Cranch. 2, 2 L. ed. 531.

No court will entertain a distinct suit to accomplish nothing beyond what can be effected by orders in a cause or a rule on parties therein.

Mann v. Blount, 65 N. C. 101; Wells, Jurisdiction, p. 135; *Parker v. Murray*, 37 N. Y. S. R. 949; *Garrett v. New York Transit & T. Co.* 36 Fed. Rep. 518.

So far as we can learn, there is no such thing known to modern practice as a separate suit on an admiralty bond or stipulation, not even in an admiralty court. The remedy is always by motion or petition in the case in which the bond was given.

The Blanche Page, 16 Blatchf. 1; *The Baltic*, 1 Blatchf. & H. 149; *Campbell v. Hadley*, 1 Sprague, 470; *The Wanata v. Avery* ("The Wanata"), 95 U. S. 600, 24 L. ed. 461; *Re Sawyer*, 88 U. S. 21 Wall. 235, 22 L. ed. 617; *The Alligator*, 1 Gall. 145; *The Sydney*, 27 Fed. Rep. 119; *Benedict*, American Admiralty, p. 637; *Conkling*, Admiralty, p. 114, footnote p. 115; *The Tolchester*, 42 Fed. Rep. 180.

Federal courts on their part are careful not to assert jurisdiction of causes which are ancillary or auxiliary to actions in state courts.

Flash v. Dillon, 22 Fed. Rep. 1; *Buford v. Strother*, 10 Fed. Rep. 406; *Pratt v. Albright*, 9 Fed. Rep. 634; *Poole v. Thatcherdeft*, 19 Fed. Rep. 49; *Lamb v. Ewing*, 54 Fed. Rep. 269; *Root v. Woolworth*, 150 U. S. 401, 37 L. ed. 1123; *Brooks v. Memphis*, Fed. Cas. No. 1,954.

But the same courts retain jurisdiction over ancillary matters where they have it of the main case.

Deakin v. Lea, Fed. Cas. No. 8,695; *Lamb v. Ewing*, *Root v. Woolworth*, and *Brooks v. Memphis*, *supra*; *Cohen v. Solomon*, 66 Fed. Rep. 411; *Kern v. Huidekoper*, 103 U. S. 494, 26 L. ed. 497; *Johnson v. Christian*, 125 U. S. 642, 31 L. ed. 820; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 368; *Dunlap v. Stetson*, Fed. Cas. No. 4,164; *Miller v. Rogers*, 29 Fed. Rep. 401; *Babcock v. Millard*, Fed. Cas. No. 699; *Thompson v. McReynolds*, 29 Fed. Rep. 657; *Gwin v. Breedlove*, 43 U. S. 2 How. 29, 11 L. 81 L. R. A.

ed. 167; *Reilly v. Golding*, 77 U. S. 10 Wall. 56, 19 L. ed. 858; Wells, Jurisdiction, § 156.

Corliss, J., delivered the opinion of the court:

Although the steamer *Eclipse* has for years lain at the bottom of the Missouri river, the litigation connected with her shows no signs of decadence. *Rea v. The Eclipse*, 4 Dak. 218, on appeal, 135 U. S. 599, 34 L. ed. 269; *Braithwaite v. Power*, 1 N. D. 455; *Braithwaite v. Aikin*, Id. 475, 2 N. D. 57, 3 N. D. 365. In this case Capt. Braithwaite is seeking to recover damages for breach of an undertaking given by defendants on appeal from the district court to the supreme court of the territory of Dakota from a judgment rendered in a proceeding in admiralty instituted to try his title to, and right to the possession of, this vessel. The questions of law on the merits which are here at issue arise on demurrer to the plaintiff's complaint. The trial court sustained the demurrer. The plaintiff has appealed. It is obvious from the complaint that the undertaking was given as a cost bond, and also for the purpose of securing a stay of proceedings under the judgment appealed from pending the appeal. It is in the following form:

"Whereas, on the 18th day of September, 1884, in the district court within and for the 8d judicial district, the above-named respondent, William Braithwaite, recovered judgment against the above named appellants for the possession of said steamer *Eclipse* and costs, and the above named appellants and interveners, feeling aggrieved thereby, intend to appeal therefrom to the supreme court of the territory of Dakota: Now, therefore, we do hereby undertake that the said appellants will pay all costs and damages which may be awarded against appellants on said appeal, or on a dismissal thereof, not exceeding \$250, and do also undertake that if said judgment so appealed from, or any part thereof, be affirmed, or said appeal be dismissed, the said appellants will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellants on said appeal, and also undertake to obey any order the appellate court may make in the premises: conditioned, however, that our liability hereunder shall not exceed \$15,000. Dated December 16, 1884."

On appeal the judgment was affirmed by the supreme court of the territory of Dakota.

Preliminary to the consideration of the merits, we must settle the question of the jurisdiction of the state courts to take cognizance of this action. Counsel for defendants insists that the power to render judgment on the undertaking sued on is vested exclusively in the United States district court for the district of North Dakota, sitting as a court of admiralty. He founds his contention upon the fact that the undertaking is the outgrowth of an action in admiralty, and on the proposition that any proceeding to enforce it is merely incidental to the main action in the course of which it was given. He asserts that a suit on the undertak-

ing is an offshoot from the original proceeding,—is supplemental in character,—and that, therefore, the court in which it was given, and that court only, has power to enforce it. His argument certainly derives no support from the analogies of the law. If the doctrine to maintain which he has striven with great force in this court be indeed the true doctrine, it stands alone. In no other case is it the rule that the court in which a bond, recognizance, undertaking, or other security is taken in the course of a judicial proceeding pending therein has exclusive jurisdiction of an action brought to enforce it. (Of course, where *scire facias* is resorted to, the court in which the main proceeding was had is the only court which can take jurisdiction.) An action on such security, whatever be its form, is always as much incidental to the original suit as this action is incidental to the admiralty proceeding in which the undertaking sued on was given. The security is in the same sense an outgrowth of the main litigation, and the action thereon is as strictly an offshoot from the original proceeding, as is any suit to enforce an appeal bond given in the course of an admiralty action an offshoot from such original proceeding in admiralty. And yet, aside from admiralty cases, no case can be found—with possibly a single exception, to which we will hereafter allude—holding that a suit to enforce any bond given during the progress of any judicial proceeding must be brought in the tribunal in which it was given. Undertakings given on suing out writs of attachments; undertakings given to secure the discharge of attachments; undertakings to obtain orders of arrest; undertakings to secure release from imprisonment thereunder, supersedeas bonds and undertakings on appeal; bonds given on the allowance of a writ of injunction; bonds given by the plaintiff, and also bonds given by the defendant, in replevin actions, to obtain possession *pendente lite* of the property in controversy,—all these and other obligations given in the course of judicial proceedings may, in the absence of some statute to the contrary, be sued on in any court having jurisdiction of actions on contract involving a like amount. That the court in which any such security is given is not vested with exclusive cognizance of an action thereon is apparent from the general trend of practice, which is to institute such an action in any tribunal possessing jurisdiction of actions on contract, where the amount is the same as that for which suit is brought on such security. If there is any class of actions in which it might be claimed with great force that the exclusive cognizance of actions on a judicial bond inheres in the court in which it was given, it is the class to which belong actions on bonds given in claim and delivery proceedings in replevin cases. Proceedings to enforce such bonds are not only incidental to the main case, and an offshoot therefrom, but they are also supplemental in their character to the original action. The property to recover which the replevin suit is brought is released, and the bond substituted for it. In the event of the sheriff's being unable, after judgment, to produce the property or collect its adjudged value, the successful litigant, in proceeding to enforce the bond, is merely pursuing his original purpose

to secure redress for the wrong done him in depriving him of the possession of his property. Such action is strictly supplemental in its nature, and if, in any case aside from the class of cases to be hereafter noted, a subsequent proceeding to enforce a judicial bond could be regarded as in any sense an essential part of the prior suit, it is in just such a case; and yet we can find no authority which holds that the exclusive cognizance of an action on such a bond is vested in the court in which it was given. In *McDermott v. Doyle*, 11 Mo. 443, the court ruled, not that the court in which the replevin bond was given had exclusive jurisdiction of an action to enforce it, but that the action should have been brought in such court, unless the plaintiff was prevented from suing on the bond in that court. The language of the court in that case is that "the bond was given in the circuit court, and suit should have been instituted on it in that court, unless the party suing was prevented from instituting his suit in that court. The action on the bond, for a breach thereof, is virtually a continuance and part of original detinue suit, and to permit the plaintiff to sue on the bond in the court of common pleas would be to permit him to divide his action, and prosecute one branch of it in the circuit court, and the other in the common pleas. On this point authorities are very abundant." In the first place, it is to be noticed that by necessary implication the court recognizes the fact that the question is not one of jurisdiction, by so qualifying the rule there enunciated as to allow the plaintiff to sue in another court when he is unable to bring his action in the court in which the bond was given. The utmost scope of the decision is that it is the duty of the plaintiff to sue in the latter court, if possible. To sustain this novel rule in actions on replevin bonds, the court cites the cases which lay down such a rule with respect to recognizances of bail. But this rule had its origin in a peculiar privilege enjoyed by the obligors on such recognizances, conferred upon them by statute. When proceeded against in the court in which such recognizance was taken, the statute allowed the recognizers to retry the merits of the original action in which the recognizance was given, although judgment had already been rendered in such original action against the defendant therein. See the opinion of Smith, J., in *Lacaze v. State*, Add. Rep. 59-90, and of Chew, J., in same case, at page 68. The courts have refused to allow the plaintiff to sue in another tribunal when he could bring his action in the court in which the recognizance was given, because they have assumed that the latter court only could give the recognizers the relief provided for by statute, or because, as some of the cases seem to indicate, no other court could afford the recognizers as effectual relief. According to Smith J., in *Lacaze v. State*, *supra*, the foundation of the rule that the recognizers must be proceeded against in the court in which the recognizance is a matter of record is that no other court can give them the equitable relief provided for by the statute; and according to the United States Supreme Court in *Davis v. Packard*, 32 U. S. 7 Pet. 276, 8 L. ed. 684, the rule rests upon the supposition that the court in which the recognizance was given is

more competent to relieve the recognizers. It is therefore obvious that the foundation of the rule is the protection of the recognizers against the loss or impairment of this special privilege, statutory in its origin. The plaintiff cannot force them into a court in which they will be deprived of it altogether, or, at the most, will enjoy it shorn of a portion of its efficacy, unless he is powerless to sue in the court in which the recognizance was given. The rule is not that no other court possesses jurisdiction to entertain the action, but that the recognizers may, for their protection, insist that, when possible, the plaintiff shall proceed against them in the court in which they gave the recognizance. It is purely a personal privilege, and if the defendants waive it the case may proceed in any other tribunal in whose jurisdiction over the case they acquiesce. *Davis v. Packard*, 6 Wend. 327. This could not be done if such tribunal did not possess jurisdiction of the subject-matter, as consent will never confer such jurisdiction. In many cases the recognizers have been sued in another court, and the jurisdiction of such court sustained. *Davis v. Gillet*, 7 Johns. 318; *Haswell v. Bates*, 9 Johns. 80; *Gardiner v. Burham*, 12 Johns. 459. See also *Burtus v. McCarty*, 13 Johns. 424, and *Davis v. Packard*, *supra*. Moreover, a recognizance was a matter of record, and in the nature of a judgment against the recognizers in the case in which it was given. *Davis v. Packard*, 6 Wend. 327, 330, 331; *Respublica v. Cobbet*, 3 U. S. 3 Dall. 467-475, 1 L. ed. 688-686. Proceedings to enforce it were by scire facias. They might therefore be regarded as part of the original action with much greater reason than an action like the one at bar, on an undertaking on appeal. It is therefore clear that the cases cited to support the decision of the court in *McDermott v. Doyle*, *supra*, do not sustain it, in so far as that case may be regarded as holding that exclusive jurisdiction of a proceeding to enforce a replevin bond resides in the court in which it was given. We feel justified in asserting it to be the general rule that the plaintiff may, in the absence of a statute regulating the matter, enforce any bond, undertaking, or other security given in the course of a judicial proceeding, in any court having jurisdiction of an action on contract for the amount he seeks to recover; and we are unable to discover any reason why this rule should not apply to an undertaking on appeal given in an admiralty action *in rem*. We are at a loss to understand on what principle it can be claimed that admiralty courts exercise a more extended jurisdiction than common-law courts in analogous cases. Formerly their powers were very much circumscribed, and, while it is true that their jurisdiction and powers have been considerably enlarged, we do not believe that they are in the possession of this exclusive jurisdiction which is not enjoyed by common-law courts in similar cases.

But counsel for defendants earnestly urges that a strong array of authority supports his contention. We are unable to agree with him in the view which he takes of the decisions he cites. It is undoubtedly true that courts of admiralty have power summarily to render judgment against stipulators upon any stipulation given during the progress of an admi-

ralty proceeding, and that such judgment may be rendered in the very proceeding in which the stipulation was given. No new suit is necessary. Nor does it matter whether the stipulation is for value or for costs, or is given to perfect an appeal, or stay execution during the pendency thereof. *United States v. Ames*, 99 U. S. 35, 25 L. ed. 295; *The Palmyra*, 25 U. S. 12 Wheat. 1, 6 L. ed. 531; *The William H. Webb v. Barling* ("The Webb"), 81 U. S. 14 Wall. 406, 20 L. ed. 774; *The Wanata v. Avery* ("The Wanata"), 95 U. S. 600, 24 L. ed. 461; *Pearce v. Germanic Ins. Co.* ("The Lady Pike"), 96 U. S. 461, 24 L. ed. 672; *Sawyer v. Oakman*, 11 Blatchf. 65, Fed. Cas. No. 12,403; *The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524; *Id.* 17 Blatchf. 221, Fed. Cas. No. 1,525; *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248; *McLellan v. United States*, 1 Gall. 227, Fed. Cas. No. 8,895; *Nelson v. United States*, Pet. C. C. 235, Fed. Cas. No. 10,116; *The Virgin v. Vyfhins*, 33 U. S. 8 Pet. 538, 8 L. ed. 1036; *The Baltic*, Fed. Cas. No. 826; *The Sydney*, 47 Fed. Rep. 260; 2 Conkling, Admiralty, p. 114; *Bartlett v. Spicer*, 75 N. Y. 528.

By virtue of admiralty rules 3 and 4 of the United States Supreme Court, the same practice is prescribed with respect to stipulations or bonds given in proceedings *in personam* to secure the discharge of an attachment or the release of the defendant from arrest. See these rules in Benedict, American Admiralty, pp. 381, 382.

Nor does the fact that a bond, instead of a stipulation, is taken, alter the rule that the admiralty court may, in the same proceeding, summarily enforce the obligation. Bonds are regarded in admiralty as stipulations to be enforced in the same manner. *The Wanata v. Avery* ("The Wanata"), *The Alligator*, *McLellan v. United States*, and *Nelson v. United States*, *supra*; Conkling, Admiralty, p. 434; *The Sydney*, *supra*; Dunlap, Admiralty Practice, 164.

Neither does the power of the court to render in the same action judgment against the parties bound by the stipulation or bond depend upon their express consent recited in the obligation, or their submission to the jurisdiction of the court by the terms of the security. It was long customary to embody such submission and consent in stipulations, and this is still done in many cases. It is possible that this doctrine that an admiralty court may proceed in the same suit summarily against the stipulators may have had its origin in such submission and consent. But, however this may be, such doctrine no longer rests thereon. In several cases in which this practice was upheld and followed with respect to supersedeas bonds on appeal, such bonds contained no clause by which the obligors in terms submitted themselves to the jurisdiction of the court nor did they contain any consent that execution might issue against them in the same action in a summary manner. *The Sydney*, and *The Blanche Page*, *supra*; *The New Orleans*, 17 Blatchf. 216, Fed. Cas. No. 10,181; *The Wanata v. Avery* ("The Wanata"), *supra*. See also *The Alligator*, and *Sawyer v. Oakman*, *supra*; *Ex parte Sawyer*, 88 U. S. 21 Wall. 235, 22 L. ed. 617. Mr. Conkling, in his work on Admiralty Practice, in which he declares that

bonds and stipulations are placed in the same category, so far as the procedure to enforce them is concerned (p. 434), sets out at length the forms of bonds which may be given, instead of stipulations, in various stages of an admiralty proceeding; and in none of them is any submission to the jurisdiction of the court, or consent to summary proceeding to enforce the bond, to be found. Conkling, Admiralty, pp. 574, 575, 581, 582, 589. He says that in this country the clause of expressing the consent of the stipulators that execution issue against their property, on the bond to enforce the decree, is not necessary. *Id.* p. 582, note.

We are strongly of the opinion that the United States district court for the district of North Dakota has jurisdiction to render judgment against the persons who executed the undertaking in suit, and to this extent we agree with counsel for defendants. It has the same power which it would have had if the admiralty suit in which such undertaking was given had been instituted in such court subsequently to statehood. It is the successor of the old territorial district court in which this action was brought, so far as such court was vested with admiralty jurisdiction. Section 22 of the enabling act. *The Walla Walla*, 44 Fed. Rep. 4. That the territorial district court was vested by the act of Congress with the same admiralty jurisdiction as was vested in the several district courts of the United States, is clear from the language of § 1910 of the Revised Statutes of the United States, which declared that the district courts of the several territories therein referred to (Dakota being one of them) should have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as was vested in the circuit and district courts of the United States. The authorities are explicit that under such legislation the same admiralty jurisdiction is vested in the territorial district courts as is vested in the Federal district courts. *Houseman v. The North Carolina*, 40 U. S. 15 Pet. 40, 10 L. ed. 653; *The City of Panama v. Phelps* ("The City of Panama"), 101 U. S. 453, 25 L. ed. 1061; *Rea v. The Eclipse* ("The Eclipse"), 135 U. S. 599, 34 L. ed. 269. That the territorial district court had admiralty jurisdiction was held by the court in *The Eclipse Case*; and that the proceeding in which the undertaking sued on was regarded by that court as an admiralty proceeding is apparent, not only from the language of the opinion in that case, but also from the fact that, being vested by Congress with the duty of deciding what cases were and what were not exclusively of Federal cognizance, on remanding them after final decision (see § 22 of the enabling act), the court remanded *The Eclipse Case* to the United States district court for the district of North Dakota, instead of to the state district court. Therefore, in determining what power the Federal district court for the district of North Dakota has to enforce the undertaking in suit, we must proceed on the same theory on which we would proceed if the original admiralty suit had been commenced after such Federal court had, by the admission of North Dakota into the Union, come into existence. The authorities seem to warrant the counsel for defendants in his contention that that court has

full jurisdiction to enforce the undertaking sued on. But the right to exercise jurisdiction does not necessarily carry with it the right to an exclusive exercise of such jurisdiction. The plaintiff may at his election, proceed in that court, but we do not think he is bound to resort to that tribunal. The language of Smith, J., in *Lacaze v. State*, 1 Add. Rep. 59, 89, 90, in which this very question was involved, is in harmony with our views: "That all proceedings legally commenced in any court to which the parties have agreed to submit, may be more properly carried into execution by that court than by any other, and that no superior court ought to prohibit the inferior court from carrying such proceedings into execution, unless when authority is expressly given to the superior court for this purpose, seems not to admit of dispute, when the party entitled to the effect of those proceedings applies to the inferior court to have them carried into execution; but does it follow that, if the party entitled to such effect chooses to apply to a superior court of common law and general jurisdiction, the superior court is precluded from carrying into effect any of the acts of the inferior court? Does this follow especially where the party applying had been forced into the inferior court? If the party who has chosen the admiralty jurisdiction, in which to institute a suit should be confined to that court to the conclusion of the transaction, does it follow that the other party, who had been forced into it, should be thereby deprived of his election of applying to the courts of common law, and of trial by jury to carry into effect a stipulation taken in the cause by the admiralty, and so deprived without the intervention of positive law or any solemnly adjudged case? I think the affirmative cannot be supported." The plaintiff in this case did not seek a court of admiralty. He was forced into it by the libelants in the original case. To assert that he has made his election to proceed in admiralty, when he might have proceeded at common law or in equity, and that, therefore, he is bound by his election, and hence that all proceedings which grow out of the principal case must by him be instituted in the admiralty court, is to ignore the undisputed facts of this litigation. He was dragged into admiralty by the libelants, when, as the United States Supreme Court held in that very case, the remedy of the libelants to secure the relief they were after was in a court of equity, for an accounting, and not in admiralty at all.

The courts, in holding that stipulations may be enforced, against those that sign them, by summary proceedings in the original case, do not adjudge such proceedings to be an essential part of the main suit. The title of the original action is used. The proceedings are carried on with greater dispatch than a formal action, and the procedure is much simpler. But, in its essence, it is an independent litigation against new parties,—the stipulators. They cannot, it is true, retry the merits of the original action; but they have an absolute right to be heard, at some stage of the proceeding, before their property is finally wrested from them under execution, on the questions whether they in fact signed the stipulation, and whether it is a valid and binding instru-

ment. These facts may be put in issue by them, and some kind of notice must be given to them, and some opportunity afforded them to litigate such facts. The proceeding against the stipulators is, in its essential nature, as much an independent proceeding against them as though an entirely new action were instituted on the stipulation in the usual way, unless, indeed, such proceeding is indispensable to secure to the successful litigant the fruits of his victory according to the usages of courts of justice. This brings us to an important and, in our judgment, controlling distinction. A proceeding to enforce a stipulation for value, given in an action exclusively *in rem*, in admiralty, is an indispensable part of such action. Without it the action would be of no possible benefit to the suitor who had won. In an admiralty action, exclusively *in rem*, there is no personal defendant; and therefore no judgment against a personal defendant can be rendered, aside from a judgment on the stipulation for value, in case one is given. The suit is against an impersonal defendant,—the *res*. After it is seized the owner may appear, and on establishing his rights as owner he may secure the release of the *res* by the giving of the stipulation for value. Thereafter the original *res* disappears from the case, and the substituted *res* takes its place. Henceforth the suit is against the substituted *res*, and the court exercises, and must, from the necessities of the case, exercise, the same jurisdiction over it that it would have exercised over the original *res*, had such *res* remained in the possession and under the control of the court. The remedy is transferred from the ship to the stipulation. *United States v. Ames, The Palmyra*, and *The William H. Webb v. Barling* ("The Webb"), *supra*; *United States v. The Haytian Republic* ("The Haytian Republic"), 154 U. S. 118, 38 L. ed. 930. It is true that in cases of fraud or mistake, or when the *res* has been unprovidently released, the court possesses ample power to order its return to the custody of the marshal. *The Thales*, 3 Ben. 327, Fed. Cas. No. 13,855; *The Virgo*, 18 Blatchf. 225, Fed. Cas. No. 16,976; *Litington v. The Jewess*, 1 Ben. 21, note, Fed. Cas. No. 8,412; *The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346; *The Favorite*, 2 Flipp. 86, Fed. Cas. No. 4,698; 2 Parsons, Shipping & Admiralty, 411; *United States v. The Haytian Republic* ("The Haytian Republic"), *supra*; *United States v. Ames*, 89 U. S. 35, 25 L. ed. 295. But this must be done before final judgment against the stipulators. *Ibid*. And when this is done the stipulation is necessarily annulled. The libellant cannot have a remedy against both the *res* and the stipulation for value. The stipulation is not additional security. It is the only security. In every case, therefore, in which there is a valid stipulation for value, which may be enforced, no resort to the original *res* can be had. It is true that in every suit *in rem*, brought to enforce some claim against the *res*, the judgment in terms condemns the original *res* to be sold to satisfy the amount for which judgment is rendered. But such judgment is never enforced against the original *res* in those cases in which a stipulation has been given, and has not been annulled by the return of the original *res* to the custody of the

marshal, under the order of the court. 2 Foster, Fed. Pr. § 416. This is recognized by all the decisions, and is an elementary principle of admiralty practice. Having no power to render a personal judgment against the owner, and no power to enforce according to its terms the judgment formally rendered against the original *res*, a judgment against the stipulators, on their stipulation, is an indispensable step in the case. Without it the remedy would be incomplete. The action would be a farce. The question of abstract right would be settled, but no means would be provided by the employment of which the successful suitor could enforce the claim which the court had decreed to be just. Judicial tribunals are not wont to administer justice after the manner of moot courts. It is their invariable practice to give the victorious litigant a judgment which will be enforced by the court rendering it according to its terms. The only judgment which a court of admiralty can render in a proceeding *in rem*, brought to enforce a claim against the *res*, which it will execute according to the terms of such judgment, in those cases in which a stipulation for value has been given, and has not been annulled by the seizure of the original *res* under the order of the court, is a judgment against the stipulators for value. And hence such a judgment is an integral part of the action in which such stipulation was given. It is as much an indispensable step in the case as any prior proceeding therein, or as proceedings with respect to the sale of the original *res* after judgment, in cases where such *res* has not been released. There is therefore an obvious reason for holding that the enforcement of the stipulation against the stipulators for value, in such cases, is within the exclusive cognizance of the court in which it was given. It is within its exclusive jurisdiction, the same as any other essential part of the case. No court has power to lay hold of an unfinished litigation pending in another court, and take cognizance of its remaining stages. The whole case must be finished in the forum in which it was started.

There is another conclusive reason why the court in which the stipulation for value is given has sole cognizance of the proceedings to enforce it: Its jurisdiction over the original *res* is exclusive. Such jurisdiction includes the power to make the *res* produce, up to its value, in that very suit, the money to satisfy the libellant's claim. This is accomplished by a sale after judgment. The stipulation takes the place of the ship. It, in turn, becomes the *res*, and over it the court exercises the same jurisdiction as over the vessel itself. It has, and must have, power, in the same suit, to make this new or substituted *res* produce, up to its value, money to satisfy the libellant's claim. The procedure against the stipulation is different from the procedure against the vessel, because the former differs from the latter in its nature. In making the stipulation produce money to apply on libellant's claim, the admiralty court proceeds as other courts proceed against similar instruments. It does not sell the obligation at public auction, but renders judgment and awards execution against the obligors therein. This it has the exclusive power to do just as it possesses

exclusive jurisdiction to sell the original *res* in case it is not released from the control of the court. But the instrument sued on in the case at bar is an appeal bond, and not a stipulation for value, and judgment on such a bond is not an essential part of the admiralty proceeding in which it is given. The admiralty court can, without awarding judgment thereon in the same case, render a judgment which it will enforce according to its terms,—either a judgment against the original *res*, to be enforced against it by sale thereof in case it has not been released, or a judgment against the stipulators for value, in case it has been released, to be enforced against them by a general execution against their property. As a judgment against the sureties on an appeal bond is not an indispensable step in the case, as is a judgment against stipulators for value, admiralty does not possess exclusive cognizance of the proceeding to enforce such bond. Many of the cases cited by counsel for defendants are cases which merely hold that summary judgment may be rendered in the original action against stipulators for value for costs, and sureties on appeal bond. They do not decide that admiralty has exclusive jurisdiction of proceedings to enforce such instruments. The case of *Bartlett v. Spicer*, 75 N. Y. 528, relied on by counsel for defendants, involved a stipulation for value, and not an appeal bond; and, for the reasons already set forth, such a case is therefore not in point. Moreover, the stipulation was given in an action in admiralty instituted by the majority owners of the vessel to secure possession thereof for a voyage. Such a remedy a common law court was powerless to give. Exclusive jurisdiction of the subject-matter rested with admiralty; and the decision of the court in the *Bartlett Case* is based on the ground that the proceeding to enforce such a stipulation is part of the original subject-matter,—a subject-matter within the exclusive cognizance of admiralty, just as in a prize case. But admiralty did not possess exclusive cognizance of the remedy which the libelants sought to enforce by their proceeding in admiralty. It is entirely competent for a court of common-law jurisdiction to entertain an action to recover possession of a vessel. *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311, Fed. Cas. No. 13,803. See also *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 522, 21 L. ed. 369. The subject-matter of the original case not being within the exclusive jurisdiction of admiralty, as in *Bartlett v. Spicer*, the reasoning of the court in that case does not apply. None of the decisions cited by the New York court of appeals in the *Bartlett Case* decide that admiralty has exclusive cognizance of actions to enforce even stipulations for value in cases on the instance side of the court, and in *Lacaze v. State*, Add. Rep. 59, the majority of the court were of the contrary opinion. Three of the judges (Chew, Biddle, and Smith) were of opinion that an action of debt would lie on such stipulation in a common-law court. Rush, J., while concurring in the result, thought that admiralty had exclusive jurisdiction. Addison inclined somewhat to the same view, but was by no means emphatic in the expression of his opinion. While, for the peculiar reasons already stated,

we do not think that the doctrine of concurrent jurisdiction is applicable to proceedings to enforce stipulations for value, yet, with respect to appeal bonds, the reasoning of the majority opinions in *Lacaze v. State* seems to us to be conclusive. See these parts of such opinions at pages 65-68, 88-91, Add. Rep.

It is true that cases can be found in which it has been asserted that admiralty has exclusive jurisdiction to enforce all bonds and stipulations given in admiralty proceedings. But these cases will be found, on examination, to be prize cases, and not actions in the instance side of the court. Such were the cases of *Smart v. Wolff*, 3 T. R. 336; *Brymer v. Atkins*, 1 H. Bl. 164. It is on this ground that these cases are distinguished by Chief Justice Chew in *Lacaze v. State*, Add. Rep. 65, 66. The cases of *Penhallow v. Doane*, 3 U. S. 3 Dall. 54, 1 L. ed. 507, and *Jennings v. Carson*, 8 U. S. 4 Cranch, 5, 2 L. ed. 532, cited by counsel for defendants, were both cases of prize. So are the cases of *Sasportas v. Jennings*, 1 Bay, 470; *Le Caux v. Eden*, 2 Dougl. 594; *Doane v. Penhallow*, 1 U. S. 1 Dall. 218, 1 L. ed. 108; *Ross v. Rittenhouse*, 2 U. S. 2 Dall. 160, 1 L. ed. 331, 1 Yeates, 443; *Simpson v. Nadeau*, N. C. Conf. Rep. 115, 2 Am. Dec. 634; *Cheriot v. Foussat*, 3 Binn. 220, and *Novion v. Hallett*, 16 Johns. 327. Except the New York case (*Bartlett v. Spicer*), we have been unable to find a single authority which asserts the exclusive jurisdiction of admiralty to enforce bonds and stipulations taken on the instance side of the court. The reason for the distinction, so far as the question of exclusive jurisdiction is concerned, between cases of prize and actions on the instance side of the court, is obvious. When sitting as a prize court, the tribunal is administering the laws of nations, and not the mere municipal jurisprudence of a single state or kingdom. The rights of foreigners are often involved. The decision in such a case may affect the public relations of the government whose tribunal had cognizance of the cause. Great international rights growing out of a state of war are generally at issue. No court of a nation, therefore, except such as is recognized by all the civilized powers as the proper tribunal in that nation to deal with such matters, should ever exercise any jurisdiction over the case of any of its incidents. Under such circumstances, the incidents are inseparably bound up with the main cause. This cogent reason for investing prize courts with exclusive jurisdiction over the whole controversy—incidental matters as well as the principal litigation—has been recognized by the master minds in jurisprudence. Said Chancellor Kent in *Novion v. Hallett*, 16 Johns. 327, at page 334: "Such cases generally arise between native citizens, or subjects and foreigners, and it is highly expedient that they should be decided by general laws, known and adopted by every nation. Courts of common law are governed by local municipal laws, and are incompetent, as Lord Mansfield afterwards observed in *Lindo v. Rodney*, 2 Dougl. 613, note 'to embrace the whole of the subject.' Matters of prize, and a piratical capture, without regular authority, involve more or less the responsibility of the national government, and may affect the public relations of the country. It

is therefore exceedingly fit that they should be discussed and tried in a court proceeding according to rules of national law equally known to every country, and which court is specially intrusted with the cognizance of such questions." In *Lacaze v. State*, Add. Rep. 59, Addison, J., at page 97, referring to the decision of the court in *Le Caux v. Eden*, 2 Dougl. 594-597, said: "As the admiralty had full authority to remedy an unlawful capture, and all its consequences, the court thought it would be extremely inconvenient to withdraw this question or any of its incidents, from a jurisdiction proceeding on a general law of all nations, and in a summary and equitable manner, and bring it before a jurisdiction governed by a limited municipal law and proceeding with a formality and mode of proof ill suited to the nature of the subject. If captors were liable to a suit at common law, by every person affected by the capture, none would venture to take a prize. And if foreigners had no remedy for injuries done to their property under color of prize, but from suits in our courts of municipal law, to the principles and effects of which they are strangers, mutual confidence between nations would be destroyed, and, in a war between any two nations, all others would protect themselves by force, and compel by arms that administration of justice to which they are reciprocally entitled." But when sitting as an instance court, a court of admiralty administers, not the laws of nations, but the municipal regulations of the jurisdiction under whose laws the tribunal is erected. Unlike a prize court, the instance court has not exclusive power to afford the suitor redress. There is nearly always a concurrent remedy at law. Section 563, subd. 8, of the Revised Statutes of the United States, saves this right to every litigant. It is true that the suitor cannot, in this country, proceed *in rem* in any other court. *The Moses Taylor v. Hammons* ("The Moses Taylor"), 71 U. S. 4 Wall. 411, 8 L. ed. 397. But he always has a remedy in a common-law court to enforce the claim or redress the wrong of which he complains. *Perceval v. Hickey*, 18 Johns. 257-291, 9 Am. Dec. 210; *Leon v. Galceran*, 78 U. S. 11 Wall. 185, 20 L. ed. 74; *Schoonmaker v. Gilmore*, 102 U. S. 118, 26 L. ed. 95; *Benedict, American Admiralty*, §§ 201, 205; *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 522, 21 L. ed. 369. There is therefore no more reason for the exclusive jurisdiction of an instance court over the incidents of the main case than for the exclusive jurisdiction of any other of the municipal courts of the same government which administer the purely municipal law of that government over the incidents of an action tried and determined therein.

The Federal Supreme Court appears to have settled the question involved, under facts precisely the same as in the case at bar, so far as the issue of jurisdiction is concerned. An admiralty action *in personam* was instituted in the United States district court, sitting as an admiralty court. The case having been decided in favor of the libellant in the district court, and thereafter on appeal in the circuit court, it was carried by appeal to the Federal Supreme Court. On that appeal a super-

seas bond was given. The judgment of the lower court was affirmed. *New Jersey Steam Nav. Co. v. Merchant's Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465. Instead of securing judgment against the sureties on the appeal bond in the very case in which the bond was given, the libellant sued them in the United States circuit court in an action of debt. This was a suit in a common-law court, and not in an admiralty court. The United States circuit court had common-law jurisdiction, but no original jurisdiction in admiralty cases. *Georgius v. Madrazo*, 26 U. S. 1 Pet. 110, 7 L. ed. 73. It could take cognizance of such cases only on appeal. The action to enforce the appeal bond was, like this action, a common-law action brought in a court possessing original jurisdiction of common law and not of admiralty cases. *Ives v. Merchants' Bank*, 53 U. S. 12 How. 159, 13 L. ed. 936. No one connected with the case, from the time the United States Supreme Court affirmed the original judgment on appeal (47 U. S. 6 How. 344, 12 L. ed. 465), seems to have had any thought that the only remedy on the appeal bond was in admiralty. If such had been the law, the court in the *Ives Case* would have declared the judgment appealed from a nullity, for want of jurisdiction of the subject-matter. If counsel for defendants be correct in his contention, then both the judgments of both the circuit and the supreme court were void, and always have been. With this case before us, we feel constrained to hold that the district court of this state has jurisdiction of the subject-matter of this action, and the case is therefore properly before us on appeal. We are of opinion that sound principle supports our view. The *dictum* of Judge Blatchford in *The Blanche Page*, 16 Blatchf. 1, Fed. Cas. No. 1,524, so far as it indicates that it was his opinion that admiralty only could render judgment on an appeal bond taken in the course of admiralty proceedings, cannot prevail against the decision in the *Ives Case*. We attach very little importance to this *dictum*, in view of the facts of the case in which it was uttered; and it is apparent that he regarded the appeal bond as having been given under the act of 1847, which in terms declares that judgment shall be rendered in the very case in which the bond was given. The statute which authorized the giving of such bonds having declared how they should be enforced, that remedy might be regarded as exclusive. The effect of our refusal to entertain jurisdiction might be serious, in case we were in error in so holding. But no irremediable harm can flow from our taking jurisdiction of this case, as the Federal Supreme Court, on writ of error, can reverse our judgment, if we are wrong. Indeed, our judgment, in that event, would be a nullity, and could be attacked collaterally in any court having jurisdiction of the subject-matter and the parties. So far from its being the rule that a court has exclusive jurisdiction of all the incidents of an action, it is a well-settled doctrine that the court of equity in which an injunction bond has been given has no power, on dissolving the injunction, to render judgment on the bond, or even to assess the damages sustained by the defendant by reason of the injunction, unless some statute

gives such power. The defendant must sue at law on the bond. 2 High, Inj. §§ 1642, 1657, and cases cited.

A large number of cases have been cited by defendants' counsel, holding that an action may be maintained in the Federal court, irrespective of diverse citizenship, if such action is an offshoot from another suit of which such Federal court had jurisdiction. Among them are *Bobyshall v. Oppenheimer*, Fed. Cas. No. 1,592; *Arnold v. Frost*, Fed. Cas. No. 558; *Lacassagne v. Chapuis*, 144 U. S. 119, 36 L. ed. 388; *Campbell v. Hadley*, 1 Sprague, 470, Fed. Cas. No. 2,358; *Seymour v. Phillips & C. Constr. Co.* 7 Biss. 460, Fed. Cas. No. 12,689. But none of the cases cited hold that the Federal court has exclusive jurisdiction under such circumstances. The decision in *Wade v. Wortman*, 29 Fed. Rep. 754, is hostile to the contention of counsel for defendant. The original replevin suit was carried on in the United States circuit court. After judgment therein an action was commenced in a state court on a forthcoming bond given in such replevin suit. It was removed to the United States circuit court. The motion to remand was denied. But, if counsel's views be sound, —that the Federal court had exclusive jurisdiction of the second action,—the motion must have been granted; for the Federal court can never secure jurisdiction of a case by transfer from a state court under the laws of the United States, unless the state court had jurisdiction of the cause, so there could be something before it to be transferred. By holding that the case was properly removed to the Federal court, the court necessarily held that the state court had jurisdiction of the case before it was so removed. In *Meyers v. Block*, 120 U. S. 206, 30 L. ed. 642, the court affirmed a judgment of the state court in an action of debt on an injunction bond given in a case in equity in the Federal circuit court. In *Campbell v. Hadley*, 1 Sprague, 470, Fed. Cas. No. 2,358, the court merely held that the Federal district court had jurisdiction of an action in the nature of a scire facias on a bail bond given in admiralty proceedings to secure release of defendant from execution. But the court did not decide that no other court had jurisdiction.

It is urged that the state courts ought not to take jurisdiction of this case, for the reason that the plaintiff has an adequate remedy by proceeding in the original admiralty case. While it is true that courts of equity will refuse to entertain a bill to set aside a judgment, where there is an adequate remedy by motion in the action in which the judgment was rendered, we have been unable to discover any decision making that general doctrine of equity jurisprudence applicable to suits at law. The fact that the suitor has another remedy, which may be more speedy, and even more efficacious, does not debar him from bringing his action at law. It appears to be the rule that, despite the fact that the respondent in an appeal has, by statute, a summary remedy to enforce the appeal bond, in the very case in which it was given, still he may sue on the bond at law. 1 Enc. Pl. & Fr. 1018.

It is next urged that comity requires us to refuse to take jurisdiction of this case. The cases to which we are cited on this point hold

that where, in an action in a Federal court, property has been seized, the state courts must not interfere with the control of the property by the Federal court, but that, if any person not a party to the suit desires to litigate his right to the property, he must intervene in the action, and there try his case. We have carefully examined these decisions, but the great length of this opinion prevents a review of them. It is sufficient to say that we are clear that they do not lay down any rule inimical to the jurisdiction of the state courts over this action. The rule which they lay down is thus stated in *Cohen v. Solomon*, 66 Fed. Rep. 411, at page 418: "No principle is more firmly entrenched in the law than the doctrine that, when one court acquires jurisdiction and power over the *res*, no other court can interfere with its possession or control." Many of the cases cited by counsel for defendants are there referred to. In *Meyers v. Block*, *supra*, the court affirmed a judgment of the state court in an action on an injunction bond given in an action in equity in the Federal court. This case is hostile to this contention of defendants' counsel. It furnishes, also, a complete answer to his contention that the suit on the appeal bond is ancillary to the proceedings in the admiralty court, within the scope of the rule that such proceedings must be carried on in the state or Federal court in which the main action was litigated. The cases cited by counsel for defendants in this connection are cases in which the courts have held that the proceedings were inseparably connected with the enforcement of the judgment in the main action, and were therefore only additional steps in that action, looking to the enforcement of such judgment. The great length of this opinion prevents a more particular reference to these cases. A casual examination of them cannot fail to show that they are not in point. They are *Flash v. Dillon*, 22 Fed. Rep. 1; *Buford v. Strother*, 10 Fed. Rep. 406; *Pratt v. Albright*, 9 Fed. Rep. 634; *Poole v. Thatcherdeft*, 19 Fed. Rep. 49; *First Nat. Bank v. Turnbull*, 83 U. S. 16 Wall. 190, 21 L. ed. 296. This action is not in any sense a proceeding to enforce, nor is it in any manner connected with the enforcement of, the judgment in the admiralty case. On the contrary, it proceeds on the theory that plaintiff has been and is unable to enforce it, and that therefore he desires to compel those to pay him the damages he has thereby sustained who have agreed to be bound in the event that he should not be able to enforce it. The decision in *Meyers v. Block*, *supra*, is, as we have said, an authority against the defendants on this branch of the case.

We now come to the merits of the case. The defendants' counsel contends that the undertaking sued on is void. The plaintiff seeks to recover damages for the alleged breach of the condition of the undertaking that the obligors would obey any order the appellate court might make in the premises. The defendants' counsel asserts that, so far as this provision of the undertaking is concerned, the undertaking is void as a statutory undertaking. A consideration of this branch of the case necessitates a more particular reference to the facts. The action in which the undertaking was given was an action in admiralty in a cause of possession,

civil and maritime, instituted in the district court of the territory of Dakota, for the third judicial district thereof, sitting as a court of admiralty under the laws of the United States. The power of such court to take jurisdiction of such an action was derived, as we have before said, from § 1910 of the Revised Statutes of the United States. This section provided that the district courts of the several territories referred to therein (Dakota being one of them) should have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as was vested in the circuit and district courts of the United States. That such a statute is valid, and that its effect was to vest in the territorial district court of Dakota territory full admiralty jurisdiction, is well settled. *Houseman v. The North Carolina*, 40 U. S. 15 Pet. 40, 10 L. ed. 658; *The City of Panama v. Phelps* ("The City of Panama"), 101 U. S. 458, 25 L. ed. 1081; *Rea v. The Eclipse* ("The Eclipse"), 135 U. S. 599, 34 L. ed. 269. This same section declares that "writs of error and appeals in all such cases may be had to the supreme court of each territory as in other cases." Construing this last provision, the supreme court of Dakota, when the admiralty case in question was before it on appeal, held that such appeal, and all appeals in admiralty cases from the district court to that court, should be governed by the laws, statutes, and rules that obtained in other civil actions tried in such district court. *Rea v. The Eclipse*, 4 Dak. 218. Both parties agree that this decision correctly states the law on this subject. It therefore being conceded that the statutes of the territory of Dakota regulated the appeal in that case, we will first treat the case from that standpoint. We therefore come to the question whether this undertaking is valid as a statutory supersedeas undertaking.

It is claimed by the plaintiff that the judgment appealed from directed the delivery of personal property, and that therefore the execution of a mere cost bond would not have been sufficient to stay the execution of such judgment. Section 416 of the Code of Civil Procedure, as revised in 1877 (the statute in force when the appeal in question was taken), provides that, "if the judgment appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or judge thereof, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal." The judgment that was appealed from did not in terms direct the delivery by the appellants, on such appeal, of the steamboat *Eclipse*, her tackle, apparel, and furniture. It merely adjudged that the claimant, who is the plaintiff in this case, was the owner of one half of such property, and entitled to the possession thereof; that the libel be dismissed, with costs, and that the intervention of certain parties who had intervened in the case be dismissed, with costs; and that the marshal deliver the possession of such property to such

claimant. Had the district court, as a court of admiralty, ordered that the marshal deliver the property to the libelants in that action, or to the interveners, on their giving proper security (whether this could be done we do not decide), it is obvious that the judgment of the court must have been against the parties so lawfully in possession of the property, directing them to deliver such property to the claimant. In such a case there would have been a judgment directing a delivery of personal property, within the letter and the spirit of section 416, assuming that this section was intended to apply to admiralty cases. But that the particular judgment which was in fact rendered was not a judgment for the delivery of personal property, within the meaning of § 416, Code Civ. Proc., does not admit of doubt. That judgment merely adjudged that the claimant was entitled to possession. It did not direct that the libelants or interveners deliver such possession. The judgment itself does not show that they were in possession. Its language indicates the contrary. We do not understand that in admiralty the libelant is ever allowed to secure possession of the *res pendente lite*, unless the action is to secure possession of the vessel for a voyage. In an action to secure absolute possession of a vessel, there seems to be no practice authorizing a delivery of the *res* to the libelant *pendente lite*. We must assume, therefore, that the property was in the legal custody of the marshal, as the hand of the court. The finding of fact (assuming that we may consider it at all that the marshal had delivered possession of the steamer to the interveners in the action without any order of court does not show that the legal possession of the property was anywhere except in the marshal. The court did not lose its control over the steamer by the illegal act of the marshal in suffering the interveners to take possession thereof *pendente lite*. *The Rio Grande v. Otis* ("The Rio Grande"), 90 U. S. 23 Wall. 458, 23 L. ed. 158. The marshal, and his official sureties were liable to the claimant for his failure to keep possession of the steamer, as it was his clear duty to do. *The Jack Jennett*, 2 Ben. 353, Fed. Cas. No. 7,121. The judgment of the court recognized this obligation by directing that the marshal deliver the steamer to the claimant. The obvious meaning of this clause of the judgment is not that the marshal, as the executive officer of the court, shall take the property from the interveners or libelants, as under a judgment directing them to deliver the property to the claimant, but that the marshal (who is the legal custodian of the property, and is therefore responsible for the possession of the property, irrespective of what he has done with it) shall himself deliver to the claimant the property, which the law regards him (the marshal) as having in his control. If he had delivered it to any one *pendente lite*, it was to hold it for him. The law does not, in such a case, recognize the possession of any one else. The court deals with the marshal alone, in directing what shall be done with such possession. The judgment was therefore not a judgment against either the libelants or the interveners, directing them to deliver possession of the property to the claimant, but was merely a judgment declaring that the latter was entitled to the

possession thereof, which the law deemed to be held by the marshal, as the hand of the court. Had the purpose of the court been to award a judgment against the libelants or interveners, directing them to deliver possession to the claimant, the phraseology of the judgment would have been different. It would have been similar to that of a judgment in a replevin action where the property is in the legal possession of the unsuccessful party. Such a judgment, in terms, adjudges that the plaintiff or defendant, as the case may be, recover possession of the property of the adverse party, who has such legal possession. But where the adverse party has no such possession, the property being already in the possession of the successful suitor, the judgment merely provides, as does the judgment under consideration, that the successful party is entitled to the possession. Comp. Laws, § 5099; 2 Abbott, Forms of Fed. Pr. 554. In replevin actions the property is never left in the custody of the officer *pendente lite*, but always in the possession of one of the parties to the suit. Hence a judgment in such cases adjudging that one party is entitled to possession never contains a provision that the officer deliver the possession to him. But in admiralty actions to recover possession the property may be, and in this case it would seem that it actually was, left in the legal custody of the marshal during the pendency of the action. It was therefore entirely proper that the clause directing the marshal to deliver the property to the claimant should have been inserted in the judgment. It was aimed at the marshal solely, because the court regarded him, as it was bound to do, as being legally in possession of the property. If the court had intended to render a judgment directing the libelants or interveners to deliver the possession of the property to the claimant, or that he recover the possession from them, it would have expressed such purpose in the judgment itself. The marshal, in taking the property from the possession of the interveners, to enable him to comply with the judgment, would not have made the seizure under the judgment, but under his right to revest himself with the possession of such property *pendente lite*. He had the same power to take it from the possession of the interveners before the judgment was rendered. That the judgment was not a judgment directing the delivery of personal property, within the meaning of § 416, Code Civ. Proc., is plain, when we consider the object of this section. It was passed to require the appellant to give a supersedeas bond in order to stay execution in cases in which the property should be in the legal possession of the adverse party, and would be left there by stay of execution. In such cases the respondent needs security. But when such property is in the custody of the court there is no occasion for additional security on appeal, as the party has the security of the court's control of it as much after appeal as before. The stay of execution will merely leave it where it was before,—not in the hands of a party, but in the custody of the court. That no supersedeas bond was required to be given to secure a stay, where the property was already legally in the custody of the court,

is apparent from that provision of § 416 which gives the appellant the option of placing the property in the custody of the court, and thus securing a stay. If he can secure a stay by the giving of a cost bond, and the surrender of the property to the control of the court, he may obtain a stay by the giving of such cost bond when the property is already legally in the control of the court. A stay of execution in the admiralty case in which the appeal bond sued on was given would not have left the property in the possession of the interveners, as a matter of legal right. The legal possession was all the time in the marshal, and he could at any time (as well after execution had been stayed as before) have taken the property from the interveners, and have held it himself pending the appeal. If an appeal, with stay of execution, would have entitled the interveners to retain possession of the property during the pendency of the appeal, the marshal would have been exonerated from liability because of their possession. But it was never the purpose of the court, in rendering the judgment in the admiralty case, to release the marshal from liability. On the contrary, it expressly ordered that he, and not the parties to the suit, should deliver the property to the claimant. We very much question the power of the admiralty court to discharge the marshal from liability without the consent of the claimant, in a suit in which such question was not at issue; and, if the marshal continued liable, it is because the interveners, during the pendency of the appeal, had no right, as against him, to retain possession of the property.

In determining whether the judgment appealed from is of such character that a stay of proceedings under it will entitle the appellant to hold possession of the property which the judgment declares shall be delivered to the adverse party, we are never to look at the practical, but at the legal, situation at the time judgment was rendered, if it is at all permissible to travel outside of the terms of the judgment itself. A stay of proceedings confers no new privilege. It merely restores a right lost by the judgment whose execution is superseded. Unless the appellant had a legal right temporarily to hold the property in controversy before the judgment was rendered, he can secure no such right by staying the execution of such judgment. Of course, in speaking of the legal right to the possession of property pending litigation, we do not refer to the ultimate legal right. It often happens that the later right resides in a person different from the one who is vested with the former right. Property about which this litigation is pending must remain during the progress of the case, and before judgment, either in the possession of one of the parties to the suit, or in the hands of a third person. Whoever this may be, under the law, he is the one who is legally entitled to the temporary control of the property; and if he be the defendant, and is defeated, he may secure by a stay pending the appeal a restoration and continuation of this legal right to hold the property, which will not cease until the final decision on such appeal. But to obtain a restoration of this right lost by the judgment, and a continuation of it

until the appeal is decided, he must have been vested with it before judgment. Now, it is evident that the appellants, before judgment, in *The Eclipse Case*, were not vested with any legal right to hold possession of the property, as against the one who was vested with that right by the law, i. e. the marshal. The marshal might have seized the vessel at any time before judgment. The stay of proceedings did not divest him of that right and confer it upon the appellants, for this would be to render the bare stay effectual to enlarge their legal rights, and not merely to revive and prolong them. If the stay of execution did not, under the statute, give the appellants such right, it was not a case in which the bond required by § 416 was necessary. They were not required by that section to give a supersedeas bond to secure a stay, unless they would thereby secure the right to retain possession of the property *pendente lite*. The authorities fully sustain this proposition under identical statutes. *Re Schedel's Estate*, 69 Cal. 241; *Pennie v. San Francisco City & County Super. Ct.*, 89 Cal. 31; *Born v. Horstmann*, 80 Cal. 452; See also *McCallion v. Hibernia Sav. & L. Soc.* 98 Cal. 442. We are therefore of opinion that the admiralty judgment does not fall within § 416. If, then, we are to accept the theory of both parties to this case that the territorial statutes, and not the practice in courts of admiralty, governed the procedure on appeal to the territorial supreme court, the undertaking was void as a statutory undertaking. It is conceded by counsel for plaintiff in this action that, if such judgment did not fall within § 416, there was no necessity, under the statutes, for the giving of a supersedeas bond to secure a stay of execution, but that the giving of the cost bond would, under § 422, have operated as a stay. As no bond other than a cost bond was required to secure a stay, the undertaking sued on is void as a statutory undertaking, so far as it relates to anything more than the costs on appeal. There was no consideration for it. The parties on whose behalf it was given derived no benefit from it. *Powers v. Crane*, 67 Cal. 65; *Powers v. Chabot*, 93 Cal. 266; *McCallion v. Hibernia Sav. & L. Soc. supra*; *Post v. Doremus*, 60 N. Y. 371; *Freeman v. Hill*, 45 Kan. 435. Said the court in *Powers v. Crane, supra*: "On behalf of the sureties who are the real parties in interest here, it is claimed that the undertaking, except in so far as the \$300 is concerned, and about which no question arises, was without consideration and void. The pretended consideration therefor was a stay of execution of the decree appealed from. And if the law itself operated a stay upon the giving of the \$300 bond it would seem that the point is well taken. That the statute did so operate was held by this court in the case of *Snow v. Holmes*, 64 Cal. 232. As the statute itself wrought the stay, there was no consideration for the sureties' promise."

If we were to be governed by the territorial statutes referred to, we would be of opinion that the undertaking was void, for the reason that under such statutes the libelants were entitled to a stay of execution on giving the mere cost bond specified in § 422. But, despite the agreement of counsel, we cannot accede

31 L. R. A.

to their view that these statutes in any manner controlled the appeal in the admiralty case to the territorial supreme court. There are only two theories on which it can be held that the territorial statutes regulated the procedure on appeal in the admiralty case. One is that by the terms of § 1910, U. S. Rev. Stat. the procedure applicable to actions at law in the territorial courts was made applicable to actions in admiralty; and the other is that the territorial legislature had in fact regulated the procedure in admiralty cases on appeal. That § 1910 did not assume to regulate the practice on appeal to the territorial supreme court of Dakota territory in admiralty cases, at all, is apparent from its language. It merely declared that in such cases, among others, writs of error and appeal, might be taken in other cases. It gave the right to appeal, but did not attempt to establish the procedure on such appeal. On this point the decisions of the Supreme Court of Washington territory and of the Supreme Court of the United States are express authorities in support of our view. Section 1911 of the Revised Statutes of the United States, which was applicable to the territory of Washington, contains precisely the same provisions as § 1910. The supreme court of that territory held in the case of *Phelps v. The City of Panama*, 1 Wash. Terr. 615, that the territorial statutes did not govern the procedure on appeal to that court from a judgment of the territorial district court in an admiralty case, but that on such an appeal the case must be tried *de novo* in the supreme court, and that on such trial new evidence in that court might be received. On appeal to the Federal Supreme Court the judgment of the territorial supreme court was affirmed; and that the Federal Supreme Court must have passed upon this question, and settled it in accordance with the ruling of the territorial supreme court, is evident from the fact that it appears from the report of the case that one of the assignments of error in the Federal Supreme Court related specifically to this point. It is in the following language: "The court erred in holding that the acts of Congress and the rules of the Supreme Court of the United States governing the circuit and district courts of the United States in admiralty practice were in force in the courts of the territory, and regulate the practice therein." There was no statute in force in the territory of Washington, giving the appellant in admiralty cases either a right to a new trial on appeal to the territorial supreme court, or a right to introduce new evidence in such court. Had the territorial and Federal courts regarded § 1911 (which is the same as § 1910, which related to Dakota territory) as *ex proprio vigore*, making the practice in the territorial supreme court in ordinary civil actions on appeal applicable to admiralty cases, the decisions in both courts would have been different. See also the opinion of Grier, J., in *Nickels v. Griffin*, 1 Wash. Terr. 374, 394, 395. In the case of *Zephyr v. Brown*, 2 Wash. Terr. 44, it was held that the territorial statutes regulating the practice in taking an appeal to the territorial supreme court were not applicable to an appeal in an admiralty case, but that the steps necessary to perfect such appeal must be such as

were recognized by the usages and practice of courts of admiralty. It is true that the supreme court of the territory of Dakota, when *The Eclipse Case* was before it, held that the territorial statutes regulated the proceedings on appeal; but no such question was before the Federal Supreme Court in that case, and the point was not settled either way by that tribunal. We are unable to agree with the decision of the territorial supreme court in this particular. Undoubtedly, the legislature of Dakota territory might have regulated the practice in admiralty cases on appeal, but it did not do so. It is obvious that the statutes of the territory did not in any manner regulate the practice in admiralty cases in the district court. There was no statute which related to a single step in such cases, from the filing of the libel to the rendering of final decree. The whole scope of these statutes is limited to actions at law and in equity. This was the view of the counsel on both sides in *The Eclipse Case*, when it was before the territorial district court. The procedure there was in accordance, not with the territorial statutes, but with the practice in courts of admiralty. If the territorial statutes did not relate to the proceedings in the district court, they certainly could not govern the proceedings on appeal to the supreme court. The territorial statutes regulated only such proceedings on appeal as were governed by the same body of territorial law when pending in the district court. They did not purport to relate to any case tried in the district court in a manner unknown to the statutes of the territory. The statutes of the territory of Washington were fully as applicable to admiralty cases as were the statutes of Dakota territory, and yet the territorial supreme court of Washington, in the two cases already cited, held that there was no legislation in that territory regulating the practice on appeal to that court in admiralty cases. The practice in admiralty courts has always been so different from that in common-law courts that rules of procedure governing the practice in the latter courts are unsuited to admiralty courts; and nothing short of a very decisive expression of such purpose should warrant us in assuming that the territorial legislature intended to introduce such an anomaly into admiralty practice as the complete assimilation of all procedure in admiralty cases to the procedure in common-law courts. Were this done where the same courts that administered relief in common-law cases already possessed admiralty jurisdiction, also, as in the territory of Dakota, nothing would have been left of admiralty in the territory, but the name. We do not believe that the subject of admiralty procedure was ever considered by the territorial legislature with a view to regulating it, but in the light of the fact that the practice in admiralty courts was reasonably settled, and that the main features of that practice were so different from common-law procedure, it is a natural inference, which the silence of the statutes themselves significantly confirms, that the territorial legislature intended to leave undisturbed a practice whose boundaries were established, and which could not be regulated without either the framing of a special system of procedure adapted to admiralty cases, or

the introduction of an anomaly into admiralty procedure,—the assimilation of the practice in such cases to the practice in common-law courts. Considering that the volume of admiralty litigation in the territory of Dakota would necessarily be small, in comparison with the number of cases at law and in equity; that the territorial condition would cease before that volume would much increase; that the practice in admiralty was reasonably well defined; and that whatever statutory procedure was adopted would be substantially a codification of the existing practice,—the members of the legislative body would naturally leave the subject untouched by legislation. We would expect them to pursue just such a course, and the universal silence of the statutes on the subject renders it certain that the policy of leaving admiralty practice unaffected by territorial statute is the very one they adopted. It is therefore apparent that the libelants and interveners had no absolute statutory right to a stay of proceedings pending their appeal to the territorial supreme court, in giving a mere cost bond. This right they could derive only from § 422, which we hold to be inapplicable. To what authority, then, must we look to discover the rules of procedure which regulated the practice in appealing *The Eclipse Case* to the territorial supreme court? Not to any statute of the United States regulating the practice in admiralty in the Federal courts, for it is well settled that territorial courts, although invested by statute with some of the jurisdiction of the Federal courts, are not Federal courts, within the scope of legislative or constitutional provisions relating to Federal courts. They are merely territorial courts, which are for the time invested with some of the jurisdiction conferred upon the Federal tribunals. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *American Ins. Co. v. 356 Bales of Cotton*, 26 U. S. 1 Pet. 511, 7 L. ed. 242; *Benner v. Porter*, 50 U. S. 9 How. 235, 13 L. ed. 119; *Clinton v. Englebrecht*, 80 U. S. 13 Wall. 434, 20 L. ed. 659; *Hornbuckle v. Toombs*, 85 U. S. 18 Wall. 648, 21 L. ed. 966; *United States v. Bisel*, 8 Mont. 20. For the same reason it is obvious that the rules of practice established by the Federal Supreme Court under the act of Congress were not applicable. Such rules are in terms limited in their application to courts of the United States. They were adopted and published by that court as rules of practice "for the courts of the United States" in admiralty cases on the instance side of the court. See *Benedict, American Admiralty*, 381. Moreover, the statute under which that court derived its power to act in adopting these rules limited the court, in framing such rules, to regulating the practice to be used in suits of admiralty "by the circuit and district courts;" thus specifically referring to the Federal courts, and excluding all other tribunals in which admiralty jurisdiction might thereafter be vested. U. S. Rev. Stat. § 917. The decisions of the supreme court of Washington territory and of the United States Supreme Court in the cases already cited are in harmony with our views in this respect. At the time these cases were decided, the rules in question had already been in force; and yet they were not re-

garded as controlling, but, on the contrary, the courts went back to the old usages, rules, and practice of admiralty courts, to ascertain the correct procedure in those cases. *Phelps v. The City of Panama*, 1 Wash. Terr. 615; *The Zephyr v. Brown*, 2 Wash. Terr. 44. See also Conkling, Admiralty, pp. 404, 405. When we turn to the old admiralty practice, we find that the appellants, in order to perfect an appeal, were required to give new security for the full value of the property in controversy, or for the full amount in litigation. Dunlap, Admiralty Practice, 322; 2 Browne, Civil & Admiralty Law, 437.

Certainly, there was no settled rule of practice which would have entitled the appellants in *The Eclipse Case* to a stay of proceedings, and even to appeal at all, without giving such a bond as the court might direct. There being no inflexible rule on the subject, the district court of the territory in which *The Eclipse Case* was decided might, in allowing the prayer of the libelants that an appeal be allowed, prescribe such terms as to security, as in the judgment of the court might seem meet under the circumstances. *Otis v. The Rio Grande*, 1 Woods, C. C. 596, Fed. Cas. No. 10,614. Under the settled practice in admiralty, the court must allow the appeal, to confer jurisdiction on the appellate court. The appeal must not only be prayed, but also allowed. *The Zephyr v. Brown*, 2 Wash. Terr. 44-47; *United States v. Haynes*, 2 McLean, 155, Fed. Cas. No. 15,335; 2 Conkling, Admiralty, p. 405. Said the court in the case of *The Zephyr v. Brown*: "However, upon searching other books, we gather that no appellate court will assume jurisdiction until it is first satisfied that an appeal has been allowed by the judge of the court below. The allowance seems to have been invariably required both in the ecclesiastical and admiralty appeals." It is true that the territorial district court could not have arbitrarily refused to allow the appeal. *The New England*, 3 Sumn. 495, Fed. Cas. No. 10,151. But that court might certainly have required, as a condition of allowing the appeal, that the libelants give security for more than the mere costs. Indeed, it appears from several of the cases that the appellant, on appeal to the United States circuit court in admiralty cases, gave a bond as for a stay of proceedings, in addition to a mere cost bond, and such bonds were treated as valid. In the case of *The Wanata v. Avery* ("The Wanata"), 95 U. S. 600, 24 L. ed. 461, it appears that a bond on appeal to the circuit court, to prosecute such appeal with effect, was given, although a stipulation for value had been given. The same was done in *Dutcher v. Woodhull*, Fed. Cas. No. 4,204. In the case of *The Blanche Page*, Id. 1,524, it appears that a similar bond to secure the whole claim was given on appeal to the circuit court, notwithstanding the fact that a stipulation for value, good in the appellate court as well as the district court, had been executed. In all of these cases the bonds were treated as valid, and in two of them judgment was rendered against the sureties therein. *The Wanata v. Avery* ("The Wanata"), and *The Blanche Page*, *supra*. Indeed, the court, in the case of *The Brantford City*, 82 Fed. Rep. 324, treated the whole matter of fixing the bond on appeal as within 31 L. R. A.

the discretion of the trial court, and, in refusing in that case to require a bond for the full amount of the claim, the court was influenced by the consideration that, in the light of the later decisions of the Federal Supreme Court, the court considered that the rule of that district, when construed in view of the change in the rulings of the supreme court, should be held not to require full security on appeal. But the court in that very case did require an additional bond for \$7,000. Nor do we think that the fact that legally the *res* was in the custody of the court made it the absolute duty of the trial court, in *The Eclipse Case*, to allow the appeal on the giving of a mere cost bond. It is by no means certain that, where a court has discretion to require security as a condition of staying execution, such court ought invariably to refuse to exact security in addition to a cost bond, even in cases where the *res* is in the actual possession of an officer of the court. Such possession does not afford absolute security to the respondent, who has been successful, and who is, according to the judgment, entitled to the *res*. Courts can hold property only through the instrumentality of some officer, and such officer may be faithless to his trust, and he and his bondsmen may become insolvent, or his bond may be exhausted by others, who first proceed against it. Capt. Braithwaite would have had a right either to enforce his judgment after an appeal by the libelants accompanied by only a cost bond, or at least to move to require the appellants to give additional security to entitle them to a stay. By abstaining from the exercise of this legal right he suffered detriment; and the appellants, in the same measure, were benefited. But the case is a much stronger one for him. If on such motion the appellants had insisted that they were in possession of the *res*, and desired and intended, if possible, to remain in possession thereof pending the appeal; that it was their wish to have the judgment regarded as practically, although not legally, a judgment against them for the delivery of this vessel to the respondent in the appeal, so that by stay of the execution of such judgment they could secure a right to retain possession pending the appeal; and if the respondent on such appeal had acquiesced in all this; had assented that a stay of execution, on proper security, should have the effect to leave appellants in possession of the property,—is it not clear that under such circumstances the trial judge would have required the appellants to give a supersedeas bond, in addition to a mere cost bond, as a condition of securing such a stay? It appears from the record that the appellants, in giving the bond in question, took precisely this position. They were in possession of the steamer. They prepared and executed an undertaking in which they recited that the respondent in the appeal had recovered a judgment against them for her possession. It is averred that they gave this undertaking to secure a stay of execution on such judgment. Had not the respondent a perfect right to rely on this position taken by them, and derive from it, through their voluntary action, the same advantage which he might have secured on motion, had they, on such motion, taken the same position? Well might he

thus reason with himself: "This position taken by the appellants with respect to the nature of the judgment appealed from, and their right to retain possession of the steamer pending the appeal, on securing a stay of proceedings, would, if acquiesced in by me, undoubtedly impel the court to require security in addition to a mere cost bond. But there is no necessity for my urging this matter before the court, for lo! here is just such a bond as the court might under these circumstances require,—executed without any order from the court." That the respondent knew of this undertaking is undisputed. That he refrained from all efforts to enforce the judgment, and from all attempts to disturb the appellants in their possession pending the appeal, is also uncontroverted. The only natural inference is that his conduct in this regard was influenced by the giving of this undertaking. This furnishes a sufficient consideration to sustain the undertaking as a common-law obligation. *George v. Bischoff*, 68 Ill. 236, and cases hereafter cited. Nor can it be said that the sureties would not be bound, in such a case, because they had not signed the undertaking to be used as a means of enabling the appellants to retain possession pending the appeal, but only to secure for them such rights as a stay of proceedings would entitle them to, which would not include the right on their part to hold the vessel until the appeal had been decided. By the recital in their own instrument, they describe the judgment appealed from as such a judgment that, if the description were true, the stay of the enforcement thereof would give the appellants the right to hold the property during the pendency of the appeal. They recite that it is a judgment which the respondent has recovered against the appellants for the possession of the steamer, or, in other words, that it is a judgment which requires them to deliver the possession thereof to respondent. The stay of such a judgment would leave the appellants in possession. Now, it is true that no such judgment was in fact rendered. But the sureties treated it as such a judgment, and therefore they justified the respondent in assuming that they signed to this undertaking to the end that the appellants might secure the right to hold the property pending the appeal. We have no doubt as to this being the object sought to be accomplished by the giving of this undertaking. The respondent, therefore, in seeking to hold the sureties responsible on the theory that this undertaking was given by them and accepted by him for this specific purpose, is merely taking them at their own word, as evinced by the very language of the instrument itself. Indeed, there is authority for the proposition that the recital would estop them from showing that the judgment was different in character. *George v. Bischoff*, 68 Ill. 236; *Pratt v. Gilbert*, 8 Utah, 54; *Gudner v. Kilpatrick*, 14 Neb. 347; *Adams v. Thompson*, 18 Neb. 541; 2 Am. & Eng. Enc. Law, p. 464. But we do not care to place our ruling on that ground. This doctrine of estoppel by recital has its limitations, and we should hesitate long before holding it applicable in a case like this. The bond appears to have been given in view of the practical situation, of which it is evident

the sureties had knowledge, or could easily have obtained knowledge, *i. e.* the possession of the vessel by the appellants. On the records of the case in the paper preceding the judgment, and on which it rested, was a finding that a portion of the appellants were in possession of the boat. Still, notwithstanding this fact, the sureties, if the territorial statutes were applicable, would have the right to insist that the undertaking was intended as the statutory undertaking in such cases, and could not be used to accomplish any other purpose. But the moment we conclude that these statutes were not applicable, then the sureties, being presumed to know the law, are not in position to urge that they merely intended to give a statutory bond, there being no statute regulating the matter; but, on the other hand, we are to discover their purpose from all the circumstances surrounding the transaction, the instrument itself being silent on the subject. We do not, however, need to rest the case on this reasoning, as clearly both the sureties and the appellants gave the undertaking to secure at least a stay, and this stay the appellants actually obtained; the property never having been delivered to the respondent under the judgment at all, either while the appeal was pending, or after it had been formally disposed of.

It is urged that the respondent could not have been compelled to refrain from enforcing his judgment pending the appeal, but we are decidedly of the opinion that he would have been promptly restrained, upon motion, it being shown that this bond had been given to secure him. But it would not be decisive of the question, if we should hold that he need not have abstained from proceeding under the judgment pending the appeal. The fact is that he did so abstain. This is sufficient. Said the court in *Wing v. Rogers*, 138 N. Y. 361: "When an action is brought against sureties on a bond or undertaking given in an action or upon appeal, the validity and force of the instrument depend upon its efficacy in performing the office or accomplishing the end or result contemplated by the parties at the time it was given." To same effect *Carter v. Hodge*, 6 Misc. 575; *Hathaway v. Davis*, 33 Cal. 161; *Gardner v. Donnelly*, 86 Cal. 367; *Hanna v. Savage*, 8 Wash. 432; *Healy v. Newton*, 96 Mich. 228; *Moffat v. Greenwalt*, 90 Cal. 368; *Buchanan v. Milligan*, 125 Ind. 332; *Hester v. Keith*, 1 Ala. 316. Judge Elliott, in his work on Appellate Procedure, says: "Weight is attached,—justly, as we believe,—by the better-considered cases, to the fact that the bond has yielded the principal obligor beneficial consideration." § 357. See also 1 Enc. Pl. & Pr. 1019. Supersedeas bonds on appeal to the circuit court in admiralty actions have been given in many cases where the claim was already secured, and yet it has never been intimated that such bonds were without consideration and void. So far as appears from the cases they were given voluntarily. On principle, such a bond must be valid, unless the obligors can show that the appellants obtained nothing under the bond except what they were entitled to without it. That the appellants did obtain something else, we are clear, for it is our opinion that they had no absolute right to stay of execution of the judg-

ment awarding possession to the respondent on the execution of a mere cost bond; and we are also clear that they obtained the privilege of retaining possession pending the appeal, and that the sureties signed it that they might retain such possession. When an appellant, who does not become entitled to a stay, as a matter of right, by the doing of a particular act, voluntarily gives an understanding for the purpose of securing a stay which, in its effect, is substantially the same as that which the court might have required as a condition of allowing a stay, the appellant and those who signed the instrument with him for the purpose of his obtaining such stay, cannot, after it has accomplished its purpose, assail it for want of consideration, because the court did not order it to be given, or because it may not be precisely such an undertaking as the court would have required. The bond is as good as a common-law bond. *Pray v. Wasdell*, 146 Mass. 324-328; *George v. Bischoff*, 68 Ill. 286; *Meserve v. Clark*, 115 Ill. 580. Indeed, this is the rule even in those cases where the statute prescribes what kind of a bond will stay execution, and the appellant gives a different one; and the respondent treats it as a sufficient stay bond. *Concordia Sav. & Aid Assn. v. Read*, 124 N. Y. 189; *Wing v. Rogers*, 138 N. Y. 361; *Goodwin v. Bunzl*, 102 N. Y. 224. See also *Granger v. Parker*, 142 Mass. 186. Nor can the sureties complain because the bond is upheld as a good common-law bond. It must have been evident to them that it was designed to subvert some other purpose than the mere securing of costs on the appeal. On the theory that it was only a cost bond, it was enormously excessive in amount, and it contains provisions which on that hypothesis are utterly meaningless. In view of the law that the appellants had no absolute right to secure a stay on the giving of a mere cost bond, the sureties were chargeable with knowledge, from the language of the bond and the amount of the penalty, that it was executed to secure a stay, or at least that the respondent might so treat it, and thus be induced to refrain from enforcing his judgment pending the appeal.

Counsel for defendants now takes up his stand at the last barrier, save one, against his clients' liability, left him, and asserts that the district court did not in fact render a judgment against the libelants and interveners for the delivery by them of this property to the claimant, that when this judgment was affirmed its character was not changed in the least, and that, therefore, there has been no breach of the undertaking on appeal, as this refers to only such a judgment as the appellants must perform. It is on his construction of the undertaking that we differ from him. His two other propositions are clearly sound. The language of the undertaking is that the obligors undertake to obey any order made in the case by the appellate court. This does not mean merely any order requiring something to be done by the promisors, for no order of that kind could be made, as against such of the promisors as were sureties. The language is broad enough to cover any order which might be made in the case, whatever its character. The parties signing the undertaking, in legal effect, guaranteed that such order would be obeyed, and

that if it were not obeyed they would save the respondent from loss. This interpretation accords with the plain significance of the language of the instrument; and it is reasonable that we should so construe the contract as to make it a security for the obedience by the marshal of the order of the court, when we consider the fact that the judgment appealed from was directed against him, and not against the parties, and that on affirmance of such judgment the only order of the supreme court to be obeyed, as the sureties must have well known, would be an order binding the marshal, and not the appellants, to deliver this property to the respondent. Unless we are prepared to say that the parties, in signing this undertaking, did not intend to bind themselves at all, except for costs, we must give it this construction. It is an elementary rule of construction that a contract must be so construed as to make it valid and efficacious, rather than invalid or inefficacious. Unless they were guaranteeing the performance by the marshal of the judgment on affirmance, they were, by all this language, really imposing no liabilities on themselves at all. Said the court in a very similar case: "We must attribute to the obligors the intention to enter into an obligation every provision of which would be valid." *Shreffler v. Nadelhoffer*, 183 Ill. 555. See also *McElroy v. Mumford*, 128 N. Y. 307; 1 Enc. Pl. & Pr. We hold that the undertaking is supported by a sufficient consideration, and that the affirmance of the judgment followed by the failure of the marshal and the appellants to deliver the steamer *Eclipse* to the plaintiff herein, constituted a breach thereof. The complaint therefore states a good cause of action for damages, unless there is force in the next point to be considered.

This brings us to the question whether the failure of the court to fix the amount of this bond as a supersedeas bond renders it void. Having held that the territorial statutes do not apply, but that the bond is good as a common-law bond, this question is not important. But, even if the case were governed by the statute, the instrument would be good. Section 416 provides that, in cases where a bond is given thereunder, the court or judge shall fix the amount thereof. This provision is obviously for the protection and benefit of the respondent on the appeal. He may waive compliance with it. If he is willing to accept as a stay bond a bond in the penalty of a certain sum, no one has any reason to complain. When the sureties sign it as a stay bond, and the respondent accepts it as such, what has the court to do in the premises? Under such circumstances, the court, if appealed to, would fix the amount of the bond at the sum agreed on by the parties. There is ample authority for the view that the respondent may waive a compliance with such a provision. *Hill v. Burke*, 62 N. Y. 111; *Irvine v. Cook*, 17 Colo. 16; *Bennett v. Mulry*, 6 Misc. 304; *Scherer v. Hopkins*, 42 N. Y. S. R. 139; *Coleman v. Bean*, 1 Abb. App. Dec. 394; *McCracken v. Todd*, 1 Kan. 148; *Skellinger v. Yendes*, 12 Wend. 308; *Shaw v. Tobias*, 3 N. Y. 188; *Wolcott v. Mead*, 12 Met. 517; *Decker v. Judson*, 16 N. Y. 439; 1 Enc. Pl. & Pr. 1007, cases in note 3. It is a necessary inference from the allegations of the complaint that the

respondent on that appeal waived all objections to the bond because the court had not fixed the amount thereof. It alleges that the bond was given to secure a stay, and that it was served on respondent's attorney. It shows on its face that it is a stay bond. It must have been treated by respondent as such, for the complaint alleges that the possession of the boat has never been restored to him. In *Post v. Doremus*, 60 N. Y. 371, the party did not waive the omission to have the amount of the bond fixed, for the reason that it did not purport to be a stay bond, and the court took the view that the respondent accepted it only as a cost bond. In that case the bond could not operate as a stay without an express order of court to that effect. Here no order granting a stay was necessary. All the court was required to do, assuming that the statute applies, was to fix the amount of the bond. A waiver of this act by the respondent made the bond effective to stay the proceedings. The acceptance of a bond in the *Post Case* did not make such bond operate as a stay: for an order granting a stay was, as we have said, indispensable. It was on an appeal from an order granting a new trial that the bond in that case was given, and the court held that in such a case nothing would stay the proceedings except an order of court; citing *McMahon v. Allen*, 22 How. Pr. 193, where the judge who wrote the opinion said: "I conclude, therefore, that the only way in which, in such a case as this, the proceedings in the court below can be stayed after an order for a new trial has been made, is by a motion directly for that purpose in this court." As the respondent on the appeal in the admiralty case saw fit to accept and act on this bond as a sufficient stay bond, without the amount thereof being fixed by the court, the obligors therein are in no position to interpose the objection that the bond is void because the amount thereof was not so fixed.

The plaintiff successfully vindicated his right to the possession to the steamer *Eclipse* through the entire course of the action in admiralty; obtaining a judgment in the district court, which was affirmed by the supreme court of the territory, and finally by the Supreme Court of the United States. The justice of the case is palpably with him. All parties have regarded this bond as taking the place of the vessel,—as his security in lieu of his obtaining possession of her under the judgment appealed from. It is a source of great satisfaction to the court that we are able, under the law, to recognize and uphold the justice of his claim.

The order of the District Court is reversed, and the trial court is directed to enter an order overruling the demurrer.

All concur.

Bartholomew, J., concurring:

I concur in the foregoing opinion, but also deem it proper to go one step further than my Brother Corliss has gone. Assuming that the territorial statutes were controlling in the matter of giving the undertaking on appeal from the original judgment in admiralty, I then think that the undertaking sued upon should be sustained as a statutory undertaking given to stay execution upon a judgment for the delivery of personal property. True, the judg-

ment was not such in form, but the facts found show that it was such in its practical effect, and all the parties to the litigation so treated it. I am authorized by the chief justice to say that he concurs in this view, also.

An application for rehearing was subsequently filed in response to which the following opinion was handed down:

On the application for rehearing, the opinion of the court has been attacked with such ability and earnestness by the counsel for defendants, who has laid under tribute, to strengthen his argument, so wide a field of juridical learning, that, despite the length of the original opinion, we feel constrained to state our reasons for not agreeing with him with respect to the new points he has presented. He seems to concede that we are correct in our view that the territorial statutes did not govern the appeal in the admiralty case. But he contends that such appeal was in all respects regulated by the statutes of the United States and the rules of the Federal Supreme Court relating to appeals from the Federal district to the Federal circuit court in that class of cases. The decision in *The City of Panama v. Phelps* ("The City of Panama"), 101 U. S. 453, 25 L. ed. 1061, is cited as conclusive on this point. We do not so construe it. The court was not called on in that case to decide whether such statutes and rules governed the appeal to the supreme court of the territory of Washington from the territorial district court, for the practice which was in fact adopted on such appeal was sanctioned by the usages of courts of admiralty on appeal in such cases, and did not require any support from legislation or formulated rules of court. The Federal Supreme Court nowhere asserts that the acts of Congress, and the rules promulgated by that court, governed the appeal to the territorial supreme court, nor is there to be found in the opinion any reasoning leading up to this conclusion. There is only a faint inference that such was the decision of the court, from the language of the assignment of error which is overruled. But that assignment would not have been changed, in its essential nature, had it stated that the court erred in holding that the general practice in admiralty, independently of legislation and formulated court rules, governed the proceedings on appeal to the territorial supreme court, and in refusing to hold that the territorial statutes regulated such appeal. And the assignment, as so framed, would have more accurately expressed the proposition before the Federal Supreme Court for decision. In *Smith v. "The Challenger"*, 2 Wash. Terr. 447, both parties agreed that rule 16 of the Federal Supreme Court, relating to admiralty practice in the Federal courts, was applicable to a case in territorial courts, the only difference between them being as to the construction of that rule.

But, even if we should agree with counsel that the appeal to the territorial supreme court in the admiralty case was governed by the statutes of the United States, so far as applicable, we could not assent to his view that at the time such appeal was taken there was any Federal legislation relating to appeals from Federal district to Federal circuit courts in admiralty cases, aside from the statute giving the right to appeal. Rev. Stat. § 641. As this

section originally stood, it provided that such appeals should be governed by the rules, regulations, and restrictions relating to proceedings on writs of error. While the statute remained in this form, there could be little doubt about appeals to the Federal circuit court, in admiralty proceedings on the instance side of the court, being governed by the statutes of the United States relating to proceedings on writs of error. See *Wilson v. Bell* ("The Lotawanna"), 87 U. S. 20 Wall. 201, 22 L. ed. 259; *Hayford v. Griffith*, Fed. Cas. No. 6,263. Mr. Conkling bases his criticism of Justice Story's ruling to the contrary on that language of the statute which had been dropped therefrom before the appeal to the supreme court of the territory of Dakota was taken in *The Eclipse Case*. 2 Conkling, Admiralty, pp. 385 *et seq.* Under the statute as it then stood, the authorities cited, which construed the statute as it originally was framed, are not in point. There is, however, a single decision in favor of the counsel's contention. It is *Providence Washington Ins. Co. v. Wager*, 87 Fed. Rep. 59. The reasoning of Judge Wallace does not convince us that he is right. He admits that his construction does violence to the language of the statutes relating to the subject. He finds his strongest—and practically his only—argument to justify his wrestling of the words of the statutes in question from their obvious meaning in the circumstance that Congress had, in express terms, exempted the government from the necessity of giving security on appeal to the circuit court in admiralty as well as in other cases. The inference he draws from this provision, that it indicates that Congress considered that the government was not entitled to such an exemption as a matter of right, is a very natural inference. But his further deduction that therefore Congress must, by prior legislation, have imposed on the government, as well as on others, the duty of giving security on such appeals, is not necessarily sound. The obligation to give security on appeal was, as we shall show later, recognized by courts of admiralty long before the Federal government was established. It is just as logical a conclusion that Congress had this practice in view, in framing the provision exempting the government from the performance of this obligation, as that it had in view a statutory enactment on the subject. Nay, the former conclusion is much more reasonable than the latter, when we examine the terms of the statutes from which the purpose to regulate proceedings on appeal to the Federal circuit court in admiralty cases is, by Judge Wallace, extorted by a process of construction which does violence to the language in which these acts are couched. Section 1012 of the Revised Statutes of the United States is, to our minds, a significant provision, and it occurs to us to be hostile to the views of Judge Wallace. It, in terms, declares that the rules, regulations, and restrictions applicable to cases taken to a higher court on writs of error shall govern appeals in admiralty cases in only prize cases. Cases on the instance side of the court are not mentioned. In *The Brantford City*, 32 Fed. Rep. 324, Judge Brown held that there was no Federal statute regulating the matter of security on appeals to the circuit court in admiralty cases, 31 L. R. A.

and this decision we regard as sound. It is not pretended that there was any rule of the Federal Supreme Court, at the time *The Eclipse Case* was appealed, which regulated the matter of security on appeals to the circuit court in admiralty cases. Our conclusion therefore is that neither the territorial statutes, nor the acts of Congress, nor the rules of the Federal Supreme Court, governed the question of security on appeal to the territorial supreme court in *The Eclipse Case*. We also hold that, even if the statutes and rules which governed appeals to the Federal circuit court in such cases applied to the appeal in question, still there was no statute or rule regulating this matter on appeals to the Federal circuit court.

But conceding all this to be true, counsel for defendants still contends that, on the assumption that general rules of admiralty practice regulated the appeal in question, the instrument sued on is void so far as it provides that the obligors shall obey any order which the court might make in the premises. We fully agree with him that if the appellants in that appeal had an absolute legal right to secure a stay of proceedings by appealing, without incorporating in the bond that condition, then that portion of the bond is without consideration and void, unless other circumstances to be referred to later take the case out of the general rule laid down and applied. *Kountze v. Omaha Hotel Co.* 107 U. S. 378, 27 L. ed. 609. In this connection we must express our dissent from the proposition that writs of error and appeals operated of themselves, at common law, absolutely to stay execution. Counsel for defendants insists that no authority to require security as a condition of allowing a stay is ever vested in any court without a statute to that effect, and that, as we hold that there is no statute relating to this matter in admiralty cases, the bond was a nullity. This is not a correct statement of the law. There has always inhered in courts of law, courts of equity, and courts exercising admiralty jurisdiction, power to require security to be given as a condition of staying execution. It is true that at common law a writ of error operated in the first instance as a supersedeas. But the court from which the appeal was taken had power, in its discretion, to allow the successful party to enforce his judgment despite an appeal, and the same power was vested in the tribunal to which the appeal was taken. *Messonnier v. Kauman*, 3 Johns. Ch. 66; *Bradwell v. Weeks*, 1 Johns. Ch. 325; *Brewster v. Cowen*, 55 Conn. 152; *Allen v. Hopper*, 24 N. J. L. 514, 515; *Enticelle v. Shepherd*, 2 T. R. 78; *Kempland v. Mocauley*, 4 T. R. 486. This power to permit executions to be issued notwithstanding an appeal necessarily included the lesser power to require the appellant to give security to obtain a stay pending the appeal. The statutes in England referred to by Mr. Justice Bradley in *Kountze v. Omaha Hotel Co. supra*, were passed to give the respondent an absolute right to that which at common law he could only pray for as a favor to be granted or withheld in the discretion of the court. When we turn to appeals in equity cases, we find that except during the struggle of the house of lords to maintain its jurisdiction to review cases in chancery on appeal, when the rights of litigants were lost

sight of in the strife for power, an appeal has never, of itself, been sufficient to entitle the appellant to a stay of proceedings pending the appeal. So long as the jurisdiction of the house of lords was challenged, that body deemed every step taken in the case, however slight, as a denial of its authority; and accordingly it arbitrarily held that nothing could be done in the lower court after appeal, however foreign it might be to the branch of the case which was carried up. As soon as its jurisdiction was generally recognized, it began to abate, its now no longer ambition inspired pretensions, and in 1772 it was held that the stay did not extend beyond that portion of the case which was removed to the house of lords by the appeal. Finally, in 1807, it declared, by resolutions, that even this doctrine, which had its origin in bitter contentions for judicial power, in which the interests of the suitor were lost sight of, had for a long time previous thereto ceased to be followed, but that, on the contrary, an appeal, of itself, did not operate as a stay,—the appellant being required to apply to chancery to secure a stay, which could refuse it or allow it on such terms as the courts might prescribe. The action of the chancellor in this regard seems to have been subject to the supervision of the appellate court. *Hart v. Albany*, 3 Paige, 381; *Messonnier v. Kauman*, 3 Johns. Ch. 66; *Burke v. Broome*, 15 Ves. Jr. 184, note; *Willan v. Willan*, 16 Ves. Jr. 216; *Way v. Foy*, 18 Ves. Jr. 452; *Monkhouse v. Bedford*, 17 Ves. Jr. 380; 2 Dan. Ch. Pr. 1467. Except as changed by statute, this has been the law in England for upwards of a century. In this country some of the courts have followed the English practice, while others have held that an appeal in an equity case stays, in the first instance, the order or decree appealed from, but that the chancellor or the appellate court may allow the successful litigant to enforce the decree or order despite the appeal. *Messonnier v. Kauman*, *supra*; *Riggs v. Murray*, 3 Johns. Ch. 160; *Bradwell v. Weeks*, 1 Johns. Ch. 325; *Green v. Winter*, 1 Johns. Ch. 77; *Hart v. Albany*, *supra*; *Schenck v. Conover*, 13 N. J. Eq. 31; *Riehle v. Heulings*, 38 N. J. Eq. 88; *Peer v. Cookerou*, 14 N. J. Eq. 361–365; *Kimball v. Alcorn*, 45 Miss. 149; *Cook v. Dickerson*, 1 Duer, 691. This power to permit the successful suitor to enforce the decree pending an appeal includes the lesser power of requiring the appellant to give security, as a condition of withholding execution while the appeal is pending. In several of the English cases the appellant was required to pay into court the money which the decree adjudged that he must pay, to be invested for the benefit of the person finally adjudged entitled to it. *Willan v. Willan*, and *Monkhouse v. Bedford*, *supra*. This was ordered to be done in *Riggs v. Murray*, *supra*, also. It cannot be questioned that in these cases the court could have required a bond, instead of the payment of the money into court. Indeed, in *Riggs v. Murray* the appellant was given an option to furnish security, instead of bringing the money into court. See also *Cook v. Dickerson*, *supra*.

With respect to appeals in admiralty cases, counsel contends that there is, in the absence of some statutory change in the practice, no such thing as a stay of proceedings, for the

reason that the appeal, of itself, annuls the decree appealed from, thus leaving nothing to be enforced pending the appeal. Undoubtedly, it has been many times asserted by the courts that the case is to be heard *de novo* on the appeal,—as though no decree had been rendered. And in some of the cases even stronger language is used. *Fenton v. United States*, 9 U. S. 5 Cranch, 281, 3 L. ed. 101; *The Collector*, 19 U. S. 6 Wheat. 194, 5 L. ed. 239; *United States v. Preston*, 28 U. S. 3 Pet. 57, 7 L. ed. 601; *The Lucille v. Respass* ("The Lucille"), 86 U. S. 19 Wall. 73, 22 L. ed. 64; *Penhallow v. Doane*, 8 U. S. 3 Dall. 54, 1 L. ed. 507. But as was said by Judge Benedict in *Dutcher v. Woodhull*, Fed. Cas. No. 4,204, there was no question before the court as to the right of the respondent to enforce a decree after appeal, no security having been given. In this case Judge Benedict intimates it to be his opinion that, despite an appeal, the decree would stand unaffected for the purpose of enforcing it pending the appeal, should no security be given. "In determining this case, it is not necessary to say whether, under some circumstances, a decree in admiralty, made by the district court, cannot remain of effect after an appeal is taken to the circuit court. It would seem that such may be the case where an appeal is taken, but no bond for damages on appeal is given. Under such circumstances, the failure of the appellant to give a bond for damages would seem to change the aspect of the case, and render it thereafter a proceeding to obtain a decree of restitution, and the numerous cases heretofore determined, both in the circuit court and the Supreme Court of the United States, do not appear to me to furnish authority for determining that, after an appeal without security for damages on the appeal, no effect whatever can be given to the decision of the district court. The general language of these decisions can only be understood by referring to the position of the cases then under consideration, which were not cases of appeal without security." That an appeal did not, of itself, prevent an enforcement of a decree in admiralty, and that for that purpose it would be regarded as a subsisting decree, would seem to follow from the language of Clerk. Praxis S. C. Adm.: "If the party against whom sentence was passed shall have appealed at the time of delivering the sentence, and a term have been assigned for prosecuting the same, and a certificate of the prosecution of the same, and in the interim the judge has not been prohibited from further proceedings, the proctor who obtained the sentence ought to pray that the adverse party should be called upon to show cause why sentence of execution should not be ordered, and the cost be taxed." (How could the court proceed, if the appeal, of itself, annulled the judgment?) Title 61. See page 110 of Hall's Practice and Jurisdiction of Courts of Admiralty, where this title is found translated. In this country stay bonds have been given, and their necessity, as a condition precedent to a supersedeas, have been recognized in many cases. Some of these cases are referred to in the original opinion. In our view, these bonds were not required to be given by any act of Congress, but only by general principles of admiralty

practice. If an appeal annulled the judgment, why was it necessary in these cases to give a stay bond to prevent the enforcement of the judgment, which, on this theory, was swept away by the appeal. But whether an appeal in admiralty cases left the decree standing for the purpose of enforcement, and security had to be given to obtain a stay, or whether the appeal was not perfected so as to annul the decree until proper security had been given, is not very important, for it cannot be denied that on appeal in admiralty cases the appellant was required to give security. "If the plaintiff in the first instance shall appeal, he is not allowed to file a libel until he has put in fiduciary security to prosecute the cause, to pay the costs, to submit to the judgment, and to confirm the act of his proctor." Clerke, *Praxis S. C. Adm.* title 59. See also Browne, *Civil & Admiralty Law*, 437; Dunlap, *Admiralty Practice*, 322; *The Brantford City*, 32 Fed. Rep. 324-326.

We agree with counsel for defendants that the plaintiff or libellant, when he was the libellant, was ordinarily not required to give security to pay or obey any judgment which might be rendered in the case, because as a rule he was not in possession of anything belonging to his antagonist which could be awarded him by the decree of the court. Generally speaking, the utmost extent of his liability under the English practice was for costs, and his stipulation for costs covered this liability. But the situation of the parties in *The Eclipse Case*, at the time the appeal was taken, was peculiar. The vessel was in the actual possession of the appellants, and this fact appeared upon the face of the record in the case. The appellants desired to retain such possession pending the appeal. The sureties must be deemed to have knowledge of the fact that appellants were in possession, for it was part of the record in the case in which the bond was given. And they must also be regarded as being cognizant of the object of the appellants in giving such bond, for its recitals as to the nature of the judgment appealed from, if true, show that it was such a judgment that a stay of execution on it would leave the appellants in possession of the property pending the appeal. The sureties were therefore plainly apprised of the purpose of the appellants to secure by means of that bond the right to remain in possession of the boat pending the appeal; and the large penalty named in the bond was another circumstance which made it obvious that the bond was given to enable the appellants to hold the vessel until final decision on appeal, thus leaving very valuable property which the decree awarded to the claimant in their hands at his risk, making it necessary that he should be secured. The bond was in the nature of a stipulation for value. But counsel for defendants urges that it cannot be regarded as having been given for any such purpose, for the reason that the complaint, in terms, avers that it was given to stay execution. But this allegation of the complaint must be construed in the light of the other facts set forth in that pleading; and, when so interpreted, it is manifest that it is an averment of the ultimate purpose for which the bond was given, namely, to enable the appellants to retain possession of the

vessel pending the appeal. To give a bond to stay execution of a judgment which those giving it construe as a judgment requiring the appellants to deliver property, of which they had actual possession, to their successful adversary, is, in its ultimate analysis, to give a bond to enable such appellants to hold possession of such property pending the appeal. We are therefore clear that the sureties executed this bond with full knowledge that it would be used by the appellants for the purpose of enabling them to keep possession of the vessel. When so used by them with the tacit acquiescence of the respondents, it became a valid obligation: having served the purpose which all the obligors intended it should serve. Whether the libellant in a possessory action is ever entitled to possession on giving a stipulation for value, or whether he may secure possession in this way after decree in favor of the claimant, even assuming that he may do so before final judgment, it is not necessary to inquire. 23 Am. & Eng. Enc. Law, p. 576. No statute or rule of law declares the bond in question void; and therefore, even though the claimant was not bound to allow the libellants to retain possession after the giving of this bond, still, as he did in fact permit them to remain in possession on the strength of the bond, the bond is valid in all its provisions, as a common-law bond, for the reasons set forth in the original opinion. Nor do we, by reaching the conclusion that the bond was in the nature of a stipulation for value, bring the case within the rules stated in the main opinion—that exclusive cognizance of proceedings to enforce stipulations for value is vested in the Federal court sitting as admiralty courts. The reasons for that rule do not apply to stipulations for value given in possessory actions. They are not substitutes for the original *res*, but are mere securities. Nor is it true that the only judgment which can be enforced according to its terms in a possessory action, where a stipulation for value has been given, is a judgment against the stipulators for value. Judgment is rendered for the delivery of possession to the successful party, and is enforced according to its terms, even if the property is in the possession of the defeated suitor. Were this not so, the right to maintain a possessory action in admiralty would, in most cases, be illusory. If the claimant, by giving a stipulation for value, could defeat the right of the libellant to recover possession of his property, the word of promise of the admiralty law that possession of property might be recovered in admiralty courts would be kept only to the ear, and broken to the hope. On principle, it must be the rule that in possessory actions the original *res* can be seized under the judgment, and delivered to the successful suitor. *The John*, 2 Hagg. Adm. Rep. 805-317; *The "Elize Cornish"*, 2 Spinks, Eccl. & Adm. Rep. 34; *The Gran Para*, 23 U. S. 10 Wheat. 497, 6 L. ed. 375. A stipulation for value, in such an action, is therefore not a substituted *res*, but in the nature of security for the property, as in replevin actions. The court can render a judgment for the delivery of the *res*, which it will enforce according to its terms. Therefore the reasons for the rule that exclusive jurisdiction of proceedings to enforce stipula-

tions for value is vested in the court in which it was given do not apply to stipulations given in possessory actions, and it follows that they may be enforced in other tribunals.

Finally, it is said that there has been no breach of the condition of the bond to obey any order the appellate court might make, for the reason that no order requiring anything to be done has in fact ever been made by that court. It is urged that a judgment of affirmance is not, either in terms or in legal effect, an order requiring the delivery of the vessel to the claimant. In this connection the case of *The Lucille v. Respass* ("The Lucille"), 86 U. S. 19 Wall. 73, 22 L. ed. 64, is cited. This merely holds that a judgment of affirmance in the circuit court is not a final judgment, from which an appeal will lie to the Federal Supreme Court. The ground of this decision is that the circuit court should render an entirely new judgment, for the reason that the amount of the judgment should not be left to be ascertained by an examination of the records of another court. But in *The Eclipse Case* it was not necessary to examine the records of the district court to ascertain just what the judgment of the supreme court was. The original decree, or a copy of it, was among the records of the supreme court in the case, and that showed that the vessel was to be delivered to the claimant. By construing the judgment of affirmance in the light of the original decree, it would ap-

pear that the supreme court also had ordered that the vessel be delivered to the claimant. All this would be shown by the records of the supreme court. It would not be necessary to look to any other record to determine the exact nature of the judgment of that court. While, perhaps, for the purposes of an appeal, the judgment of affirmance might not have been sufficient to sustain an appeal, it was a sufficient order of the supreme court for the delivery of the vessel to constitute a breach of the bond. Indeed, the Federal Supreme Court took jurisdiction of the case on appeal from such judgment, and have thus treated it as a sufficient, final judgment in the case. *Rea v. The Eclipse* ("The Eclipse"), 135 U. S. 599, 34 L. ed. 269. How a new judgment could now be entered, after an affirmance of this judgment by the Federal Supreme Court, we are unable to see; and, if counsel's contention be sound, there could never be any recovery in this case, because the judgment of the territorial supreme court did not, in terms, order that the vessel be delivered to the claimant, although, in legal effect, it was just such a judgment. *The application for a rehearing is denied.*

Wallin, J.:

I concur in the foregoing opinion, in so far as it denies the application for a rehearing.

OHIO SUPREME COURT.

LAKE SHORE & MICHIGAN SOUTH-
ERN RAILROAD COMPANY., *Plff. in*
Err.,

v.

William SALZMAN.

(52 Ohio St. 558.)

***A railroad company is under obligation to give such care to a passenger**

*Headnote by the COURT.

who becomes sick on its train as is fairly practicable, with the facilities at hand, without thereby unduly delaying its train, or unreasonably interfering with the safety and comfort of its other passengers.

(April 23, 1893.)

ERROR to the Circuit Court for Williams County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover

NOTE.—*Duty of carrier as to passengers taken ill during journey.*

The cases are very few in which the courts have had to consider the question of the duty of a carrier to a passenger taken ill during the journey. There are several cases in which the question of the carrier's duty to receive and transport a sick passenger, and of the care it must give him, has been considered, and in some of them are *dicta* which, if accepted to their full extent, would make the duty which the carrier owes a passenger who becomes ill during the journey very slight. But when the attention of the courts has been called to the distinction it has been generally admitted that there is more ground for active care when the illness comes during the journey than when the passenger is ill when the journey begins.

In a Mississippi case the court holds that a conductor is not bound to arouse a passenger when he reaches his destination if he was sick when he embarked. The court says: "One too sick or from any cause not able to do as travelers usually do in conforming to the usage in running trains for the 31 L. R. A.

traveling public, should avoid them or secure the assistance necessary to enable them to accomplish what is required of passengers generally." But the court further says: "Whether sudden illness occurring to one on board a train after going upon it, and made known to the conductor, would create such an emergency as to impose the duty on him to give such passenger needed attention and vary the course of dealing with passengers, is purposely left an open question to be decided when it arises." *Sevier v. Vicksburg & M. R. Co.* 61 Miss. 8, 48 Am. Rep. 74.

So, in *New Orleans, J. & G. N. R. Co. v. Statham*, 42 Miss. 607, 97 Am. Dec. 478, in which the court says that railroad cars are not traveling hospitals, nor their employees nurses, and that no duty rests on the conductor to help passengers, it appeared that the passenger was ill when he embarked and was placed on board by friends, and the court held that under such circumstances he must provide attendants to assist him in disembarking.

In the few cases that have arisen upon the subject the court has considered more the duty of the

damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Statement by **Burket, J. :**

The facts in the case are as follows: William Salzman resided in Bryan, Williams county, Ohio. On the morning of the 26th day of April, A. D. 1887, he, with his wife, went on an excursion train to Toledo, in company with a number of his brother Odd Fellows and their wives, to attend the dedication of the Odd Fellows' Temple at the latter place. At the conclusion of the ceremonies in the evening, he, with some of his friends, visited some of his acquaintances around the city until about nine o'clock, when he went to the Union hotel, and thence with his wife, about eleven o'clock, to the Union passenger station to take the train home.

The passenger train was a special one made up on purpose to carry the excursionists to their homes, and consisted of a locomotive and four passenger coaches, all properly connected together continuously one after the other, properly warmed and lighted, and which offered ample and abundant convenience and accommodation for the carriage of the plaintiff and his wife, and all the passengers taking passage upon said train.

After the train had pulled out of the station, but before proceeding on its way, there had been placed and attached to the rear of said train, as a protection and guard to said train, and for the sole use of the train men, a caboose car, provided with all the tools, lanterns, and implements for an emergency. The platform of the caboose was several inches lower than the platform of the passenger

coach, and the space between the two platforms was from 12 to 15 inches.

Salzman and his wife had taken seats in the rear passenger coach, and the train proceeded on its way. It had not gone far before a man by the name of Charles Shawley, a brother Odd Fellow, and who occupied the seat immediately in front of Salzman, was taken sick and was suffering great pain, occasioned from scrotal hernia.

Some of the friends of the sick man sent for Mr. Wm. Darby, a friend of the sick man, who in turn went for Dr. Rotsel, also on the train. The doctor attended Mr. Shawley, but was unable to reduce the hernia in the seat where the sick man was. He said it was necessary to find some place where the man could be put on his back, and his lower clothes removed. The passenger car was filled principally with ladies, and that was not a proper place to expose his person.

Thereupon Mr. Darby went for conductor Covert and told him the trouble, and asked him if there was not some place on the train where they could take the man and lay him on his back. Conductor Covert said there was a caboose at the rear of the train, having seats at the side, and also a cot where they could take the man when the train stopped at the next station.

Mr. Darby went back into the caboose to see and arrange for Mr. Shawley's coming. The conductor informed his rear brakeman of the trouble, and that when the train arrived at the next station, the man would be moved back into the caboose, and to look after and attend to same, and not to give any signal to start the train until everything was well.

As the train began to slow down for the next station, four persons, *viz.*: Dr. Rotsel,

carrier in the protection of other passengers than in the care of the one who is ill.

In *Thurston v. Union P. R. Co.* 4 Dill. 321, there is a *dictum* that the carrier is not bound to carry passengers infected with contagious diseases to the danger of other passengers. But that remark applies more to the receiving of them as passengers in the first instance than to the proper disposal of them after they have been received. And the same is true of the *dictum* in *Pearson v. Duane*, 71 U. S. 4 Wall. 606, 18 L. ed. 447, where the court says that although a carrier may properly refuse to transport an insane man it cannot expel him after having admitted him as a passenger and received his fare unless he misbehaves during the journey.

But it has been held that it is the duty of the employees of the train to restrain a man attacked with delirium tremens so that he will not harm the other passengers. *King v. Ohio & M. R. Co.* 22 Fed. Rep. 413.

So, in *Lemont v. Washington & G. R. Co.* 1 Mackey, 180, 47 Am. Rep. 238, a passenger with paralysis was placed on board a street car and during the journey he acted in such a manner that the conductor thought he was drunk and expelled him from the car, and the court treating the case as though he was in fact sick said that it was necessary that sick people should be transported on street cars, but that their right was not unlimited. A sick person has no prerogative to misbehave and must conform to the reasonable regulations of the company, and while showing him good treatment they are not required to provide, without a special contract, any extra means for his accommodation.

From the few cases in which an opinion upon the

question has been expressed, it would seem that if the passenger is unattended when he becomes ill the carrier must remove him from the cars and place him where he can receive the necessary attention as soon as it can do so. And in the meantime such care must be given him as can be given without leaving unperformed the other duties of the employees.

Thus, it has been held that when an unattended passenger becomes sick and unconscious or insane during a journey, it is the duty of the carrier to remove him from the train until he is in a fit condition to resume his journey, and it must exercise reasonable and ordinary care in temporarily providing for his protection and comfort. *Atchison, T. & S. F. R. Co. v. Weber*, 38 Kan. 543, 52 Am. Rep. 543. In that case the court approves the rule that "a carrier is not required to keep hospitals or nurseries for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him, until some suitable provision may be made." But it was held that it was a suitable provision to turn him over to the poor authorities of a town of 4,000 inhabitants.

And in *Indianapolis, P. & C. R. Co. v. Pitzer* (Ind.) 4 West. Rep. 256, the court in considering the liability of a carrier for putting a child off the train quotes, with seeming approval, the doctrine of *Atchison, T. & S. F. R. Co. v. Weber*.

So, a carrier has a right to remove from its train a passenger who breaks out with eruption which from the best medical advice that can be obtained is believed to be small-pox. But in removing him

Messrs. Campbell, Salzman, and Elliott, picked Mr. Shawley up out of the seat and started towards the rear end of the car. The brakeman, at that time, passing back to the rear end of the car, stopped them, requesting them to take plenty of time and not to come out onto the platform until the train had come to a full stop.

When the train stopped, the brakeman opened the door, and told the men carrying Shawley they could come on.

Thus far the facts are undisputed. On part of plaintiff in error it is claimed, in addition to the foregoing, that the brakeman after he opened the door of the car and told them to come on, immediately crossed over and down the caboose step to the ground, stepped between the passenger and caboose platforms, held up his lantern to light the way across, and as the men came out onto the platform, called out to them to "look out and be careful in stepping across;" that this warning and notice were heard by all those carrying Mr. Shawley, as well as Mr. Shawley himself, and including also Mr. Salzman; that the two ahead and in advance, Rotsel and Campbell, heard the warning and stepped down and across; that Mr. Salzman heard the notice and warning, but mistook or misunderstood the call, and in stepping, stepped a little short and between the two platforms, fell and was injured.

On part of defendant in error it is claimed that the conductor was present and asked Mr. Salzman to assist in carrying the sick man to the caboose; that there was no light on the platform; that it was not sufficiently lighted to enable a person to cross over to the caboose in safety; that the warning "look out and be careful in stepping across" came just as the step forward was being made, and coincident

therewith; that defendant in error had no notice or knowledge of the condition of the step, and that there was a sudden jerk of the car by the engine just as the step across was being made.

A verdict was returned in favor of plaintiff below, and a motion filed by defendant below for a new trial, which motion was overruled, and judgment entered on the verdict, to which defendant below excepted.

On petition in error the circuit court affirmed the judgment. Thereupon a petition, was filed in this court to reverse the judgments below.

Mr. E. D. Potter, Jr., for plaintiff in error.

Messrs. Charles H. Masters and Hurd, Brumback, & Thatcher, for defendant in error:

It is the duty of the railroad company to remove from the train a passenger entering the train well and becoming sick, on arriving at its next station, and provide a suitable and comfortable place for such sick passenger, and suitable attendance, nursing, including medical skill if necessary.

In the meantime it should provide for his care and comfort until such time that he can be thus removed.

Atchison, T. & S. F. R. Co. v. Weber, 38 Kan. 543, 52 Am. Rep. 543.

What the company through and by its conductor assumed to do, it became liable for doing negligently.

Secord v. St. Paul, M. & M. R. Co. 18 Fed. Rep. 224; *Patterson, Railway Accident Law*, § 275; *Croom v. Chicago, M. & St. P. R. Co.* 52 Minn. 296, 18 L. R. A. 602; *Weightman v. Louisville, N. O. & T. R. Co.* 70 Miss. 563, 19 L. R. A. 671.

It is the duty of the carrier to put him off at some place where he can find accommodations and medical attendance, or where there is a reasonable ground to believe that he can do so. *Paddock v. Atchison, T. & S. F. R. Co.* 37 Fed. Rep. 841, 4 L. R. A. 231.

So, when the condition of a sick passenger is such that his continued carriage is inconsistent with the safety, or even the reasonable comfort, of his fellow passengers, regard for the rights of the latter will authorize the carrier to exclude him from the conveyance. Yet this right cannot be exercised arbitrarily or inhumanely, or without due care and provision for the safety and wellbeing of the ejected passenger. *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L. R. A. 133. In that case a passenger on a street car was stricken with apoplexy and he was removed from the car and left lying beside the track for several hours, on a cold day, and the court said: "It should need no parade of learned authorities to maintain the proposition that a common carrier cannot treat an unfortunate passenger stricken with apoplexy while under its charge, in that manner, without a breach of the plainest obligations of its contract of carriage. If there were any precedent to the contrary, humanity would revolt at it, and it would be one more honored in the breach than in the observance."

England and the United States have enacted laws requiring ocean carriers to provide medical assistance for passengers who have become ill during the voyage. To these statutes the following constructions have been given:—

Under the English act of 1855, requiring passen-

ger vessels to carry a physician and medicines, the responsibility of the carrier ceases when it has provided a competent physician and good medicines, and it is not responsible for the mistake of the physician in administering them. *Allan v. State S. S. Co.* 132 N. Y. 91, 15 L. R. A. 166, Reversing 29 N. Y. S. R. 288.

Under the act of Congress of 1882, requiring all steamships carrying passengers other than cabin passengers, exceeding fifty in number, to provide a surgeon and medicines for them, the ship is liable only for its own negligence in selecting the physician, and not for his acts in treating the passengers. *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L. R. A. 329.

In *Laubhelm v. De Koninglyke Nederlandsche S. B. Maatschappij*, 107 N. Y. 230, the court refuses to determine whether a steamboat company owed a duty to passengers to provide a surgeon for their care and safety in the emergency of sickness or accident. But it held that even if it was bound to do so, its liability ceased when it had provided a competent one.

It would seem that whatever liability exists must be enforced by the passenger who had a right to require the performance of the duty, and not by his or her representatives, for in *Briggs v. Minneapolis Street R. Co.* 52 Minn. 36, the action was to recover for the death of a person suffering from heart disease who in an attack to which he was subject was removed from a street car, and the court held that his administratrix could not recover unless it was shown that the death was caused by the removal.

H. F. F.

Burket J., delivered the opinion of the court:

This case was tried to a jury three times, and three judgments rendered in favor of the plaintiff below. The case was three times before the circuit court, and twice before this court. The second judgment in the common pleas was reversed by the circuit court on the ground that the verdict was not sustained by sufficient evidence, and that judgment of reversal was affirmed by this court.

It is claimed now by plaintiff in error that the evidence upon which the last verdict in the common pleas was rendered is substantially the same as that upon which the second verdict was rendered, and as the circuit court found that the second verdict was not sustained by sufficient evidence, it should have found that the last verdict was not sustained by sufficient evidence, and that failing to so find is error.

The defendant in error claims that the evidence in the last trial was much stronger in his favor than at the second trial, and that the last verdict is sustained by sufficient evidence.

Be that as it may, the circuit court affirmed the last judgment, and thereby said that the evidence was sufficient to sustain the verdict. Even conceding that the evidence in the second and third trials was the same, the rule is that the last judgment controls. The circuit court may have concluded that its former judgment was wrong, and in this last judgment concluded to right the wrong. This court, not being required to weigh the evidence, did not examine the evidence when this case was here the first time, to see whether the circuit court was right or wrong as to the verdict not being sustained by sufficient evidence; neither do we now weigh the evidence to ascertain whether the last verdict was sustained by sufficient evidence. The judgment of the circuit court on that question is usually final. The charge of the court excepted to is as follows:

"If the jury find, from the evidence, that the plaintiff, pursuant to the direction or request of the conductor of defendant's train, attempted to assist in the carrying of Mr. Shawley from the passenger coach to the caboose, and that in so doing he used reasonable care, and was injured by reason of exposure to a danger of which he was not aware, and of which the servants of defendant, if exercising only reasonable care, would have known of, and either protected him from or gave him timely and adequate warning of,—then in that case, defendant is liable for the injury resulting from exposure to such danger."

On part of plaintiff in error it is urged, in support of the exception to this part of the charge, that the conductor had no control over Mr. Salzman to order him to do anything in aid of the sick man; that as Mr. Salzman was not bound to obey the orders of the conductor in that regard, whatever he did was purely voluntary on his part, and that he assumed all the risks incident to his voluntary acts, and that the conductor had no authority to bind the company in giving orders as to the sick man.

¶1 L. R. A.

On part of defendant in error it is urged that there is no difference in the obligation of the company, whether the removal of the sick man was undertaken by the direction and order of the conductor, or simply by his permission; that the duty devolved upon the company to take reasonable care of the sick passenger on its train, and that when other passengers assisted the officers of the train in the performance of that duty, the company owed to such assisting passengers the obligation of ordinary care to prevent injury to them.

If no duty devolved upon the company to take reasonable care of the passenger who became sick on its train, then neither the order, direction, nor permission bound the company, because such order, direction, or permission was not within the scope of his employment, and not in the line of his duties.

The case therefore turns upon the question, whether or not a duty devolves upon a railroad company to take reasonable care of passengers who become sick after entering its cars.

In travel by ship care and medical attendance are always provided by the company, as one of the necessities of the journey. In travel by rail no such necessity exists, and therefore a railroad company is under no obligation to furnish hospitals on wheels, or physicians or nurses to attend the sick on their journeys. But without hospitals, and without physicians and nurses of their own, still much can be done to alleviate the pains and aches of a sick passenger. While the train is in motion, the passenger is utterly helpless as to aid, except from those on the train. His fellow passengers owe him no duty, except humanity. The alternative is presented of being cared for by his fellow passengers, by the company, or to writhe in pain and sickness until relieved by death, or the end of his journey. By taking passage and repaying his fare the relation of carrier and passenger is established between the company and himself, and as he is under the control of the company for many purposes, and debarred by the rapid movement of its trains from receiving aid from the outside world, it would seem to follow as a necessity of the situation that those who have received his money, and are thus rapidly transporting him, should assume the obligation of taking reasonable care of him, in case of sickness while on the train. This obligation is on the company, not only for the benefit of the sick person, but also for the comfort and sometimes the safety of the other passengers. A sick person, by his cries and moans, may so annoy the other passengers as to require his removal to a separate apartment, or from the train. In case of small-pox or cholera, or other contagious disease, the comfort and safety of the other passengers would demand the early removal of the afflicted passenger from the train. The company would in such case be charged with the duty of removal, and reasonable care thereafter, until the afflicted person could be otherwise cared for. *Atkinson, T. & S. F. R. Co. v. Weber*, 33 Kan. 543, 52 Am. Rep. 543; *Conolly v. Crescent City R. Co.* 41 La. Ann. 57, 3 L. R. A. 133.

It is therefore clear that the company owed a duty to the sick passenger, and was under obligation to take reasonable care of him—such care as was fairly practicable with the facilities at hand, without unreasonable delay of the train, or discomfort to the other passengers.

The defendant in error assisting in the care of such sick person by direction or permission of those in charge of the train was entitled to at least ordinary care on their part for his protection from injury. There was therefore no error as against the defendant below in the part of the charge excepted to.

In fact the charge throughout was much

more favorable to plaintiff in error than to defendant in error.

There was also an exception to another part of the charge, but when taken in connection with the whole charge, there was no error.

The verdict, \$9,100, seems large, but if too large a remittitur should have been ordered by the court of common pleas of the circuit court.

After the amount of a verdict, in an action not founded on contract, has had the sanction of a jury, and both the common pleas and circuit courts, this court will not usually interfere to reduce the amount.

Judgment affirmed.

ILLINOIS SUPREME COURT.

ILLINOIS STEEL COMPANY, *Plff. in Err.*,

v.

James L. O'DONNELL *et al.*

(156 Ill. 624.)

1. **Relationship of a creditor of an insolvent corporation to one or more of its directors** or officers will not prevent the giving of a valid security as a preference to such creditor.
2. **Unearned interest must be subtracted** from the amount of recovery in entering judgment before maturity by the voluntary act of the payee of notes on which interest has been paid in advance.
3. **Judgment notes of a corporation renewed after its insolvency** are in the same position with respect to the right of the corporation to make preferences as prior judgment notes for which the renewals were given.
4. **Valid securities may be given to its directors** by a corporation, although it is in fact insolvent, where it is a going concern doing a large business, and the securities are given for money loaned at the same time in good faith to enable the company to carry on the purposes of its incorporation.
5. **Directors and officers of an insolvent corporation** can dispose of its property in good faith to pay or secure corporate debts, even though the result is to give some creditors a preference over others.
6. **Subsequent insolvency of a corporation** which has borrowed money when solvent from officers or directors will not affect their rights of action to recover such loans and enforce their securities.

(June 15, 1895.)

ERROR to the Appellate Court, Second District, to review a judgment reversing a

NOTE—For validity of preferences among creditors of an insolvent corporation, see *note* to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 L. R. A. 802; also *Corey v. Wadsworth* (Ala.) 23 L. R. A. 618; *Schufeldt v. Smith* (Mo.) 29 L. R. A. 890; and *Ballin v. Merchant's Exch. Bank* (Wis.) 27 L. R. A. 367.

In addition, see *Blair v. Illinois Steel Co.* (Ill.) *post*, 269.

31 L. R. A.

judgment of the Circuit Court for Will County which set aside a judgment confessed by the Joliet Enterprise Company in favor of Henry Fish & Sons who had assigned their property to O'Donnell for the benefit of creditors. *Modified and affirmed.*

Messrs. Williams, Holt, & Wheeler, with *Mr. E. P. Prentice*, for plaintiff in error:

The judgment in favor of Henry Fish & Sons is void as being the result of the efforts of the directors themselves to create a preference in their own favor.

Bacon v. Harris, 62 Fed. Rep. 99; *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080; *Atwater v. American Exch. Nat. Bank*, 40 Ill. App. 501; *Morawetz, Priv. Corp.* § 528.

Assuming that the notes on which the judgment was based, and the warrants of attorney attached thereto, were given before insolvency and for bona fide loans of money, still such notes with the warrants of attorney created no lien, but simply gave rise to the possibility of a lien, to be created by subsequent action.

P. C. Hanford Oil Co. v. First Nat. Bank, 126 Ill. 590.

The judgment in favor of Henry Fish & Sons, and also the conveyance of the property on Cass street to Mrs. Mary V. Fish, and the payment to Mrs. Miller, effected by the directors of the corporation, acting as agent for the creditor, on the morning of the 30th of November, 1892, were invalid and must be set aside.

No diligence on the part of the creditors is shown or claimed. The conveyance to Mrs. Fish was the result solely of the diligence of George Fish, acting as agent for the creditor of the corporation, and to that diligence and to the influence which George Fish had with his fellow directors, Mrs. Fish owes such security as she has received from the Enterprise Company. The payment to Mrs. Miller and the judgment given to Henry Fish & Sons' stand, so far as this phase of the argument is concerned, exactly in the situation of the conveyance to Mrs. Fish.

Atwater v. American Exch. Nat. Bank, 40 Ill. App. 501; *Aberdeen R. Co. v. Blaikie*, 1 Macq. H. L. Cas. 461; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553.

Messrs. George S. House and P. C. Haley, with **Mr. E. A. Otis**, for defendants in error:

Tested by the strictest rules applicable to the relation of trustee and *cestui que trust*, we challenge the counsel to show where the banking firm of Henry Fish & Sons obtained any advantage or preference over other creditors in this case by making direct loans to the Joliet Enterprise Company.

Merrick v. Peru Coal Co. 61 Ill. 472; *Beach v. Miller*, 130 Ill. 169; *Harts v. Brown*, 77 Ill. 226; *Atwater v. American Exch. Bank*, 40 Ill. App. 501.

The legal ownership of the assets of a corporation is not altered by the company's insolvency, and regular agents of the company would still have the power of representing it and managing its property for all authorized purposes.

2 *Morawetz*, Priv. Corp. § 787; 1 *Beach*, Priv. Corp. § 245; *Smith v. Skenary*, 47 Conn. 47; *Stratton v. Allen*, 16 N. J. Eq. 229.

Corporations that have the power to borrow money have also the necessary power, as well as the legal right, to give obligations for its repayment, in any form not expressly forbidden by law.

Curtis v. Leavitt, 15 N. Y. 9.

Where an officer of a corporation has received its securities in good faith as collateral to a debt due him from the corporation, it is an essential prerequisite to an avoidance of the transaction that the indebtedness should be paid.

Wait, Insolvent Corp. § 95; *Duncomb v. New York H. & N. R. Co.* 84 N. Y. 190; 1 *Beach*, Priv. Corp. 242; *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 686.

The good will of a going concern can be considered as an asset in determining the question whether a corporation is solvent or insolvent.

Bell v. Ellis, 33 Cal. 620; *Chipman v. McClellan*, 159 Mass. 363.

Baker, J., delivered the opinion of the court:

This is a writ of error to the appellate court for the second district wherein the Illinois Steel Company is plaintiff in error, and James L. O'Donnell, assignee of Henry Fish & Sons, and others, are defendants in error. This writ brings before the court the same record and decree that have been in part reviewed in the appeal of *Blair v. Illinois Steel Company*. A statement of the case will be found with the report of that appeal.

The principal matters for consideration on this writ of error are the claims that the preference given by the insolvent Joliet Enterprise Company to Mary V. Fish was unlawful and invalid, and that the judgment for \$176,420.96 rendered on the 30th day of November, 1892, against the Joliet Enterprise Company and in favor of Henry Fish & Sons was and is illegal, and should be set aside as an unlawful preference.

On November 30, 1892, the Joliet Enterprise Company was insolvent. At that time and for some time prior thereto it was indebted to Mary V. Fish in the sum of \$15,000 for borrowed money, and she held the judgment note of the corporation therefor.

She was the mother of Charles M. Fish, George M. Fish, and Henry M. Fish, three of the five directors of the company. On the day mentioned the corporation, through its directors and officers, conveyed to her certain real estate in payment of the indebtedness due her, and she accepted the deed in satisfaction of her claim. The value of property conveyed was not greater than the amount of the debt for which it was given.

It is the settled law of this state that the directors and officers of an insolvent corporation have the power to dispose of corporate property, in good faith, for the purpose of paying or securing corporate debts, and that they may do this even though the result is that some creditors are given a preference over others. *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Bouton v. Smith*, 113 Ill. 481; *Burch v. West*, 184 Ill. 258; *Ragland v. McFall*, 187 Ill. 81; *Glover v. Lee*, 140 Ill. 102; *Warren v. First Nat. Bank*, 149 Ill. 9; 25 L. R. A. 746; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588; *Gottlieb v. Miller*, 154 Ill. 44. And the fact of relationship of the person to whom preference is given to one or more of the directors or officers of the corporation does not invalidate the transaction, if it is otherwise fair and free from fraud. *Schroeder v. Walsh*, 120 Ill. 403; *Ragland v. McFall*, and *Gottlieb v. Miller*, *supra*; *Blair v. Illinois Steel Co.* *post*, 269, 159 Ill. 350.

There was no error in sustaining the validity of the conveyance to Mrs. Fish.

The firm of Henry Fish & Sons was composed of Henry Fish, the father, and his three sons George M. Fish, Charles M. Fish, and Henry M. Fish, and it was engaged in the banking business at Joliet. The Joliet Enterprise Company was engaged in carrying on an extensive business in the manufacture of barbed wire. Said George M., Charles M., and Henry M. were, as already stated, three and a majority of its board of directors. The firm had for some years been loaning large sums of money to the corporation. On the morning of November 30, 1892, the firm held six judgment notes of the company for \$29,000 each, amounting in the aggregate to \$174,000. At that time it was manifest that both the bank and the corporation were insolvent, and that both would be compelled to suspend payment.

Among other things that were done during the morning of that day, a judgment was entered upon said judgment notes in favor of Henry Fish & Sons for \$176,420.96 and costs, and execution immediately issued thereon and a levy made on the property of the corporation.

Later in the day, the firm of Henry Fish & Sons made a voluntary assignment for the benefit of its creditors, and James L. O'Donnell, the principal defendant in error herein, became the assignee.

In the decree in equity that was afterwards entered in the circuit court of Will county, the judgment by confession was sustained to the extent of \$116,000, and to that extent only, and for the amount for which it was sustained it was given priority. But the court found and decreed that the Joliet Enter-

prise Company was insolvent on and after March 31, 1892; that while four of the judgment notes were renewals of like notes for loans made prior to said date, yet the other two of said judgment notes of \$29,000 each upon which the judgment by confession was based were for loans made after that date and after insolvency; and that said corporation then had no power to make said two last-mentioned judgment notes, because three of the partners in the banking firm of Henry Fish & Sons were directors and officers of the insolvent corporation. And the court also found and decreed that an attorney's fee of \$1,000 was unlawfully and improperly included in the judgment; and also that \$1,420.96 interest was wrongfully included therein.

O'Donnell, the assignee of Henry Fish & Sons, appealed from the decree to the appellate court; and both errors and cross-errors were assigned in that court.

The judgment of the appellate court sustained the findings and decrees of the circuit court in regard to the sums of \$116,000 and \$1,420.96, respectively; but reversed its findings and decrees in regard to the two notes of \$29,000 each and in regard to the attorney's fee of \$1,000. It reversed the decree as to the judgment by confession, and remanded the cause with directions to sustain said judgment for the amount for which the same was entered, except \$1,420.96 which had erroneously been included as interest and which was ordered to be deducted as of the date of said judgment, leaving said judgment as of such date at the sum of \$175,000, and which judgment with interest thereon was ordered to be preserved as a lien upon the property of said Joliet Enterprise Company in favor of said firm of Henry Fish & Sons and their assignee under the judgment, execution, and levy.

It is conceded by all parties that the deduction of \$1,420.96 was properly made from the judgment by confession. It was included in that judgment as interest, whereas the notes were not due at the time of rendition of judgment, and interest on them up to times of maturity had been paid. The judgment also contained another element of double and unlawful interest which a court of equity should correct. Interest had already been paid in advance up to the dates of the maturity of each of the six notes, respectively, and upon the entry of judgment before maturity at the election and by the voluntary act of the payees of the notes, this unearned interest should have been subtracted. The directions given by the appellate court are so modified as that the just and equitable proportion of the interest paid shall be deducted from the face of the notes and the judgment.

The circuit court, in its decree, found that the Joliet Enterprise Company was insolvent on the 31st day of March, 1892, and from and after that date. For the purposes of the decision, we will assume the correctness of this finding.

Four of the judgment notes on which the judgment was based, the principal of said notes amounting to \$116,000, were renewals of other like judgment notes, and represented

money actually loaned to the corporation by said banking firm of Henry Fish & Sons, said notes having their origin in loans made and judgment notes given on December 18, 1890, October 3, 1891, October 31, 1891, and February 16, 1892, respectively.

The giving of a judgment note is the giving of a security or preference. *Young v. Clapp*, 147 Ill. 176. Although this may be so, yet there can be no serious question of the propriety of the action of both of the courts below in sustaining the judgment so far as it has for its foundation the four renewal notes mentioned above. The renewal judgment notes were only continuations of the original judgment notes given during the solvency of the company. The substance of the matter is, that each loan of money and judgment note given therefor continued to be one and the same transaction, without reference to the number of like judgment notes given in renewal, and without regard to the fact that the last renewals may have been after corporate insolvency. *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250. And the law is, that the directors or officers of a solvent corporation, acting in good faith, may deal with it, and loan it money and take security therefor, and that the subsequent insolvency of the corporation will not affect their rights of action to recover such loans or enforce their securities. *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655.

The circuit court found that two of the judgment notes, for \$29,000 each had their origin in loans made by Henry Fish & Sons to the insolvent company,—one on June 13, 1892, and the other on October 4, 1892. It held that the taking of security for such loans, by way of warrants of attorney to confess judgment, or by way of judgment notes, was inequitable and unauthorized as against the creditors of the Joliet Enterprise Company, and forbidden by law. And it therefore set aside and annulled the judgment as to \$58,000, that being the amount of the principal debts secured by said two notes.

Upon the appeal of O'Donnell, the assignee of the insolvent firm of Henry Fish & Sons, the appellate court held otherwise in regard to said two notes, as already herein sufficiently appears.

The two loans of money amounting in the aggregate to \$58,000 were made by the banking firm to the corporation in good faith, and the judgment notes were given therefor at the time that the loans were respectively made. The assets of the corporation were not diminished by the transactions. It got the benefit of the moneys so borrowed, and they were used in completing the new plant that it constructed at a cost of some \$280,000, and in conducting and keeping on its feet its large manufacturing business. The banking firm did not obtain, or anticipate receiving any advantage to itself by loaning the money to the corporation, other than that of getting interest on the money that it loaned. The corporation, at the time of these transactions, was embarrassed for want of means, in fact insolvent, in the sense that its liabilities exceeded its assets; and it was forced to adopt various temporary shifts and expedients for

the purpose of raising money. At the same time, it was a going concern, had an extensive plant which had cost it over a quarter of a million of dollars, and was unencumbered; was employing some 300 workmen; had on hand manufactured products worth about \$200,000; and was doing a large business, and meeting its commercial obligations. The securities that were given by the corporation to the banking firm—i. e. judgment notes—were not outside of the usual order of things, for the evidence shows that it was and for many years had been the custom and usage of the banking firm to require judgment notes in all cases of actual and absolute loans of money, and that the same custom and usage obtained with all of the other banks and banking firms doing business in the city of Joliet.

There is a marked difference between a case where a mortgage or other preference is given by an insolvent corporation to a director or officer to secure a pre-existing indebtedness, and a case like this, where the corporation, though in fact insolvent, in the sense above stated, is a going corporation that is seeking to accomplish the objects of its incorporation, and the security is given to directors for moneys actually and in good faith loaned at the time the security is given to such embarrassed corporation, and for its benefit.

In *Harts v. Brown*, 77 Ill. 226, the coal company had expended all of its means in sinking a shaft, etc., and owed debts to the amount of from \$23,000 to \$33,000. This court held that the directors had power to borrow money from one of their number and execute to him a mortgage on the corporate property. It was there said (p. 231): "The company had expended all their means, and had failed to realize their expectations, and had reached a point at which the enterprise must be abandoned unless means could be procured to further prosecute the work; and, so far as we can see, there was nothing reckless or unbusinesslike in effecting this loan for the time, at the rate of interest or on the security given. They all seem to be according to the usual course of business."

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329, the corporation became very much embarrassed, and borrowed money from Marbury, who was one of its directors, and secured him by a note and trust deed. The court found that the loan was made in good faith to assist the corporation in its embarrassments, and held that no rule of law prohibited a director from loaning money to the corporation in good faith when it was needed for its benefit, and that such a rule would deprive a corporation of the aid of those most interested in it and most likely to render it assistance. The views we entertain in respect to the particular matter now under consideration are well expressed in certain language used by Justice Harlan in delivering the opinion of the circuit court of appeals in the late case of *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. Rep. 496. We quote the language referred to, which is as follows:

"A corporation is not required, by any 31 L. R. A.

duty it owes to creditors, to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and, by a mortgage upon its property, secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him." Of course, in cases of that kind, a court of equity will closely scrutinize the transaction, and, in a contest between general creditors and a director or managing officer who takes a mortgage upon its property, will hold the latter to clear proof that the mortgage was executed in good faith, and was not a device to enable him to obtain an advantage for himself over those interested in the distribution of the mortgagor's property. *Washburn v. Green* ("Richardson v. Green"), 133 U. S. 30, 43, 33 L. ed. 516, 521; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 588, 23 L. ed. 329, 330.

A rule that would prevent directors and officers of financially embarrassed corporations, acting in good faith and for the apparent benefit of such corporations, from loaning them money and at the same time taking from them security for repayment—the terms and the securities being such as are in accord with the usual course of business—would be highly injurious to corporations themselves, and frequently detrimental to the interests of their creditors. The line of demarcation that separates valid from invalid preferences to directors or officers of insolvent corporations lies between already incurred liabilities and liabilities assumed by going corporations at the time the security is given and taken.

In our opinion, there was no error in the ruling of the appellate court, that the judgment notes given for the moneys lent and advanced on June 13, 1892, and on October 4, 1892, were legal and valid securities and preferences, even as against the claims of the general creditors of the corporation.

It is not intended or considered that anything herein decided or said is in conflict with the decisions in *Beach v. Miller*, 130 Ill. 162, and subsequent cases in line therewith.

Some other and minor objections to the decree are suggested, but we think that a part of them are, in principle, disposed of by what we have already said; and that the others are not well taken, and do not require special notice.

With the slight modification in the directions to the circuit court that has already been adverted to, the judgment and order of the Appellate Court are affirmed. The plaintiff in error will pay the costs made in this court.

Chauncey J. BLAIR *et al.*, *Appts.*,
v.

ILLINOIS STEEL COMPANY *et al.*

(159 Ill. 350.)

1. **Jurisdiction to set aside a trust deed** is acquired although complainants in the original bill in which such relief was sought were not judgment creditors of the grantor, where a cross bill to foreclose the deed is filed in the suit, making numerous parties defendant with a requirement to answer, which they do by attacking the deed, and upon issues so formed the question of the validity of the deed is submitted by the parties for decision.
2. **Creditors whose executions cannot be levied** upon their debtor's property because it is in the hands of a receiver are not, because of failure to levy executions, precluded from attacking the validity of a deed of trust which had been given by the debtor as being in fraud of their rights.
3. **A defendant who is brought into a suit by cross bill** may himself file a cross bill where it is necessary to do complete justice and terminate the litigation, under a statute providing that any defendant may, after filing his answer, exhibit and file his cross bill.
4. **The filing, in a suit to dissolve a corporation and close up its business, of cross bills** in the nature of creditor's bills, and of prayers to set aside a deed of trust on the property, will not operate to give the creditors praying such relief preference over the other creditors of the corporation.
5. **A preference given by deed of trust** to a creditor of an insolvent corporation is not avoided by the fact that the creditor is an aunt of some of the directors.
6. **A sale of property in a suit to wind up an insolvent corporation** is not made subject to the provisions, as to redemption, in a statute governing sales in foreclosure proceedings or under decrees for the payment of money, by the fact that in the suit are filed cross bills seeking preferences in the assets, if the decree refuses to recognize such claims, but leaves the assets unencumbered thereby.
7. **A deed of trust by an insolvent corporation preferring certain creditors** will not be rendered void by the fact that their claims were guaranteed by directors of the corporation, unless they are shown to be able to respond to the demands; nor by the fact that the preference was given without the knowledge of the creditors, unless it is shown that it was for the benefit of the directors rather than of the creditors.

(January 20, 1896.)

APPEAL by defendant trustee and the beneficiaries under a deed of trust given by the Joliet Enterprise Company from a decree of the Appellate Court, Second District, affirming a decree of the Circuit Court for Will County setting aside a trust deed as being in fraud of creditors. *Reversed.*

Statement by **Wilkin, J. :**

On December 10, 1892, the Will County National Bank and Joseph Stephen filed their

NOTE.—See Illinois Steel Co. v. O'Donnell (Ill.) ante, 265, and footnote therewith.

31 L. R. A.

bill in the circuit court of Will county, alleging, among other things, that the complainant Stephen had recovered a judgment against the Joliet Enterprise Company, a corporation of this state engaged in manufacturing barbed wire at Joliet, that execution had been issued and returned unsatisfied, and that said corporation was insolvent, and praying for the appointment of a receiver, the dissolution of the corporation, the ascertainment and enforcement of the individual liability of the stockholders and directors, and for such other, further, and different relief as might be agreeable to equity. On December 24, 1892, the Cleveland Rolling-Mill Company and the Illinois Steel Company filed their bill in the said court, alleging, among other things, that the Cleveland Rolling-Mill Company had recovered a judgment against the Joliet Enterprise Company, December 1, 1892, for \$17,464.67, on which execution was immediately issued, and which remained wholly unpaid and unsatisfied; that said Joliet Enterprise Company was also indebted to the Illinois Steel Company in the sum of \$169,751.04; that Charles M. Fish, George M. Fish, Henry M. Fish, Francis H. Connell, and John T. Brooks were directors and officers of said Joliet Enterprise Company; that said directors Charles M. Fish, George M. Fish, and Henry M. Fish, together with Henry Fish, their father, composed the firm of Henry Fish & Sons; that on November 30, 1892, the defendant corporation confessed judgment in said circuit court in favor of said firm of Henry Fish & Sons for \$176,420.96, on which execution immediately issued, and was levied on all the property of the corporation; that on the same day said corporation executed and delivered a trust deed to Chauncey J. Blair, trustee, securing various creditors, to the amount of about \$159,000; that said corporation at that time was, and for many months, prior thereto had been, insolvent; and that said confession of judgment and trust deed were unlawful attempts to prefer creditors, and praying that James L. O'Donnell, assignee of said firm of Henry Fish & Sons, insolvents, should be enjoined from enforcing said judgment, and that the judgment and trust deed should be set aside and declared null and void; that the trust deed be decreed to be a general assignment for the benefit of creditors; that the assets of the corporation should be marshaled, administered, and distributed among all the creditors of the corporation; that liabilities of the stockholders, directors, and officers should be determined and enforced; and that complainants might have such other and further relief as to equity should seem meet. The whole property of the corporation, except such as was in the custody of the sheriff, under the execution in favor of Henry Fish & Sons and certain attachment writs, had been in the possession of a receiver, appointed under a bill filed in the United States court; but on the same day that said bill of the Cleveland Rolling-Mill Company and the Illinois Steel Company was filed, the bill filed in the United States circuit court was dismissed for want of jurisdiction, and George H. Munroe, the former

receiver, was appointed receiver under said bill of the Cleveland Rolling-Mill Company and the Illinois Steel Company, and took possession as such. On December 30, 1892, the court, on its own motion, and in pursuance of the stipulation and agreement of parties, consolidated the two suits so begun in the Will county circuit court, and the appointment of Munroe as receiver was extended over both. The Joliet Enterprise Company was defaulted on the bill to wind up the corporation, but answered the bill which questioned the judgment confessed and the trust deed, and contested that bill. James L. O'Donnell, assignee for Henry Fish & Sons, in his answer, claimed the right to enforce the judgment in favor of that firm for the full amount for the benefit of their creditors. The trustee and beneficiaries under the trust deed, in their answer, claimed the benefits conferred by the trust deed, and insisted on its validity. A cross bill was also filed by Chauncey J. Blair, trustee, and certain of the beneficiaries named in the trust deed for the foreclosure of the same. The Cleveland Rolling-Mill Company and the Illinois Steel Company answered the cross bill, challenging the validity of the trust deed, and setting out substantially the same matters averred in their original bill concerning it. Joseph S. Wiley and the Ashley Wire Company were brought in as defendants in said cross bill filed to foreclose the trust deed, and they answered and filed a cross bill thereto, alleging the recovery of judgments in their favor against the Joliet Enterprise Company, and averring that no execution had issued because the property of the corporation was in the hands of a receiver, and that the trust deed was an unlawful preference, and not authorized, and praying that it should be set aside and declared null and void. Afterwards said Joseph S. Wiley and the Ashley Wire Company were, by order of the court, admitted as complainants in the bill of the Will County National Bank and Joseph Stephen; and on the hearing of the cause said Joseph S. Wiley filed an intervening petition, setting out the recovery of his judgment, and asking to be made a party complainant with the Cleveland Rolling-Mill Company and the Illinois Steel Company in their bill. The prayer of the petition was granted, and said Joseph S. Wiley filed a supplemental bill to said bill of the Cleveland Rolling-Mill Company and the Illinois Steel Company, alleging that he recovered said judgment, and that no execution was issued because the property of the Joliet Enterprise Company was in the hands of a receiver, as aforesaid.

As a result of the hearing the court found that the judgment recovered by confession in favor of the firm of Henry Fish & Sons was based upon six judgment notes of the Joliet Enterprise Company, for \$29,000 each, which were given for money actually loaned to said corporation by said Henry Fish & Sons; that said corporation was insolvent March 31, 1892, and thereafter the directors had no right to loan it money and take judgment notes therefor; that four of said judgment notes were renewals of like notes for loans

made before March 31, 1892, and two were for loans made after that date; that the corporation had no power to make said last two judgment notes, because three members of said banking firm were members of the corporation; that \$1,000, included in the judgment as attorney's fees, could not be sustained, and that \$1,420.96 was wrongfully included as interest; and it was decreed that said judgment should stand for \$116,000 only, the principal of the four notes held valid. The findings concerning the trust deed, and the rights of the beneficiaries thereunder, were that the several debts secured by the trust deed were all evidenced by notes of the Joliet Enterprise Company; that the debts were not created when the trust deed was made, but had existed a considerable time; that neither the trustee nor any beneficiary knew of the execution and recording of the trust deed, until after it was executed and recorded by the officers of the corporation; that in every case, except that of Cornelia A. Miller, two or more members of the banking firm of Henry Fish & Sons, who were also directors of the corporation, were bound as guarantors for the payment of the indebtedness, by written guaranties indorsed on the notes; that, as to such debts so guaranteed, the trust deed was an unlawful attempt on the part of the directors to secure indebtedness for which they were personally liable; that on November 30, 1892, the same day the trust deed was made, the corporation paid to Cornelia A. Miller, on her note, \$4,500, leaving due her \$500 and interest; that judgment was confessed on said note for \$621.35, which included \$50 attorney's fees; that said attorney's fees should not be allowed; and that she had a right to rely on the trust deed to the amount of \$508 and interest due. The cross bill to foreclose the trust deed was therefore dismissed, with costs, for want of equity, except as to said Cornelia A. Miller, and except as to her the trust deed was held to be an illegal and fraudulent preference, and was set aside and canceled.

From the decree that was rendered by the circuit court an appeal was taken to the appellate court for the second district by James L. O'Donnell, assignee of Henry Fish & Sons, by Chauncey J. Blair, trustee, and by the Merchants' National Bank of Chicago, the American Trust & Savings Bank of Chicago, the Third National Bank of New York, the Will County National Bank, the First National Bank of Joliet, and the Washburn & Moen Manufacturing Company, whose claims were secured by the trust deed. In the appellate court numerous errors were assigned by the three appellants, and cross errors were assigned by the Illinois Steel Company and by others. By the judgment of the appellate court the decree of the circuit court was affirmed in all respects, except as to the judgment by confession in favor of the firm of Henry Fish & Sons against the Joliet Enterprise Company, and as to such judgment the decree was reversed (53 Ill. App. 314), and the cause remanded, with directions to sustain said judgment for the amount for which the same was entered, except \$1,420.96, which had been erroneously included as interest.

and which was ordered to be deducted as of the date of said judgment, leaving said judgment as of such date at the sum of \$175,000, and which judgment, with interest thereon, was ordered to be preserved as a lien upon the property of the Joliet Enterprise Company, in favor of said firm of Henry Fish & Sons and their assignee, under the judgment, execution, and levy.

The present appeal is by Chauncey J. Blair, trustee, and the Merchants' National Bank of Chicago, the American Trust & Savings Bank of Chicago, the Third National Bank of New York, the Will County National Bank, the First National Bank of Joliet, and the Washburn & Moen Manufacturing Company, beneficiaries under the trust deed executed by the Joliet Enterprise Company to said Blair as trustee.

Mr. George S. House, with Mr. E. A. Otis, for appellants:

The power of an insolvent corporation to secure any bona fide creditor by conveyance or mortgage of its property, even though it may result in a preference of one creditor over another, is no longer an open question in this state.

Reichwald v. Commercial Hotel Co. 106 Ill. 439; *Bouton v. Smith*, 113 Ill. 481; *Burch v. West*, 134 Ill. 258; *Ragland v. McFall*, 137 Ill. 81; *Glover v. Lee*, 140 Ill. 102.

The general current of authority as announced by decisions of courts of last resort in a great majority of the states, is that, in the absence of a statute, the corporation may give a preference to one creditor over another, provided there is no fraud practiced, nor any attempt by any one occupying a fiduciary relation toward it to obtain an undue advantage or preference in his own favor.

Ringo v. Biscoe, 13 Ark. 563; *Bank of Montreal v. J. E. Potts Salt & L. Co.* 90 Mich. 345; *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Planter's Bank v. Whittle*, 78 Va. 737; *Dana v. Bank of United States*, 5 Watts & S. 223; *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Catlin v. Eagle Bank*, 6 Conn. 233; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746.

The fact that the indebtedness secured by the Blair trust deed was further evidenced by the guaranty of Henry Fish & Sons did not in any manner affect the power of the creditors to demand, or of the corporation to give, other security for its payment.

A sale or conveyance of property will not be set aside for constructive fraud on the part of the grantor alone, but both the grantor and the grantee must be shown to have participated in the fraudulent intent before relief will be granted against it.

Schroeder v. Walsh, 120 Ill. 408; *Hatch v. Jordan*, 74 Ill. 414; *Phelps v. Curtis*, 80 Ill. 109; *Bump, Fraud. Conv.* p. 195; *Reehling v. Byers*, 94 Pa. 316; *Dudley v. Danforth*, 61 N. Y. 626; *National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co.* 118 Mo. 365.

The directors of the Joliet Enterprise Company, who were liable as guarantors, could not by payment of such debts be subrogated to the

rights of the beneficiaries named in the deed of trust.

Sheldon, Subrogation, § 44; *Dexine v. Harkness*, 117 Ill. 145; *Milwaukee & M. R. Co. v. Soutter*, 80 U. S. 13 Wall. 517, 20 L. ed. 543.

Security given for a bona fide preexisting debt is not to be held invalid for the sole reason that the corporate officers are personally liable for its payment.

Duncomb v. New York, H. & N. R. Co. 88 N. Y. 1; *Re Wincham Shipbuilding, Boiler & S. Co. L. R. 9 Ch. Div. 322*.

The officers are not trustees in the sense in which that term is used by courts of chancery, and they still have the full power of disposition and control of the corporate property and assets.

Warren v. First Nat. Bank, supra; *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721.

A deed to a trustee for the benefit of bona fide creditors will be presumed to have been accepted by them in the absence of proof that they refused to accept it.

Brooks v. Marbury, 24 U. S. 11 Wheat. 78, 6 L. ed. 423; *Dale v. Lincoln*, 62 Ill. 22; *Weber v. Christen*, 121 Ill. 91.

The decree below directs the receiver to sell the property of the insolvent corporation without redemption, which is directly contrary to the decision in *Locey Coal Mines v. Chicago, W. & V. Coal Co.* 131 Ill. 9, 8 L. R. A. 598.

On petition for rehearing.

In this state under our general incorporation act the board of directors are invested with the exercise of all corporate powers.

Beach v. Miller, 130 Ill. 162; *Gottlieb v. Miller*, 154 Ill. 44; *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 385, 37 L. ed. 1117.

There is no lack of power in the directors of an insolvent corporation to give preferences to debts due themselves, and such preferences will stand unless called in question in a court of equity by a party having the right to make the claim.

It is the vice as to this question of power in the opinion that leads the court to seemingly ignore the rights of the beneficiaries, and, accepting as granted that the act done is for the advantage of the directors, who are guarantors, hold the trust deed as invalid. The rights of the beneficiaries constitute an important factor in this transaction, and should be considered.

Lowry Bkg. Co. v. Empire Lumber Co. 91 Ga. 624; *Wehl v. Atlanta Furniture Mfg. Co.* 89 Ga. 297; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439; *Henderson v. Indiana Trust Co. (Ind.)* 40 N. E. 516.

Any direct creditor of an insolvent corporation created and existing in good faith has the right under the law to obtain and receive security for his debt even to the exhaustion of the entire estate of the insolvent creditor.

The fact that these directors were liable personally on these notes, as guarantors, is and was a mere incident. The securing of these notes by the trust deed may or may not be of benefit and advantage to these directors; but, be that as it may, it is not such an act as is brought within the principle governing, for

the reason that the act works or results in no injury to the other creditors of the corporation whereby there exists right of complaint to such creditors.

Sanford Fork & T. Co. v. Howe, B. & Co. 157 U. S. 312, 39 L. ed. 713 (1895); *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746.

Messrs. Williams, Holt, & Wheeler, with *Mr. E. Parmelee Prentice*, for appellees:

The deed of trust to Blair is void as an attempt by an insolvent corporation to prefer its officers.

Atwater v. American Exch. Nat. Bank, 40 Ill. App. 501; *Beach v. Miller*, 130 Ill. 162; *Roseboom v. Whittaker*, 133 Ill. 81.

The time has long since passed when the directors in their own interest can defend their own acts. They cannot be heard in this court to claim what the trust deed would give to them, but their plan has been so conceived that other persons, represented by Mr. Blair, will be here, and will speak in their interest. We do not believe that the eyes of the court of equity, looking into the merits of a transaction, will be blinded by any such circuitry of action as that which is here shown.

Consolidated Tunk Line Co. v. Kansas City Varnish Co. 45 Fed. Rep. 7; *Hutchinson v. Sutton Mfg. Co.* 57 Fed. Rep. 998; *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618; *Olney v. Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *Goodyear Rubber Co. v. George D. Scott Co.* 96 Ala. 439; *Lowry Bkg. Co. v. Empire Lumber Co.* 91 Ga. 624; *Cook, Stock & Stockholders*, §§ 661 et seq.; *Sicardi v. Keystone Oil Co.* 1 Pa. Adv. R. 710 (1892); *Corbett v. Woodward*, 5 Sawy. 403; *Wait, Insolvent Corp.* §§ 156, 157.

Under the 25th section of the incorporation act of this state a bill such as that which is now before this court may be filed by a simple contract creditor, and the court below had full authority to entertain the case so made.

Woolcorton v. Taylor, 132 Ill. 197; *Talcott v. Grant Wire & S. Co.* 33 Ill. App. 155; *Woolcorton v. George H. Taylor Co.* 43 Ill. App. 424.

The bill filed by complainants in the court below prayed that the various conveyances and payments made by the Enterprise Company on the 30th of November, 1892, should be declared in effect to be a voluntary assignment for the benefit of creditors. Whether complainants succeed in their contention upon this point or not, it nevertheless remains true that the court has jurisdiction to hear and to decide upon the question which is thus presented to it.

Roseboom v. Whittaker, 33 Ill. App. 442.

Some trust unquestionably exists.

Beach v. Miller, 130 Ill. 162.

The legal title and the disposition of the property belong, to such extent as shall be declared by the court, to the corporation and its officers. The beneficial interest is in the creditors.

Lindauer v. Lang, 29 Ill. App. 188; *Hanchett v. Waterbury*, 115 Ill. 220.

Wilkin, J., delivered the opinion of the court:

In deciding this case upon the former hearing, after making the foregoing statement of facts, we said:

"This appeal brings before us so much of the order and judgment of the appellate court as affirms those portions of the decree rendered by the circuit court of Will county, in the consolidated cause, that have reference to the trust deed dated November 30, 1892. Appellants challenge the right of appellees, and especially that of the Illinois Steel Company, to question the validity of the trust deed, and also seem to call in question the jurisdiction and right of the court, under the pleadings and proofs, to decree the invalidity of such trust deed, and the relief that it granted. We do not deem it necessary to inquire whether or not the Cleveland Rolling-Mill Company and the Illinois Steel Company, or either of them, had so exhausted their remedies at law as to entitle them, under their original bill, to set aside said trust deed in a court of chancery. Appellants answered said original bill, and then, on February 9, 1893, exhibited their cross bill to foreclose the trust deed, and the Cleveland Rolling-Mill Company, the Illinois Steel Company, Joseph S. Wiley, the Ashley Wire Company, and very numerous other persons, firms, and corporations, were, by appellants, made parties defendant to the said cross bill, and required to answer the same. This they did, and they interposed, by way of defense to the cross suit, substantially the same matters that had been alleged in the original bill, and made substantially the same objections to the validity of the trust deed; and thereupon appellants filed a replication to these answers, and the issues thus formed as to the validity of the trust deed were by the parties submitted to the decision of the chancellor at the hearing of the consolidated cause. We think that the circuit court, under the circumstances, had power and authority to adjudicate in respect to the matters thus submitted to it, and this, even though all or some of the defendants to the cross bill were but simple-contract creditors of the Joliet Enterprise Company. But, even assuming that the question of the validity of the trust deed could not be raised in chancery, even by way of defense, by a creditor of the Enterprise Company, without such creditor had first reduced his claim to a judgment, and had exhausted all legal remedies for its collection, yet the record before us shows that the Cleveland Rolling-Mill Company not only recovered a judgment at law for its demand of \$17,464.67 and had an execution issued thereon, on December 1, 1892, on which the sheriff, on December 24, 1892, indorsed a return of 'No property found,' but that said execution and return were, on January 6, 1893, filed in the office of the clerk of the circuit court; and that the demands of the Ashley Wire Company and Joseph S. Wiley were reduced to judgments on January 23, 1893, and that no executions were issued on said judgments, because all the property of the Joliet Enterprise Company then was, and for a long time had been, in the hands of a receiver, and in the custody of the court. There may be some

question as to the sufficiency of the return on the execution, based on the judgment for \$17,464.67, but there can be no question but that the Ashley Wire Company and Wiley had a clear right to contest the trust deed. When their judgments were recovered, all the property of the Enterprise Company was in the custody of the law, in charge of the receiver in the consolidated suit, composed of the winding-up bill exhibited by the Will County National Bank and Stephen and the subsequent bill of the Rolling-Mill Company and the Steel Company; and in that state of the case, the issuance and attempted levy of executions would have been a vain and idle ceremony, and probably a contempt of court. In *Steere v. Hoagland*, 39 Ill. 264, this court said that the general rule was that there must be a judgment and a return of no property before a creditors' bill will be entertained, yet that to that rule there were well-recognized exceptions; and the case of a deceased debtor was there held to be one of the exceptions, since, under our statutes, an execution cannot issue against an administrator so as to reach personal assets. The same principle has application in the case at bar. Where a debtor corporation is insolvent, and all its property is in the hands of a receiver in a suit in equity, brought under section 25, chap. 32, Rev. Stat., for the purpose of dissolving and closing up the business of such corporation, the case is one of an exception to the general rule that there must be a return of *nulla bona* upon which to base the right of a creditor to contest in equity a transfer of property made by the debtor.

"There can be no doubt but that the decree dismissing the cross bill to foreclose was fully authorized by the issues formed therein; and to any question made as to the authority of the court to grant the affirmative relief of decreeing the cancelation of the trust deed, it is a sufficient answer to say that the Ashley Wire Company and Wiley not only interposed answers to the cross bill to foreclose, but also each filed a cross bill, praying that the trust deed should be set aside and declared null and void, and that Wiley afterwards filed a supplemental bill of like tenor, and that appellants answered, and issues were formed upon such bills. In this state of the case it is hardly worth while to inquire whether or not it was proper practice to allow the filing of cross bills to a cross bill. It may be remarked, however, that the statute provides that any defendant may, after filing his answer, exhibit and file his cross bill; and no good reason is perceived why defendants, who are only brought into the suit by a cross bill, may not also exhibit cross bills, where the same are necessary or proper for the purposes of doing complete justice and terminating the litigation.

"If we assume that the circuit court decided properly in decreeing the invalidity of the trust deed, and in setting it aside, then such decree was for the benefit of the Illinois Steel Company and all others of the general creditors of the Joliet Enterprise Company, as well as for the benefit of Wiley and the Ashley Wire Company. The property covered by the trust deed and all other prop-

erty of the insolvent corporation was in the possession and control of the receiver, appointed as well in the winding-up suit brought by the Will County Bank and Stephen as in the suit of the Illinois Steel Company *et al.* that had been consolidated with it. The prayer of the winding-up bill was that a decree should be entered dissolving the insolvent corporation, and for an accounting of all such matters wherein an account was necessary, and for the appointment of a receiver under the statute, with authority to close up its affairs, and for such further and other relief in the premises as should be agreeable to equity and good conscience. The whole consolidated cause was submitted to the court,—the two original bills, and the various cross bills,—and the issues formed on such bills; and when the court decreed, upon one branch of the consolidated cause, that the trust deed should be set aside as to the insolvent corporation and its creditors, then the proceeds of the property covered by said deed, as well as the proceeds of all other property of the insolvent corporation, was properly decreed, after the payment of the several parties found to be entitled to priorities, to be paid *pro rata* to Joseph Stephen, the Will County National Bank, Joseph S. Wiley, the Ashley Wire Company, the Illinois Steel Company, the numerous other creditors named in the decree, who were parties to the consolidated cause, and all other creditors of the Enterprise Company proving their claims.

"When a court of equity acquires jurisdiction over the assets of an insolvent corporation for the purpose of administering upon them, it will administer the assets upon the principle that equality is equity, and will distribute such assets ratably among all the creditors, paying due regard, however, to legal rights and preferences existing before it takes jurisdiction. *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605; *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588. Here the jurisdiction of the court of chancery attached on December 10, 1892, when suit in equity was brought, under the statute, for the purpose of dissolving the Joliet Enterprise Company and closing up the business of said corporation. The subsequent filing in the same court of a creditors' bill and of cross bills in the nature of creditors' bills, and of answers to the cross bill to foreclose the trust deed, did not have the effect of giving to some of the creditors preference over the other creditors; nor, indeed, do we understand that such a claim is made in behalf of any of the creditors.

"The principal controversy upon this appeal is whether or not the Joliet Enterprise Company had the right to make the preferences that it did by the trust deed of November 30, 1892, executed to the appellant Blair, trustee. We have held, in numerous cases, that an insolvent corporation, as well as an insolvent natural person, has the right, in the absence of a fraudulent intent, to make preferences among creditors. *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Bouton v. Smith*, 113 Ill. 481; *Burch v. West*, 134 Ill. 258; *Ragland v. McFall*, 137 Ill. 81;

Glover v. Lee, 140 Ill. 102; *Warren v. First Nat. Bank*, 149 Ill. 9, 25 L. R. A. 746; *J. W. Butler Paper Co. v. Robbins*, *supra*; *Gottlieb v. Miller*, 154 Ill. 44. Such preference may even be given to the wife or a relative of directors or officers of the corporation, provided no pecuniary advantage is thereby obtained by such directors or officers. *Ragland v. McFall*, and *Gottlieb v. Miller*, *supra*; *Schroeder v. Walsh*, 120 Ill. 403. Therefore, in the case at bar, the court properly held that the fact that Cornelia A. Miller was an aunt of three of the directors of the insolvent company did not vitiate the preference given to the debt due her.

"It is assigned as error that the appellate court erred in holding that the circuit court had power, even by consent of counsel, to order the lands, premises, and plant of the Joliet Enterprise Company to be sold without redemption, and to direct the receiver of said corporation to execute and deliver deeds of conveyance to the purchaser thereof, upon the confirmation of said sale, without reserving any right of redemption. In our opinion the decision in *Locey Coal Mines v. Chicago, W. & V. Coal Co.* 131 Ill. 9, 8 L. R. A. 598, does not control in this case. The decision there made was based on the statute, which expressly makes subject to the right of redemption all sales of real estate made 'by virtue of an execution, judgment, or decree of foreclosure of a mortgage, or the enforcement of a mechanic's lien, or vendor's lien, or for the payment of money.' The sale there involved was one ordered in a decree rendered upon a creditors' bill to enforce the collection of a judgment at law, and it was considered that the decree was one 'for the payment of money,' viz. the amount due on the complainants' judgment, and also considered that the creditors' bill was to be regarded as a species of process for the execution and enforcement of a judgment at law. Here there was no decree of foreclosure and sale under the trust deed, even in favor of Mrs. Miller. The payment of the small amount remaining due and unpaid upon the debt secured to her was, by agreement of parties, otherwise provided for. Nor was any decree of sale rendered upon the creditors' bills or cross bills of either the Illinois Steel Company, the Cleveland Rolling-Mill Company, the Ashley Wire Company, or Joseph S. Wiley, giving them or either of them preference over the other and general creditors. The only effect accomplished by said bills and cross bills, and by the answers to the cross bills to enforce the trust deed, was to set aside said trust deed as a preference, and leave the real estate and plant as an asset in the hands of the receiver wholly unencumbered thereby. The decree for the sale of the real estate of the Joliet Enterprise Company, to be made by the receiver, without redemption, was manifestly based upon the winding-up bill and the statute that provides for the dissolution and winding up of insolvent corporations. We think that the statute upon which the decision in *Locey Coal Mines v. Chicago, W. & V. Coal Co.* *supra*, was based, has no application to the matter of a decree for the sale of

real estate, ordered to be made by the receiver, in a suit in equity, brought, under our winding-up statute, for the purpose of dissolving an insolvent corporation, and closing up its business and affairs. The decree for a sale without redemption was the proper decree to be entered."

That part of the decree of the circuit court which dismissed the bill of these appellants was then affirmed on the ground that the trust deed was, as to them, for the benefit of those directors of the corporation who had guaranteed the payment of the notes secured by it, and therefore made in violation of the rule that the directors and other agents of an insolvent corporation cannot give themselves any advantage or preference in payment of claims due them by the corporation at the expense of other creditors. The correctness of this position is the only question before us upon this rehearing, and we are satisfied, upon a further consideration of the case, that the position there taken cannot be maintained. That a corporation, although insolvent, can prefer creditors not officers of the company, has been too long and firmly established by the decisions of this court to be now the subject of controversy. We said in *Warren v. First Nat. Bank*, *supra*: "The doctrine is recognized here that the property of an insolvent corporation is a trust fund, in such sense as precludes the directors and officers of the corporation from dealing with it in such manner as to secure preferences for themselves, (citing *Roseboom v. Whittaker*, 132 Ill. 81; *Beach v. Miller*, 130 Ill. 162). "But we have not gone so far as to hold that the mere insolvency of a corporation *eo instanti* deprived the directors and officers of the power to dispose of the corporate property in good faith, by way of paying or securing corporate debts, even though the result may be to give certain creditors a preference over others." The rule laid down in *Cook on Corporations* is: "Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may. In making the assignment the corporation may make preferences for one or more creditors over others, or of one class of creditors over other classes." *Cook, Stock, Stockholders, & Corp. Law*, §*691. In the case of *Warren v. First Nat. Bank*, *supra*, this rule was held to be in harmony with our decisions in *Reichwald v. Commercial Hotel Co.*, *Ragland v. McFall*, and *Glover v. Lee*, *supra*. To the same effect is *Gottlieb v. Miller*, 154 Ill. 48, where it is said: "That the doctrine that we have so frequently held, and that we are here so strenuously urged to change or modify,—that in the absence of legislation an insolvent corporation may make a preference among creditors, subject to the same restrictions that apply to individual debtors,—is in accord with the great weight of authority, is indicated by the following list of cases in which like doctrines are announced,"—citing a long list of authorities. So we hold, in this case, that the preference given by this trust deed to Mrs. Cornelia A. Miller was not unlawful, she-

being merely a creditor of the corporation, having no indorsement or guaranty from its directors.

That the Merchants' National Bank of Chicago, the American Trust & Savings Bank of Chicago, the Third National Bank of New York, the Will County National Bank, the First National Bank of Joliet, and the Washburn & Moen Manufacturing Company, whose claims were secured by the trust deed, were all bona fide creditors of the insolvent corporation, is not questioned. That they were guilty of any fraud or misconduct which would deprive them of the same rights accorded to Mrs. Miller, or any other bona fide creditor, is not claimed. Therefore, the grounds, and only grounds, upon which it is contended, or can be held, that they were not entitled to be preferred as creditors of the corporation, are that certain directors of the corporation had guaranteed the payment of their debts. If it is a sufficient reason for depriving them of that right, it must be upon the theory that, otherwise, the preference would result in some benefit to the guarantors, directors of the company, and that, too, without any proof tending to establish that fact,—that is to say, there is no affirmative proof in this record that these guarantors are solvent, or can be made to respond to these creditors for any balance which may remain due them after the company's assets are exhausted. For anything here appearing, if the contention that because the creditors had the names of the directors upon their notes as guarantors deprives them of the right, secured to other creditors, to be preferred, be maintained, they must suffer loss merely because they had such guaranty. We do not understand that the rule which authorizes an insolvent corporation to give preference to one or more of its creditors, or a class of creditors, in the distribution of its assets, to the exclusion of others, is limited by the mere fact that such preference may, in a certain contingency, result in benefit to directors of the company; and the authorities, so far as we have been able to ascertain, are to the contrary. While it is not so decided, in terms, in the case of *Sanford Fork & T. Co. v. Howe*, 157 U. S. 312, 39 L. ed. 713, it is inferentially so held. Justice Brewer, in rendering the opinion of the court, puts these questions: "Will it be doubted that, if this mortgage had been given directly to the holders of these notes, it would have been valid? Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guaranty of some of the directors or stockholders, whose guaranty may or may not be worth anything?" The case of *Henderson v. Indiana Trust Co.* (Ind.; April, 1895) 40 N. E. 517, involves the decision of this very question, and it is there held, as stated in the syllabus of the case: "An insolvent corporation, while in pos-

session of its property, may prefer any of its creditors, not directors or stockholders, even though their claims are secured by the indorsement of directors and stockholders, where the creditors were at the time of the preference unaware of its insolvency, or that the transfer was made to protect such directors and stockholders."

But it is unnecessary to further pursue this inquiry. We do not understand counsel for appellee to seriously question the correctness of the position that the mere fact that the directors of the company had guaranteed the payment of the debt would not be an insuperable objection to the creditor availing himself of a preference made in his favor. They say: "The case at bar is very different from the cases cited in the two petitions for a rehearing, and the difference is just this: That in these cases, such as *Henderson v. Indiana Trust Co.* the creditor who was preferred exercised diligence for his own protection. In the present case the preference was a gift, pure and simple, voluntary on the part of the directors, and unsought by the donees. It is not claimed on behalf of the steel company that creditors who have secured the guaranty of directors of the corporation are by that fact always and necessarily prevented from obtaining a preference when the corporation becomes insolvent. If the corporation fails, all creditors are entitled to exercise the highest diligence in their behalf, and, when that diligence has been exercised, it may be that they are entitled to the fruits of it, whether they had the guaranty of directors or not." The right of these beneficiaries to a preference is thus made to depend upon the exercise of diligence on their part to obtain the preference, and not merely upon the fact that they had the guaranty of certain directors upon their paper. It is true that the circuit court found, as shown in the foregoing statement of facts, "that neither the trustee nor any beneficiary knew of the execution and recording of the trust deed until after it was executed and recorded by the officers of the corporation." That finding of fact, it will be seen, applied to Mrs. Cornelia A. Miller as well as to the other beneficiaries in that deed; and yet it is not pretended that her right to a preference depended upon any act of diligence upon her part. Why, then, in the absence of proof tending to show that this preference to the other creditors was not for their benefit and for the benefit of the directors, should the question of diligence cut any figure in the case? We assume that it will not be seriously contended that the right of an insolvent individual or corporation to prefer creditors is in any wise conditioned upon the act of the creditor. The right to prefer a creditor rests upon the principle that, so long as the debtor retains control and dominion over his property, he may do with it as he sees fit, and discharge one obligation to the exclusion of another, presumably upon the theory that he regards the claim of one debtor more meritorious than another. In our view of the case, the fact that the trust deed was executed without the knowledge of the creditors, or without their having insisted upon its execution, is wholly

immaterial, unless it can be said that that fact, of itself, is sufficient to justify the conclusion that it was executed for the benefit of the directors or guarantors upon the note, and not for the benefit of the creditors themselves; and this certainly cannot be claimed. This trust deed conferred a direct benefit upon the creditors by way of preference. That it might result in benefit to the guarantors or directors is a mere inference or con-

jecture. We think the decree of the court below in dismissing the cross bill of appellants was erroneous, and should be reversed. The cause will be remanded with instructions to it to enter a decree in conformity with the prayer of that bill.

Reversed and remanded.

Cartwright, J., took no part in the consideration of the case in this court.

TEXAS SUPREME COURT.

MEXICAN NATIONAL RAILROAD COMPANY, *Plff. in Err.*,

v.

James O. JACKSON.

(.....Tex.....)

1. **The law of Mexico must be applied** to the rights of the parties in an action against a railroad company by an employee for a personal injury sustained in that country in which the contract of service was made.
2. **An action for personal injuries caused by negligence is transitory** and may be maintained in any place where the defendant is found, if there be no reason why the court should not entertain jurisdiction.
3. **It is for the court whose jurisdiction is invoked to determine** whether or not the law of a foreign country by which the right claimed must be determined is such that it can properly and intelligently be administered by that court with due regard to the rights of the parties.
4. **A court will not undertake to adjudicate rights** which originated in any other state or country under statutes materially different from the law of the forum in relation to the same subject.
5. **Jurisdiction of an action for personal injuries** sustained in any other country by a railroad employee will not be entertained by a Texas court where the foreign law which governs the case permits what is termed "extraordinary indemnity" in a sum which the judge might deem proper, considering the plaintiff's social position, and also provides for subsequent judgments for additional damages afterwards arising out of the same injury as well as for a reduction of the judgment in case of an increased earning capacity of the injured person.

(January 23, 1896.)

ERROR to the Court of Civil Appeals, Fourth Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Webb County in favor of

NOTE.—The above case furnishes an unusual illustration of the doctrine with respect to the refusal to enforce rights of action under foreign laws.

As to rights of action for death, caused by wrong negligence in other jurisdictions, see *note to v. Chesapeake & O. R. Co.* (Va.) 15 L. R. A.

R. A.

plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Dodd & Mullally for plaintiff in error.

Messrs. E. A. Atlee and Charles C. Pierce, for defendant in error:

Under the laws of Mexico, where the injuries were received, an action for damages may be maintained by the person injured against the railroad company whose negligence caused the injuries; such action being transitory, its enforcement not being against the laws nor the public policy of the state of Texas, and the party liable for damages being found within the jurisdiction of the trial court, the relief prayed for may be granted.

Texas & P. R. Co. v. Richards, 68 Tex. 375; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804; *Willis v. Missouri P. R. Co.* 61 Tex. 432, 45 Am. Rep. 301; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11, 47 Am. Rep. 771; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 39; *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439; *Wooden v. Western N. Y. & P. R. Co.* 126 N. Y. 10, 13 L. R. A. 458; *Burns v. Grand Rapids & I. R. Co.* 118 Ind. 169; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 489.

While the law of the place where the right was acquired, or the liability was incurred, may govern as to the right of action, the law of the forum will control as to all that pertains merely to the remedy.

Herrick v. Minneapolis & St. L. R. Co., *Wooden v. Western N. Y. & P. R. Co.*, and *Higgins v. Central New England & W. R. Co.*, *supra*.

On petition for rehearing.

Mexican law may make a negligent act criminal, but negligence would not be more difficult to prove under that law than under Texas law. If the negligence is proved, the plain letter of the Mexican law will determine whether or not such negligent act is declared to be a crime.

Whether the domestic law provides for redress in like cases should in principle be im-

material so long as the right is a reasonable one, and not opposed to the interests of the state.

Story, Const. L. 8th ed. § 635, note a.

The enforcement of the penalty of the Mexican law belongs solely to the Mexican government, and incidental to its enforcement is the postponement or suspension of the civil action. Such delay is a matter pertaining only to the procedure, and does not impair the right of action for damages.

Article 313 of the Mexican law is barely susceptible of even the strained construction that the judges enforcing that law are required to bring the parties together before suit so as to endeavor to induce a settlement or compromise.

As to the rule or measure of damages, there is no material difference.

Would not the plaintiff be precluded from claiming damages by suit in Mexico, after he has obtained his judgment in a Texas court?

While there may exist numerous differences between the laws of the two countries, yet they are substantially the same in all matters affecting the right of action.

Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 953.

Whether plaintiff's rights may be adjudicated better in one jurisdiction than in another, should not enter the mind of the court. The only inquiry should be: Have our courts power to hear and determine the controversy?

Rhode Island v. Massachusetts, 37 U. S. 12 Pet. 657, 9 L. ed. 1233.

The dismissal of plaintiff's cause is a denial of justice.

Const. art. 1, § 13.

Brown, J., delivered the opinion of the court:

The plaintiff in error is a corporation operating a line of railroad in the republic of Mexico, which extends into the state of Texas. The defendant in error was in the employ of that railroad company in the republic of Mexico, and while engaged in the performance of duties as such employee, was injured at the station of La Ventura, in the said republic. The injuries received were serious, and of a permanent nature. The injury was caused by the negligence of the conductor, who was the vice principal of the railroad company. The defendant below, by special plea, set up and pleaded the laws of Mexico in such cases, alleging that the contract of service was entered into in that republic, and the injury occurred within the republic of Mexico; that it was entitled to an adjudication under those laws, which are so dissimilar to the laws of Texas that the courts of this state ought not to undertake to adjudicate them; and that the defendant still owned and operated its line of railroad in Mexico, and was subject to the jurisdiction of the courts of that country. Proof was made of the laws of Mexico, from which we copy the following articles, as being material to the determination of the question involved:

"Art. 72. Congress has power: . . . XXII. To enact laws governing general lines of communication, and governing post-offices and mails."

31 L. R. A.

"Art. 4. A crime is the voluntary infraction of a penal law, doing that which it prohibits or neglecting to do that which it commands.

"Art. 5. A misdemeanor is the infraction of police regulations or proclamations and good government.

"Art. 6. There are intentional crimes and crimes resulting from neglect."

"Art. 11. Negligent crimes exist—I. Where an act is done or a duty omitted which, although lawful in itself, is not so by reason of its consequences, if the accused fails to provide against such consequences through negligence, want of reflection or care, by not making proper investigations, by not taking necessary precautions. . . . III. Where the question relates to an act which is punishable solely by reason of the circumstances under which it is done, or by reason of a circumstance personal to the party aggrieved, if the accused is ignorant of such circumstances, through not having previously made the investigations which the duty of his profession or the importance of the case demands."

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, with the violation of a right which is formal, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable result.

"Art. 305. Indemnization imports: The payment of damages, that is, that which the injured party fails to enjoy as a direct and immediate consequence of an act or omission by which a formal, existing and not merely possible right is attacked, and of the value of the fruits of the thing usurped and already consumed, in the cases in which the same should be done conformably with civil right.

"Art. 306. The condition required by the two preceding articles, that the damages and injuries should be actual, shall not prevent that the indemnization of subsequent damages and injuries be exacted by a new suit, when they shall have accrued; if they proceed directly from, and as a necessary consequence of, the same act or omission from which resulted the previous damages or injuries.

"Art. 307. The payment of judicial expenses solely embraces those absolutely necessary, which the injured party incurs for the purpose of investigating the act or omission which causes the criminal proceeding, and to avail himself of his rights in such proceeding or in the civil suit.

"Art. 308. The civil responsibility cannot be declared except at the instance of the party entitled to recover.

"Art. 309. The judges who adjudicate upon the civil responsibility shall be con-

trolled by the provisions of this title, in so far as its provisions extend; on other questions they shall follow, according to the nature of the suit, the provisions of the civil or of the commercial laws which may be in effect at the time of the happening of the act or omission causing the civil responsibility.

"Art. 310. The right to civil responsibility forms part of the estate of a decedent and descends to his heirs and successors,—provided it be not the case of the following article, or that it arise from injury or defamation, and that the offended person having been able in his lifetime to bring his suit, he neither did so nor directed his heirs to sue; in such case the offense shall be understood as remitted.

"Art. 311. The act to enforce civil responsibility demanding support of a person guilty of homicide is personal, and belongs exclusively to the persons named in the end of article 318, as directly damaged. Consequently, such action forms no part of the estate of the deceased, nor is it extinguished although the latter pardon the offense in life."

"Art. 318. The judges who take cognizance of suits based upon civil responsibility shall endeavor that the amount and terms of payment be fixed by agreement of the parties. Failing in this, the provisions of the following articles shall be observed."

"Art. 321. In case of blows or wounds from which the injured party does not remain crippled, lamed, or deformed, he shall have the right that the responsible party pay him all expenses of cure, the damages he may have suffered, and that which he may fail to gain during the time which in the opinion of competent persons he may not be able to do the work by which he subsisted. But it is essential that the inability to work should be the direct result of the wounds or blows, or of a cause which is the immediate effect of such blows or wounds.

"Art. 322. If the inability of the injured party to devote himself to his accustomed work be permanent, from the moment in which he shall recover and can properly devote himself to other and different work, which shall be lucrative and appropriate to his education, habits, social position and physical constitution, the civil responsibility shall be reduced to paying him the sum which his ability to earn in his new employment falls short of his daily earnings in his former occupation.

"Art. 323. If the blows or wounds cause the loss of any member not indispensable for work, or the person wounded or struck remain otherwise crippled, lamed, or deformed, by that circumstance he shall have the right, not only to the damages and injuries, but also to the sum which the judge may determine as extraordinary indemnity, considering the social position and sex of the person and the part of the body remaining crippled, lamed, or deformed.

"Art. 324. The gain which the injured party fails to earn during his inability to work shall be computed by multiplying the sum which he formerly earned per day by the number of days of his disability.

31 L. R. A.

"Art. 325. The provisions of the foregoing articles for computing the civil responsibility for wounds or blows shall be applied to all other cases where, in violation of a penal law, a person may cause the illness of another, or may have placed him under disability to work.

"Art. 326. No person shall be charged with civil liability upon an act or omission contrary to a penal law, unless it be proved: That the party sought to be charged usurped the property of another; that without right, he caused, by himself or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding article are established, the defendant shall be civilly liable, without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the acts or omissions of the clerks or servants, causing the liability, shall occur in the service for which they were employed.

"Art. 331. Under the condition of the preceding article those liable are: . . . Railroad companies."

"Art. 363. (Limitation.) The various actions by which the civil responsibility may be demanded, or the execution of a final judgment declaring that such responsibility has been incurred by the accused may be asked, shall be extinguished according to the terms and in the manner provided by the Civil Code or the Commercial Code, according to the nature of the demand and the subject-matter treated of.

"Art. 364. Amnesty shall not extinguish the civil responsibility, nor the actions to exact it, nor the legal rights which third persons may have acquired. Nevertheless, when the responsibility may not yet have been made effective, and the demand is not for restitution but for reparation of damages, of indemnity for injuries, or for payment of judicial expenses, the guilty person shall remain free from such obligations only when it is so declared in the amnesty and they are expressly left to the charge of the public treasury.

"Art. 365. A pardon shall in no case extinguish the civil responsibility, nor the actions to enforce it, nor the legal rights which third persons may have acquired.

"Art. 366. Limitation is interrupted by the criminal proceeding until final judgment is pronounced. This done, the term of limitation commences to run anew."

"Art. 28. Until it is determined in the new Code of Procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: . . . Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceedings in the former shall be stayed."

"Art. 20. When a judicial controversy can be decided neither by the text nor by the natural meaning or spirit of the law, it must be decided according to the general principles of right, taking into consideration all circumstances of the case.

"Art. 21. In case of conflict of rights and the absence of express law for the especial case, the controversy shall be decided in favor of him who seeks to avoid damages and not in favor of him who seeks to obtain profit. If the conflict should be between equal rights, or rights of the same species, it shall be decided observing the greatest equality possible between the parties."

"Art. 1905. Limitation bars in three years:

... VIII. Civil responsibility for injuries, whether done by word or by writing, and that which arises from damage caused by persons or animals, and which the law imposes upon the representatives of such persons or the owners of the animals."

"Art. 1. The executive shall regulate the service of railroads, telegraphs and telephones constructed, or which in the future may be constructed, upon Mexican territory, according to the following cases: I. Railroads, telegraphs, and telephones which in the Federal district and territory of Lower California unite together two or more municipalities, or the Federal district and territory of Lower California with one or more states; those which communicate two or more states with each other; those which touch any port in the territorial boundary line of the republic and foreign countries or run parallel therewith within a region of 20 leagues, are known as general lines of communication within the meaning of fraction XXII. of art. 72 of the Constitution. II. These general lines of communication and their branches shall be subject exclusively to the Federal legislative, executive, and judicial powers, in their respective spheres, in all cases where any of the following matters are involved:

... G. Construction and repair of the works. Crimes committed against the security or integrity of the works or against the operation of the lines. H. Security of the same works for which the companies are obligated, and crimes or misdemeanors of the companies through delays or obstruction, carelessness or fault in the service and for accidents or mishaps in the operation."

"Art. 52. The coaches and cars which enter into the make-up of a train shall have the draw-heads of the same height, so that their centers will be opposite to each other."

"Art. 88. The conductor of a train *en route* is the person in command of all the train crew, including the engineer and fireman."

"Art. 121. Engineers shall communicate by means of a steam whistle with the agents charged with the duty of watching, and with the conductors of trains, using the following signal: ... Three blasts or sounds of the whistle will be the signal that the engine or train is going to move backwards."

"Art. 124. Companies [railway] are liable for accidents which occur through the failure to observe the provisions of this chapter [chapter 7] respecting signals, and for employing persons who do not have certificates

showing that their sight and hearing are free from infirmity which does not permit them to recognize the signals."

"Art. 184. Companies [railway] are liable for all faults or accidents which occur through tardiness, negligence, imprudence, or want of capacity of their employees."

"Art. 208. All violations of this law, which companies [railway] commit, shall be subject to punishment by the administration by fine up to \$500, which the department of public works shall assess, reserving always the right of individuals, through indemnity, and the liability which the companies may have incurred through criminal acts or omissions committed by them."

The trial court rendered judgment for the plaintiff in that court, J. O. Jackson, for the sum of \$5,000, from which appeal was taken, and the judgment affirmed by the court of civil appeals.

The law of Mexico, under which plaintiff's claim originated, having been pleaded and proved by the defendant, the rights of the parties must be determined by its provisions: "It would be as unjust to apply a different law as it would be to determine the rights of the parties by a different transaction." Story, Conf. L. p. 38. This is a transitory action, and may be maintained in any place where the defendant is found, if there be no reason why the court whose jurisdiction is invoked should not entertain the action. The plaintiff, however, has no legal right to have his redress in our courts; nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law by which the right claimed must be determined is such that we can properly and intelligently administer it, with due regard to the rights of the parties. *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564. The decisions of this court (well sustained by high authority) establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of this state in relation to the same subject. *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804; *Texas & P. R. Co. v. Richards*, 68 Tex. 375. Many difficulties would present themselves, in an attempt to determine the meaning of the Mexican law, and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts, from which we could ascertain their interpretation of these laws. The language of some of the articles quoted is ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. There could be no reasonable certainty that the parties' rights would be adjusted here as they would be if the case were tried in the courts of that country, which is their right; for it is well settled that, if one

state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes a sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases.

We will briefly compare some of the provisions of the law of Mexico with the law of this state, showing wherein they differ, and the impracticability of attempting to administer them here. By the Mexican law, the plaintiff's right does not rest upon the fact of negligence on the part of the defendant, but such negligence, in order to give a right of action, must be of such character as to make the act a crime under that law. We must first determine whether the defendant would be subject to a criminal prosecution in Mexico, before we can proceed to administer the remedy provided for the wrong. If it is not a crime, no right of action exists, no matter how grossly negligent may be the act which caused the injury. While this is not a criminal prosecution, in the sense that a punishment for the crime is to be inflicted in this suit, it does require a determination of the guilt of the defendant in order to give relief to the plaintiff. In this state, under the facts of this case, no such prosecution could be maintained, nor in any case is the right of recovery made to depend upon the criminality of the act. However, in some cases a recovery cannot be had except upon proof of facts which would show the act to be contrary to a penal statute. The acquittal of the defendant under the Mexican law does not bar the right to recover in a civil proceeding, but the civil action for damages is suspended by the pendency of the criminal prosecution, if such has been commenced, until its final determination. If a suit were pending in a court of this state under that law, and a criminal proceeding should be inaugurated in the courts of Mexico, the court here could not recognize this requirement of the law of that country, and stay the action until the prosecution there had been concluded. We can see no reason for the requirement of the law of Mexico that the civil proceeding should be stayed during the prosecution of the criminal charge, except that the government would thereby secure the presence of the injured party as a witness, and his aid in the punishment of the guilty party. To permit such suits to be maintained in our courts would enable the plaintiffs therein to evade the laws of that country in that particular, and would be against the policy of that government. While it is true that this is not a prosecution for the crime, as such, nor a suit for a penalty, it is so closely related to that class of proceedings that the courts of this state should not aid in the enforcement of rights arising under those laws, which practically require the defendant to be tried for a crime, in the civil action. Under the laws of Mexico, the judge before whom the civil action is commenced is required to induce the parties to adjust their differences and settle their grievance by agreement, if he can do so. This our courts cannot do. If this be regarded as matter of procedure, it is

of a character which may involve a substantial benefit to the parties, of which the defendant would be deprived by permitting the action to be prosecuted in the courts of this state. If we conclude that the plaintiff is entitled to relief, then we must determine what he has a right to recover, and what protection the defendant is entitled to receive by the judgment of the court, under the law proved in this case. By that law the plaintiff would be entitled to recover for all actual damages existing at the time of the trial, and such as must necessarily result therefrom. By our law he would recover for all such damages, and for all such as might probably thereafter result from the injury. Thus, under our law, the plaintiff would have a present right to that which he could not recover by the terms of the Mexican law, except by subsequent actions therefor. If the plaintiff remain lamed or crippled, disfigured or maimed, by the injury, the Mexican law permits the judge to give, in addition to the actual damages, what is termed "extraordinary indemnity," in a sum that might be by the judge deemed proper, considering plaintiff's social position. How could a court in Texas ascertain what this extraordinary indemnity is to be? Is it compensatory or vindictive damages? In this state a party, by reason of social position, is not entitled to more or less compensation for such an injury, and our courts could not afford this relief. The plaintiff would have the right, under the law of that country, by subsequent suits, to recover for any damages that might arise out of the injury after the first judgment was rendered, while in our courts the whole sum must be adjudged in one proceeding. After a judgment in Texas for all damages, existing and prospective, the plaintiff might, in the courts of that country, recover for injuries subsequently developed, which might be included in the judgment of the Texas court, and thus a double recovery be had. Under the laws of Mexico, the defendant would be liable for injuries to plaintiff's family, or to third persons, growing out of the injury inflicted upon plaintiff. What this might comprehend, we do not know. It might include a part of what would be adjudged in the judgment in a Texas court, or it might not. At any rate, it appears to be a different right to anything known to the laws of Texas, and in favor of persons who could not, under our law, maintain any action for the alleged injury. If the plaintiff should recover from his injuries to the extent that he would become able to pursue an occupation suitable to his education and social position, the defendant would have the right, under that law, to have the payment of damages awarded for diminished capacity to earn money reduced by the amount that plaintiff could earn in such employment. In this state no judgment could be rendered which would secure that right, but the judgment must be entered for all probable future losses; hence the future earnings, no matter how great they might prove to be, could not go to reduce the damages already paid under such judgment as would be rendered in Texas. How this right would be secured in

Mexico, we cannot see, unless payments were required by the judgment to be made in installments, or that, future inability to earn money not being considered upon the first trial, the matter would be settled in subsequent suits to recover for such damages. In any event, it is a right of the defendant which no court of this state can secure by its judgment.

There are many points of dissimilarity between the laws of Mexico as proved in this case, and the law of this state applicable to the same subject, which we have not mentioned; but those noticed are sufficiently numerous and material to show that the courts of Texas should not undertake to adjudicate the rights of parties arising under those laws for torts committed in that country. Indeed, as we have shown, they could not properly determine the rights of parties arising under those laws. The cases of *Texas & P. R. Co. v. Richards*, and *St. Louis, I. M. & S. R. Co. v. McCormick*, *supra*, were actions for damages caused by the death of the injured party, but they were decided upon the same principles that apply to this case; that is, that the courts of Texas will not entertain such actions, if founded upon a law which is materially different from the law of this state. The cases cited are sustained by the weight of authority, and are conclusive of the question in this state.

There are other sufficient reasons why our courts should not attempt to enforce the Mexican law in cases like this. The reason which influences the courts of one state to permit transitory actions for torts to be maintained therein, when the right accrued in a foreign state or country, is that the defendant, having removed from such other state or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him. In this case there has been no removal of the person or property of the defendant. Its railroad remains, as it was at the time of the injury, within the jurisdiction of the courts of Mexico, and it is liable to suit there according to the laws of that country. The reason for permitting the action to be prosecuted in our courts does not obtain in this case. The plaintiff has voluntarily resorted to the jurisdiction of our courts, when his rights could be better adjudicated in Mexico. The Mexican National Railroad is an important public highway in the republic of Mexico, by

31 L. R. A.

which the commerce of that country is largely carried on with our people. Every judgment for damages rendered against it reduces its revenues, which must, of necessity, be restored through its charges for transportation of persons and property, and, in the main, must be paid by that people. It is but just, and perhaps necessary to a proper maintenance of that means of transportation, that the country in which it is operated should determine the charges to be enforced against it. If Texas should open her courts to all persons that may be injured in Mexico in the management of that railroad and others, it may seriously affect the means of commerce between this state and that republic. Thus it becomes a matter of public concern, and a proper subject for our consideration in this connection, in view of the fact that the railroad company is still subject to that jurisdiction. Justice does not demand the exercise of the jurisdiction, and comity between the governments of this state and Mexico would seem to forbid that we should do so. *Gardner v. Thomas*, 14 Johns. 184, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 548, 13 Am. Dec. 564. There are at this time two systems of railroads extending from the borders of this state into Mexico, for several hundred miles each; and as that country shall hereafter develop, and commerce between the two countries become more extended, we may expect other lines to be constructed in the same direction. If our courts assume to adjust the rights of parties against those railroads, growing out of such facts as in this case, we will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and the trial by jury secured, to seek the courts of this state to enforce their claims. Thus we would add to the already overburdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the state, under the laws of a different government, a charge upon our own people. If the facts showed that this was necessary in order to secure a justice, and the laws were such as we could properly enforce, this consideration would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity.

We conclude that the district court and the court of civil appeals erred in not dismissing this case, under the proof made, for which error the judgments of both of said courts are reversed, and this cause is dismissed.

Petition for rehearing overruled.

MICHIGAN SUPREME COURT.

Edgar D. CASE, *Plff. in Err.*,
v.

Ely T. SMITH.

(.....Mich.....)

1. A betrothed person has no right of action for the seduction or alienation of the affections of his affianced.
2. A note given in consideration of concealing from the maker's wife and from the public his criminal intimacy with another woman cannot be enforced.

(December 17, 1896.)

ERROR to the Circuit Court for Genesee County to review a judgment in favor of defendant in an action to recover the amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. Tinker & Frackelton for plaintiff in error.

Messrs. Durand & Carton, with *Mr. Ed. S. Lee*, for defendant in error:

A betrothed person has no right of action for the seduction or the alienation of the affections of his affianced.

Cooley, Torts, p. 236.

The consideration of the note was wholly illegal and void and against public policy.

Cicotte v. Wayne County, 44 Mich. 173.

The absence of the words "for value received," from the note makes it incumbent on plaintiff to allege in his declaration what the consideration of it was, and while he might offer it and prove it in evidence under the common counts, if the signature was not denied, on oath, he would have to enter on proof of its consideration, too, before he could rest his case, as there is no admission of value in it.

Conrad Seipp Brew. Co. v. McKittrick, 86 Mich. 191.

A recovery in a court of justice for services in aid of prostitution is not permissible.

Williams v. Garde, 34 Mich. 83; *Loomis v. Cline*, 4 Barb. 453; 2 Am. & Eng. Enc. Law, p. 368; *Crisup v. Grosslight*, 79 Mich. 380; *Buck v. First Nat. Bank*, 27 Mich. 294, 15 Am. Rep. 189; *O'Hara v. Carpenter*, 23 Mich. 410, 9 Am. Rep. 89; *Meech v. Lee*, 82 Mich. 274.

A promissory note given in consideration of the suppression of proceedings under a criminal complaint is void in the hands of the promisee, who was a party to the illegality, and he cannot enforce collection of it.

Snyder v. Willey, 33 Mich. 483; *McNamara v. Gargett*, 68 Mich. 454; *Morgan v. Hodges*, 89 Mich. 404, 15 L. R. A. 438; *Lyon v. Waldo*, 36 Mich. 345.

McGrath, Ch. J., delivered the opinion of the court:

Suit is brought upon a non-negotiable promissory note, which omitted the "for value

NOTE.—The above case is a novel one in respect to the rights of betrothed persons. As to the insurable interest in life of such persons, see note to *Alexander v. Parker* (Ill.) 19 L. R. A. 187.

31 L. R. A.

received" clause. Plaintiff declared on the common counts, and in four special counts set up, (1) that plaintiff had been for some time engaged to be married to a widow named D.; that November 10, 1892, he visited D., and found defendant concealed in the house; that defendant was at the house for the purpose of having carnal intercourse with said D., and in consequence plaintiff suffered great mental and physical anguish; (2) that prior to that time defendant had betrayed, seduced, and debauched said D., with full knowledge that she was the betrothed wife of plaintiff, to plaintiff's damage; (3) that defendant had also endeavored to alienate the affections of said D. from plaintiff; (4) that, after the discovery of defendant's intimacy with said D., defendant came to plaintiff, and requested plaintiff to keep the matter quiet, and agreed that if plaintiff would continue to keep company with said D., and would refrain from telling the people of that locality of the intimacy existing or that had existed between defendant and said D., viz., the seduction, debauching, and sexual intercourse aforesaid, defendant would recompense him well for the same; that, in consideration of plaintiff's agreeing so to do, defendant executed and delivered to plaintiff the note in question; that plaintiff did as he agreed, and publicly kept company with said D., and did refrain from informing the public of the intimacy that had existed between defendant and said D.; that said note was expressly given and accepted with the agreement that defendant was to pay the same in consideration of plaintiff's keeping company with said D., and refraining from expressing to said defendant's wife the criminal proceedings and action aforesaid; that plaintiff has performed the agreement on his part, but defendant has failed so to do. A bill of particulars was demanded, under the common counts, and furnished, which contained the following items: "For damages in alienating the affections of Mary B. Davidson from plaintiff, \$5,000. For damages in seducing, debauching, and having carnal intercourse with Mary B. Davidson, the betrothed wife of plaintiff, \$5,000. For failure of defendant to keep his agreement with plaintiff, and in failing to pay the note set forth in plaintiff's declaration, \$5,000." The case comes here on appeal from an order sustaining a demurrer to said declaration, and judgment accordingly.

A civil action for the alleged seduction of D. could only be brought by the woman herself, or by her father, guardian, or some relative. A betrothed person has no right of action for the seduction or the alienation of the affections of his affianced. Cooley, Torts, p. 236. In *Swanson v. Griffin*, 68 Miss. 319, cited by appellant, defendant had seduced plaintiff's infant unmarried daughter, and she had given birth to a child. In *Brannum v. O'Connor*, 77 Iowa, 632, also cited by appellant, plaintiff had married defendant's foster daughter, and afterwards learned that she was pregnant at the time of the marriage, by her foster father. Defendant agreed to

continue to live with the woman and maintain the child. The court held that under the Code the pregnancy of the woman at the time of her marriage was a cause for divorce, and that plaintiff was under no obligation to live with the woman or maintain the child. In *Loomis v. Cline*, 4 Barb. 453, the maker of the note had assaulted plaintiff's daughter with intent to commit a rape. The court held that, from his paternal relation alone, plaintiff had no authority to commence an action for his daughter; that he could not release or compromise such claim, and so, if she had a right of action, it remained unaffected by that agreement; and that the note was without consideration; citing *Fonda v. Van Horne*, 15 Wend. 631, 30 Am. Dec. 77; *Hunter v. Westbrook*, 2 Car. & P. 578; *Macpherson, Infants*, 228 (352). Defendant was not liable to respond in damages to plaintiff by reason of the matters set forth in the first three special counts of the declaration, or the first two items of plaintiff's bill of particulars, and in the absence of such liability there was no consideration for the note.

As to the contract set up in the fourth count, plaintiff's agreement was in part to conceal from the public and from defendant's wife the fact that defendant had been guilty of a crime. It is well settled that any contract, the consideration of which is to conceal a crime or stifle a prosecution, is necessarily repugnant to public policy, and that a contract whose consideration is contrary to public policy is void. 2 Kent, Com. 866; 2 Starkie, Ev. 87; *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759; *Clark v. Ricker*, 14 N. H. 44; *Treat v. Jones*, 28 Conn. 334. It is equally true that if any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained thereon. *Snyder v. Willey*, 33 Mich. 483, and cases cited at page 494.

The judgment is affirmed.

Long, J., did not sit; the other Justices concurred.

UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

Emily A. CORLISS *et al.*
v.

E. W. WALKER CO. *et al.*

(57 Fed. Rep. 434, and 64 Fed. Rep. 280.)

1. The publication of the life of an inventor, whether he is regarded as a public or

private character, cannot be enjoined as an invasion of the right of privacy, since the freedom of the press is a constitutional right.

2. The jurisdiction of equity to grant injunctions is founded on rights of property, and does not extend to a matter affecting an exclusively personal right.

3. The use of plates made from a pic-

NOTE.—*The law of privacy.*

The right of personal privacy, or the right to be secure from public molestation, seems to be a right the possible existence of which has been only recently recognized. The right to privacy in respect to the use of real property is one which has long been recognized.

In *Jones v. Tapling*, 12 C. B. N. S. 864, the relative rights of adjoining proprietors to privacy, and to light and air are considered in connection with the question of the right to block up windows, which had been opened overlooking private grounds, and while the right to privacy is recognized, it is stated that the law does not protect such right as it does that of light and air.

So in condemnation proceedings the distinction of privacy forms a proper element of damages.

The loss of privacy is a proper element of damages to be awarded for the deterioration of land by the construction of a railroad. *Duke Buccleuch v. Metropolitan Bd. of Works*, L. R. 5 H. L. 418, 41 L. J. Exch. 137, 27 L. T. N. S. 1.

Loss of privacy of rooms in a dwelling house because of the construction of an elevated railroad near it is a proper element to be considered in estimating the damages which must be paid to the abutting property owner. *Moore v. New York Elev. R. Co.* 130 N. Y. 523, 14 L. R. A. 731.

There are several rights in which the right to privacy may be said to be somewhat involved, which have been cited as tending to establish a right to privacy pure and simple. But the right to privacy does not necessarily follow from the existence of either of them.

-31 L. R. A.

Thus, it has been said that an injunction may be granted against the exhibition of a picture which is a libel upon the complainant. *DuBost v. Beresford*, 2 Campb. 511.

But the right to protection against libel falls far short of establishing a right to be free from any public attention, whether flattering or otherwise.

So, *Monson v. Tussauds* [1894] 1 Q. B. 671, was a suit brought to enjoin the exhibition of a wax likeness of a person who had been tried and acquitted upon a charge of murder. In the opinion it is stated that it was agreed between the counsel on both sides that any right which the plaintiff had to complain of what defendants had done depended on principles underlying the law of libel, and it is not suggested that the exhibition could be interfered with on any other ground. The result was that it was held that enough had not been shown to warrant an injunction before a trial at law, and there is no discussion of the case in reference to the right to an injunction because of an invasion of the right of privacy.

Again, the right to prohibit the publication of letters is suggested as tending to establish a right to privacy. But the cases upon that question do not necessarily involve the right to privacy.

In *Prince Albert v. Strange*, 1 Macn. & G. 25, 18 L. J. Ch. 120, 13 Jur. 109, an application was made to enjoin the publishing of a list of etchings which had been made by plaintiff for his own amusement, and which had been kept private by him. Counsel for defendant stated that the case was not put on any principle of trust or contract but on property, and contended that it cannot be main-

ture or photograph for insertion in a publication will be enjoined, where the pictures were obtained on conditions which have not been complied with, as the publication would be a violation of confidence, or breach of contract.

4. For a photographer to make additional copies from a negative of a picture from which a customer has procured a certain number of copies to be made is a breach of contract as well as a violation of confidence.
5. The picture or photograph of a public person, such as a great inventor, may lawfully be published in a newspaper, magazine, or book, if a copy can be obtained without breach of contract or violation of confidence.

(August 1, 1893.)

BILL in equity to restrain respondents from publishing a biography and a picture of George H. Corliss, deceased. *Bill dismissed.*

The facts are stated in the opinions.

Messrs. Henry Marsh, Jr., and James M. Ripley for complainants.

Messrs. M. L. Sanborn and Henry E. Fales for defendants.

Colt, Circuit Judge, delivered the following opinion:

This suit is brought by the widow and children of George H. Corliss to enjoin the

tained that privacy constitutes property, or that the court will interfere to protect the owner in the enjoyment of it. The court held that both property and breach of trust were shown, and that the injunction must be granted, and further held that privacy being the right invaded, postponing the injunction would be equivalent to denying it altogether; and in the lower court, 2 De G. & S. 652, 13 Jur. 507, it was said that upon the principle of protecting property the common law in cases not aided or prejudiced by statute shelters the privacy and seclusion of thoughts and sentiments committed to writing and desired by the author to remain not generally known.

But in the other cases upon the question of restraining the publication of letters, the court has proceeded upon a theory of property right in the thought expressed rather than upon a right to have privacy secured.

In *Pope v. Curl*, 2 Atk. 342, an injunction against the publication of letters was granted, but it was placed upon the ground that letters had value, although they were on familiar subjects and could not be called a learned work.

The publication of letters will not be enjoined because it will be painful to the feelings of the writer. *Gee v. Pritchard*, 2 Swanst. 402.

In *Wetmore v. Scovell*, 3 Edw. Ch. 515, the vice chancellor, without discussing the question of privacy, holds that the mere fact that it will be mortifying in the extreme to have private letters published gives a court of equity no jurisdiction to enjoin the publication.

The publication of letters is enjoined, not because of the injury which their publication would inflict upon the writer, but because of the property which he retains in them. *Woolsey v. Judd*, 4 Duer, 379.

There are, however, a few recent cases in which the right to privacy has been directly asserted by the parties and passed upon by the court.

In 4 Harv. L. Rev. 185, is cited the case of *Manola v. Stevens* as having been mentioned in the New York Times of June 15, 18, 21, 1890, in which an actress applied for an injunction restraining the using of a photograph which had been surreptitiously

defendants from publishing and selling a biographical sketch of Mr. Corliss, and from printing and selling his picture in connection therewith. The bill does not allege that the publication contains anything scandalous, libelous, or false, or that it affects any right of property, but the relief prayed for is put upon the novel ground that such publication is an injury to the feelings of the plaintiffs, and against their express prohibition.

The counsel for plaintiffs, in argument, put the case upon the ground that Mr. Corliss was a private character, and that the publication of his life is an invasion of the right of privacy, which a court of equity should protect. In the first place, I cannot assent to the proposition that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world-wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public character (a distinction often difficult to define) is not important in this case. Freedom of speech

taken of her while she was playing a role upon the stage. And it is stated that a preliminary injunction was issued and a time was set for argument of a motion that it should be made permanent, but that at that time no one appeared in opposition to the motion.

So, a private individual is entitled to an injunction against the publication of his portrait for the purpose of inviting votes to test popularity in comparison with another person. *Marks v. Jaffa*, 6 Misc. 290. In that case the court says that courts will secure to the individual what has been aptly termed the right "to be let alone."

But a father has no right to an injunction to restrain the publication of a photograph of his infant daughter, even assuming that the unauthorized publication of the portrait is an unlawful invasion of the latter's right to the enjoyment of personal privacy. The court says that the law does not take cognizance of and will not afford compensation for sentimental injury, independent of redress for a wrong involving physical injury to person or property. *Murray v. Gast Lithographic & E. Co.*, 49 Alb. L. J. 288, 8 Misc. 36, 31 Abb. N. C. 286.

The most important case beside *CORLISS v. E. W. WALKER CO.* is that of *SCHUYLER v. CURTIS*, post, 286. While the right in the latter case was not upheld by the court of appeals to the full extent to which it was claimed, the judges of the lower courts were inclined to recognize and uphold it.

In *Schuyler v. Curtis*, 64 Hun, 594, it is said that if a living person would be remediless and powerless to protect himself against the making and exhibiting of a bust of himself, "it would certainly be a blot upon our boasted system of jurisprudence that the courts were powerless to prevent the unwarranted doing of things by persons who are mere volunteers, which would wound in the most cruel manner the feelings of many a sensitive nature."

In *Schuyler v. Curtis*, 30 Abb. N. C. 373, the court did not place its ruling upon any ancient branch of the law, but simply stated that the act to be enjoined is an unauthorized act which has caused and will in the future cause, damage. H. P. F.

and of the press is secured by the Constitution of the United States and the Constitutions of most of the states. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity, or scandalous character, may be a public offense, or, by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals. Cooley, Const. Lim. 6th ed. 518. In other words, under our laws, one can speak and publish what he desires, provided he commits no offense against public morals or private reputation. *Schuyler v. Curtis*, 40 N. Y. S. R. 289, recently decided by the New York supreme court, and upon which the plaintiffs rely, is not in point. In that case the court enjoined the defendants from erecting a statue of Mrs. Schuyler. The right of publication was not in issue in that case.

There is another objection which meets us at the threshold of this case. The subject-matter of the jurisdiction of a court of equity is civil property, and injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. *Re Sneyer*, 124 U. S. 200, 210, 31 L. ed. 402, 405; *Kerr, Inj.* 2d ed. § 1. It follows from this principle that a court of equity has no power to restrain a libelous publication. *Boston Diatite Co. v. Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 310; *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368. The opinion of Vice Chancellor Malins in *Dixon v. Holden*, L. R. 7 Eq. 488, to the contrary, is disapproved by Lord Chancellor Cairns in *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142. In *Kidd v. Horry*, 28 Fed. Rep. 773, Mr. Justice Bradley, in speaking of *Dixon v. Holden*, and several recent English cases, declares that they depend on certain acts of parliament, and not on the general principle of equity jurisprudence. But in the present bill it is not pretended that the publication is libelous, and therefore there can be no question as to the want of jurisdiction in this case.

As to the picture which accompanies the published sketch, the case stands on a different footing. The defendants obtained from the plaintiffs a copy of a portrait and a photograph of Mr. Corliss, from which they have made two plates, one of which they propose to insert in the publication. But it appears from the evidence that these pictures were obtained on certain conditions, which the defendants have not complied with. This matter directly concerns the exclusive right of property which the plaintiffs have in the painting and photograph, and it would be a violation of confidence, or a breach of contract between the parties, to permit the defendants, under these circumstances, to use either of the plates. *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345; *Prince Albert v. Strange*, 1 Macn. & G. 25.

The injunction is denied as to the publication, and granted as to the use of the plates.

dissolution of the injunction granted, in response to which *Colt*, Circuit Judge, on November 19, 1894, delivered the following opinion:

The defendants move to dissolve the injunction heretofore granted in this case. As the case was first presented, it appeared that the print of George H. Corliss to be inserted in a biographical sketch about to be published by the defendants was taken from a photograph obtained from Mrs. Corliss by the defendants upon certain conditions, which they had failed to comply with, and the court granted an injunction upon the ground that the proposed use by the defendants would be a breach of contract and a violation of confidence. 57 Fed. Rep. 434. Upon a full presentation of the facts at the present hearing, it now appears that the defendants obtained two photographs of Mr. Corliss, and that the one received from Mrs. Corliss was returned to her, while the other, from which the print was actually taken, was purchased for the defendants at a store in Providence several months before any contract was entered into between the parties, or any correspondence had in relation to the subject. It must be confessed that the case now assumes a different aspect. If we eliminate the element of contract or trust, the question resolves itself into the broad proposition of how far an individual, in his lifetime, or his heirs at law after his death, have the right to control the reproduction of his picture or photograph. The photograph obtained by the defendants was a copy of an original taken by Mr. Heald, of Providence, for Mr. Corliss, in September, 1885. Mr. Corliss engaged Mr. Heald, in the ordinary way, to take his photograph, and paid for the pictures which he ordered. The contention of the plaintiffs is that Mr. Heald had no right to make prints from the original negative, other than those which Mr. Corliss ordered, and that neither Mr. Heald nor any one else had the right to reproduce copies from any of the photographs ordered by Mr. Corliss, and that to do so would be a breach of contract or a violation of confidence, for which relief can be had in a court of equity. In support of this position, the plaintiffs say that Mr. Corliss never authorized Mr. Heald to make any prints from the negative, except those he ordered, and that after his death, in February, 1888, Mrs. Corliss obtained the original negative, and forbade Mr. Heald from exhibiting in his studio any pictures of Mr. Corliss.

When a person engages a photographer to take his picture, agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence, for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer. *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345; *Tuck v. Priestler*, L. R. 19 Q. B. Div. 629. Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property

as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk. *Duke Queensberry v. Shebbeare*, 2 Eden, 329; *Gee v. Pritchard*, 2 Swanst. 402; *Folsom v. Marsh*, 2 Story, C. C. 100, Fed. Cas. No. 4,901; *Abernethy v. Hutchinson*, 3 L. J. Ch. 209; *Caird v. Sims*, 12 App. Cas. 326; *Tipping v. Clarke*, 2 Hare, 383, 393; *Williams v. Prince of Wales Life etc. Assur. Co.* 28 Beav. 338. In case of *Prince Albert v. Strange*, 1 Macn. & G. 25, 2 De G. & S. 652, this doctrine was extended so far as to prohibit the publication of a catalogue of private etchings. But, while the right of a private individual to prohibit the reproduction of his picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies, it seems to me, between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character the case is different. A statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he has the right to reproduce it, whether in a newspaper, magazine, or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public characters. Such characters may be said, of their own volition, to have dedicated to the public the right of any fair por-

traiture of themselves. In this sense, I cannot but regard Mr. Corliss as a public man. He was among the first of American inventors, and he sought public recognition as such.

The defendants, in the present instance, obtained a photograph of Mr. Corliss at a public shop in Providence. Whatever contract may have existed between the photographer and Mr. Corliss, they were not a party to it, and they had the same right to reprint copies from this photograph that they would have had from that of any other public man. Further, it does not seem that Mr. Corliss, personally, ever objected to the reproduction of his picture, but, on the contrary, that he permitted thousands of his pictures to be circulated. Ten thousand pictures of Mr. Corliss were sold or given away, without objection on his part, at the time of the Centennial Exhibition, in 1876. In 1886 there was published in Providence, by J. A. & R. A. Reid, about 10,000 copies of a book called "Providence Plantations," in which a picture of Mr. Corliss appears, which is a reprint from the *Herald* photograph, now in controversy. His picture also was printed in *Harper's Weekly* of March 3, 1888, and in the *Scientific American* of June 2, 1888. I am aware that Mrs. Corliss says that she wrote a letter, at the request of her husband, to the Messrs. Reid, forbidding the insertion of the picture in the "Providence Plantations," and that she also declares that the publication in the *Harper's Weekly* and *Scientific American* were authorized by the family; but, whatever may be the position now taken by the plaintiffs, there is no substantial evidence that Mr. Corliss, in his lifetime, ever prohibited the production and circulation of his picture. Upon the facts as now presented, and for the reasons given, I am of opinion that the defendants have a right to insert in the biographical sketch of Mr. Corliss published by them a print of his photograph, and the motion to dissolve the injunction is granted.

NEW YORK COURT OF APPEALS.

Philip SCHUYLER, *Respt.*,

v.

Ernest CURTIS *et al.*, *Appts.*

(147 N. Y. 434.)

1. There is no such real mental distress or injury as will justify equity in enjoining a violation of the right of privacy by making a statue of one of plaintiff's relatives, if the facts fail to furnish any clear or sure foundation for a reasonable man to claim that any injury to his feelings has been or would be caused by the action taken or to be taken by defendant.

NOTE.—As to the law of privacy, see note to case immediately preceding this one.

31 L. R. A.

2. A woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts, or statues of her to commemorate her worth or services, does not survive her so that it can be enforced by her relatives.

3. That the erection of a statue in his honor would have been disagreeable to a person's ancestor in his lifetime is not a sufficient cause for real mental injury or distress to such person because of the erection of such statue after such ancestor's death, to entitle such person to enjoin such erection.

4. Relatives of a deceased person cannot enjoin the erection of a memorial to her because the work is undertaken without their consent by strangers, if there is an honest purpose to do honor to her, which is carried out

in an appropriate and orderly manner by reputable individuals.

5. Erroneous claims respecting the services of a deceased person in whose honor persons are seeking to erect a memorial, which cause adverse newspaper comment, furnish no ground for injunction against the memorial in favor of her relatives, who have made no attempt to rectify the error.

6. No ground for enjoining the making by a woman's society of a bust of a deceased woman, in favor of her descendants, is shown by the fact that the same society contemplates the exhibition of the bust in the same room of a public fair building in which they are to exhibit one of another woman with whose objects and work the ancestor had no sympathy, if the two busts are designed to represent totally distinct classes of persons.

7. The making of a bust of a deceased person will not be enjoined on the ground of fraud upon the public because no likeness of her is accessible for a model, if the idea of actual likeness has been abandoned and the bust is to be made an ideal one, at least where no fraudulent intent is shown.

8. Reversal of an erroneous injunction decree against making a bust of a deceased person for exhibition at a public fair will not be refused because the fair has closed, if there is also the purpose of placing the bust permanently in a proper place as a memorial to decedent.

(November 26, 1895.)

A PPEAL by defendants from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term for New York County in favor of plaintiff in an action brought to enjoin defendants from making and exhibiting a statue of plaintiff's aunt. *Reversed.*

Statement by Peckham, J. :

The plaintiff brought this action against the defendants to restrain them from making a statue or bust of the late Mrs. Mary M. Hamilton Schuyler, in any form, and from causing the same to be made or exhibited; also from receiving or soliciting subscriptions for the purpose of defraying the cost and expenses of making such bust, or procuring it to be made, and also to restrain them from making use of the name of Mrs. Mary M. Hamilton Schuyler, or circulating any description of her, in any way, in connection with the "Woman's Memorial Fund Association" mentioned in the record. The findings of the court upon the trial of the action state what is material as to the facts upon which the action is based, while the conclusions of law show the theory upon which relief has been granted. The court has found, among other facts, the following: The plaintiff is the only son of George L. Schuyler, late of the city of New York, and of Eliza Hamilton Schuyler, his wife, who was a daughter of the late James A. Hamilton and granddaughter of Maj. Gen. Alexander Hamilton. Mrs. Schuyler died in the year 1863, and plaintiff's father, for his second wife, married Mary Morris Hamilton, a younger sister of his first wife. The second Mrs. Schuyler died in May, 1877, leaving no children.

31 L. R. A.

Her husband died in July, 1890, and her only brother died in December, 1889. The only immediate relatives, now living, of the second Mrs. Schuyler, are certain nephews and nieces, an uncle and an aunt, all of whom approve of the commencement and maintenance of this action. The defendants other than Hartley are members of a voluntary and unincorporated association in New York City named "The Woman's Memorial Fund," and its avowed object was the completion of two sculptures to honor "woman as the philanthropist" and "woman as the reformer," to be placed on exhibition at the Columbian Exposition of 1893. This association in May, 1891, publicly announced that, "as the typical philanthropist, Mary M. Hamilton, who died Mrs. G. L. Schuyler, has been chosen as the subject of the statue;" and about that time the association began to send printed circulars to that effect, and to solicit subscriptions for the purpose of carrying out this project, and public announcement was made that a contract had been entered into with the defendant Hartley, a professional sculptor, for the execution of a statue of Mrs. Schuyler, to be placed on exhibition as stated. It was also announced that the association intended to place the statue on exhibition at the same time and place as a statue of Miss Susan B. Anthony, whom the association had chosen as the subject of the statue to be designated the "Representative Reformer." George L. Schuyler, the husband, and Alexander Hamilton, the brother, of the deceased Mrs. Schuyler, were, at the time when the association claims to have originated the plan for making the statue, living in New York; but no application was made to either for his consent to the making of the statue, and neither of them ever authorized any one to make it. Subsequent to the deaths of the husband and brother of Mrs. Schuyler, and in May, 1891, the plaintiff first heard of the contemplated action of the defendants, and he, in behalf of himself and also of the other relatives of Mrs. Schuyler, requested the defendants to abandon the making of such statue and the circulation of subscription papers for the purpose of collecting money towards defraying the cost and expenses of procuring the statue. The defendants denied the right of the plaintiff to prevent the making of the statue, or to prevent their soliciting subscriptions throughout the country for that purpose and they continued to circulate such subscription papers widely throughout the United States, and they were printed in some of the New York City newspapers at the instance of the defendants. These acts, the court finds, have exposed the name and the memory of Mrs. Mary M. Hamilton Schuyler to adverse comment and criticism of a nature peculiarly disagreeable to her relatives, and have caused disagreeable notoriety, for which they are in no way responsible; that such comment has been made in the public prints and elsewhere; that annoyance and pain have been caused thereby to the plaintiff and to the immediate relatives of Mrs. Schuyler; that he and they have been greatly distressed and injured thereby, and by the notoriety incident thereto; and that.

such notoriety and adverse comment and criticism are wholly due to the unauthorized acts of the defendants. As conclusions of law, it was found that the acts of defendants constituted an unlawful interference with the right of privacy, and that the surviving relatives of the deceased, Mary Schuyler, were specially injured by the acts. It was therefore adjudged that the plaintiff was entitled to judgment perpetually enjoining the defendants from making or causing to be made a statue of Mrs. Schuyler, in any form, and from exhibiting any statue of her, and from receiving subscriptions for the purposes stated. Upon the trial evidence was given upon the part of the defendants which showed that Mrs. Schuyler, in her lifetime, was a very charitable woman; was a member of many private charitable associations; that in 1852 she was one of the founders of the School of Design for Women in the city of New York, and one of its managers until it was adopted by the Cooper Institute; that some of the female defendants were members of the School of Design for Women, and had frequently met Mrs. Schuyler at its meetings, and were on terms of some intimacy with her, so far, at least, as her interest in and her attendance at the meetings of the above association called for; that the Ladies' Art Association was founded about 1867, partly at the suggestion of Mrs. Schuyler, made to some of the defendants, who were members of the School of Design for Women, the object of the association being to help ladies support themselves, and to give them adequate education in art and design, and the association is a reputable and well-known organization in New York City, and Mrs. Schuyler evinced considerable interest in it during her life; that the Woman's Memorial Fund Association was composed largely of members of the Ladies' Art Association, and it was publicly announced that the statue in question was to be placed, after the exposition, in the rooms or studio of the association, there to remain permanently; that Mrs. Schuyler was prominently identified with the United States sanitary commission during the late war; and also that she was one of the vice regents for the state of New York of the Mt. Vernon Association, which was organized for the purpose of securing the preservation of the home of Washington. These several facts were proved and were uncontradicted, and the defendants requested the court to find them, which request was refused on the ground that they were immaterial.

Messrs. Walter S. Logan and Charles M. Demond, for appellants:

A defamatory picture or statue of a person, whether he be living or dead, is a libel.

Townshend, *Slander & Libel*, pp. 2, 3, 118; Holt, *Libel*, p. 244; 1 Wood, *Inst.* 445; *Reg. v. Labouchere*, L. R. 12 Q. B. Div. 320; *Com. v. Batchelder*, Thacher, *Crim. Cas.* 191; *State v. Farley*, 4 McCord, L. 317; 1 Hilliard, *Torts*, chap. 7, § 13; *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *State v. Jeandell*, 5 Harr. (Del.) 475; *White v. Nicholls*, 44 U. S. 8 How. 266, 11 L. ed. 591; *Root v. King*, 7 Cow. 613; *People v. Crosswell*, 3 Johns. Cas. 354; *Steele v.* 81 L. R. A.

Southwick, 9 Johns. 214; *Cooper v. Greeley*, 1 Denio, 847.

The remedy of persons aggrieved by a libel is a suit at law for damages or a criminal prosecution.

New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly, 188; *Francis v. Flinn*, 118 U. S. 885, 30 L. ed. 165; *Brandreth v. Lance*, 8 Paige, 24, 34 Am. Dec. 368.

No suit can be maintained in any court of the state of New York to enjoin the publication of a libel.

Brandreth v. Lance, *supra*; *Wetmore v. Scocell*, 3 Edw. Ch. 515; *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178; *Mauger v. Dick*, 55 How. Pr. 132; *Boston Diatitle Co. v. Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 310; *Francis v. Flinn*, *supra*; *Life Assn. of America v. Boogher*, 3 Mo. App. 178; *Clark v. Freeman*, 11 Beav. 112; *Liverpool Household Stores Assn. v. Smith*, L. R. 37 Ch. Div. 170; *Mulkern v. Ward*, L. R. 18 Eq. 619; *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. App. 142; *Raymond v. Russell*, 143 Mass. 295, 58 Am. Rep. 137; *Kidd v. Horry*, 28 Fed. Rep. 778; *Whitehead v. Kitson*, 119 Mass. 484; *Consumers Gas Co. v. Kansas City Gaslight & C. Co.* 100 Mo. 501; *Halbey v. Brotherhood*, L. R. 19 Ch. Div. 386; *Hammersmith Skating Rink Co. v. Dublin Skating Rink Co.* 10 Ir. Eq. Rep. 235; *Chase v. Tuttle*, 27 Fed. Rep. 110; *Quartz Hill Consol. Gold Min. Co. v. Beall*, L. R. 20 Ch. Div. 501.

An injunction to restrain a libel is unconstitutional.

New York Juvenile Guardian Soc. v. Roosevelt, 7 Daly, 188; *People v. Crosswell*, 3 Johns. Cas. 337.

If the publication of a statue plainly libelous cannot be enjoined, all the more is an injunction improper if the statue be not libelous.

Cortis v. E. W. Walker Co. 57 Fed. Rep. 434; *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402; *Kerr*, 124 U. S. 200, 31 L. ed. 402; *Boston Diatitle Co. v. Florence Mfg. Co.*, and *Brandreth v. Lance*, *supra*.

Neither on the ground of the right of privacy, nor on the ground of pain and suffering, nor on the ground of a continuing trespass, can the judgment be sustained.

Murray v. Gast Lithographic & E. Co. 49 Alb. L. J. 288, 8 Misc. 36, 31 Abb. N. C. 266; *Re Sawyer*, *supra*.

Messrs. Augustus Noble Hand, George W. Wickersham, and James Bettner Ludlow, for respondent:

The acts of the defendant in seeking to make and exhibit a statue of Mrs. Schuyler, and in soliciting subscriptions therefor, constitute an unwarrantable invasion of the right of privacy, for which no adequate remedy exists at common law, and which therefore falls within the jurisdiction of a court of equity to redress.

Cooley, *Torts*, p. 19.

In the English law, the earliest development in the recognition of rights to privacy is to be found in the decisions holding that the writer of a private letter has a right to restrain the receiver from publishing it.

Pope v. Curl, 2 Atk. 342 (1741); *Gee v. Pritchard*, 2 Swanst. 402 (1813); *Lord and Lady Perceval v. Phipps*, 2 Ves. & B. 19; *Prince Albert v. Strange*, 3 De G. & S. 652, on appeal 1 Macn. & G. 25 (1849); *Woolsey v. Judd*, 4 Duer, 379

(1855); *The Right to Privacy*, 4 Harvard L. Rev. 201.

The legal right of the sender of a letter is not really one of property.

• *Payne v. People*, 6 Johns. 108; *Eyre v. Higbee*, 35 Barb. 502; *Oliver v. Oliver*, 11 C. B. N. S. 139; *Grigsby v. Breckinridge*, 2 Bush, 480, 92 Am. Dec. 509.

Along the same line of development that is exhibited in the history of the Roman law, we next find the English court of chancery extending its protection to the authorized use, and enjoining the unauthorized use, of a name.

Routh v. Webster, 10 Beav. 561; *Dizon v. Holden*, L. R. 7 Eq. 488; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Marxwell v. Hogg*, L. R. 2 Ch. 307; *Mackenzie v. Soden Mineral Springs Co.* 27 Abb. N. C. 402; *Farmers' Loan & T. Co. v. Farmers' Loan & T. Co.* 21 Abb. N. C. 104.

Then, as a later development, there is the class of cases where the protection has been sought from a new invasion of privacy, a wrong to one's personality.

Pollard v. Photographic Co. L. R. 40 Ch. Div. 345; *Tuck v. Priester*, L. R. 19 Q. B. Div. 629; *Corliss v. E. W. Walker Co.* 57 Fed. Rep. 434, 64 Fed. Rep. 280, ante, 283; *Manola v. Steens*, N. Y. Times, June 15, 1890; *Marks v. Jaffa*, 6 Misc. 290.

Injunctions have been granted to surviving relatives to protect the dead body of a deceased relative from injury, or to secure the proper disposal of the remains; or to protect grave-stones or monuments from desecration.

Co. Litt. fol. 186; *Institutes*, Lib. 1, cap. 1, § 13; p. 182, 12 fol. ed. 1788, p. 238, vol. 3, Thomas' Am. ed. (Phila. 1836); *Law of Burial*, 4 Bradf. 503-532; *Mitchell v. Thorne*, 134 N. Y. 536; *Snyder v. Snyder*, 60 How. Pr. 368; *Thompson v. Hickey*, 8 Abb. N. C. 159; *Secord v. Secor*, 13 Abb. N. C. 80, note; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Pierce v. Swan Point Cemetery Proprs.* 10 R. I. 227, 14 Am. Rep. 667; *Re Girard's Remains*, 5 Pa. L. J. 68, cited in 12 Moak. Eng. Rep. 664; *First Presby. Church v. Second Presby. Church*, 2 Brewst. (Pa.) 372; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; 6 Am. L. Rev. 182; *First Evangelical Church v. Walsh*, 57 Ill. 363; *State v. McClure*, 4 Blackf. 329; *Bogert v. Indianapolis*, 13 Ind. 184; *Renihan v. Wright*, 125 Ind. 536, 9 L. R. A. 514; *Guthrie v. Weaver*, 1 Mo. App. 186.

The argument that the present case is analogous to a case of libel, and that because it has been held that a libel cannot be enjoined it follows that there can be no injunction in this case, is specious but entirely unsound.

The right exists to prevent a libel upon the dead.

12 Week. L. Bull. (Ohio, 1884); 59 L. T. 257; 12 Alb. L. J. 173.

An injunction will be granted, in a clear case, to restrain libel.

Bonnard v. Perryman [1891] 2 Ch. 269; *Coltard v. Marshall* [1892] 1 Ch. 571; *Monson v. Tussauds* [1894] 1 Q. B. 671.

The theory that an injunction can only be granted in a case where there is injury to property for which damages could be recovered in an action at law has long since been exploded.

Pollard v. Photographic Co. L. R. 40 Ch. Div.

31 L. R. A.

345; *Pierce v. Swan Point Cemetery Proprs. supra*; *Snyder v. Snyder*, 60 How. Pr. 368 (1880); *Mitchell v. Thorne*, 134 N. Y. 536 (1892).

The defendants were properly enjoined from carrying out their project of making and exhibiting a statue of Mrs. Schuyler, on the ground that it necessarily involved both a breach of confidence and a fraud on the public. The acts of the defendants in this respect amount to a gross fraud on the public, entirely analogous to the fraud in the imitation of trademarks, etc.

Devlin v. Devlin, 69 N. Y. 212, 25 Am. Rep. 178; *Caswell v. Hazard*, 121 N. Y. 484.

Peckham, J., delivered the opinion of the court:

This action is of a nature somewhat unusual, and depends for its support upon an application of certain principles, which are themselves not very clearly defined, or their boundaries very well recognized or plainly laid down. Briefly described, the action is founded upon an alleged violation of what is termed the "right of privacy." The alleged violation of this right, so far as regards the plaintiff, consists of an attempt on the part of certain reputable women,—among them the female defendants herein,—without the sanction of the plaintiff or other immediate members of the family, to do honor to the memory of a woman who was the aunt of the plaintiff, and who, at the time of the commencement of this action, had been dead for fourteen years. A statue of a most costly and meritorious kind, to be made out of appropriate material and by an artist of the first rank, was contemplated as the means of doing this honor to the memory of the deceased relative of the plaintiff. It may, perhaps, be somewhat difficult for the ordinary mind to perceive any reason for the plaintiff's distress arising out of this contemplated action by women of respectability, who are desirous of honoring the memory of a woman whom they regarded in life as a friend and benefactor of their sex. Objection has, however, been made to the carrying out of this project, and we must examine this record in order to see whether there is any evidence of a violation of this alleged right of privacy belonging to the plaintiff. In order to determine whether there has been a violation of the right, it is necessary to know something about the right itself and its proper limitations. It is not necessary, however, in the view which we take of this case, to attempt to lay down precise and accurate rules, which shall apply to all cases touching upon this alleged right. If the facts in any case fail to furnish any clear or sure foundation for a reasonable man to claim that any injury to his feelings has been or would be caused by the action taken or to be taken by a defendant, then we can at least say, in such a case, that there has not been and cannot be any such real mental distress or injury as a court of equity ought to recognize as within judicial relief. For the purpose we have in view, it is unnecessary to wholly deny the existence of the right of privacy to which the plaintiff appeals as the foundation of his cause of action. It may be admitted that courts have power

in some cases to enjoin the doing of an act where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no "property," as that term is usually used, is involved in the subject.

The question in this case is whether there has been proved such a violation of the rights of the plaintiff, even under a most liberal construction as to the extent of those rights, which a court of equity ought to take cognizance of. We enter upon this examination with an admission, for the purposes of this case, that the plaintiff occupies such a relationship to the deceased that he might maintain an action to enjoin the painting of a picture or the making of a statue of the deceased which would be regarded as inappropriate by reasonable people because the use for which it was destined, or the place where it was to be kept, was obviously improper, or because the thing itself—portrait or bust or statue—was not of that degree of merit, all the circumstances considered, which might reasonably and properly be insisted upon by those to whom the life and memory of the deceased were most dear. Many other cases can be imagined where the ulterior purpose of the individuals engaged in the matter would be so manifestly improper, if not illegal, that no statue or picture of a reputable individual, alive or dead, ought to be permitted to be made for such purpose. These are merely imaginary cases, alluded to only for the purpose of accentuating our ideas as to some of the circumstances in which courts might be called upon to act on the part of a living relative of one who was long since dead. In the present case the grounds of the plaintiff's objection are not very many, and have been stated in the complaint, and by the plaintiff on the witness stand. They are these: (1) The persons concerned in getting up the proposed statue were not the friends of the plaintiff's deceased aunt, and, as plaintiff alleged, did not know her. (2) They were proceeding with their plan without consulting with the plaintiff or other immediate members of the Schuyler-Hamilton family, and without their consent to the making of any statue. (3) The circulars issued by or in behalf of the defendants contained a statement that Mrs. Schuyler was the founder of, or the first woman in, the enterprise for securing the home of Washington, and that this statement was inaccurate, because a prominent woman in South Carolina was in fact such founder, and justly entitled to the honor arising therefrom. This mistake, it was asserted, had caused adverse comment in the newspapers as to the attitude of the family of plaintiff in permitting such a claim to be made when they must have known it was without foundation. (4) It was disagreeable to the plaintiff because the making of such a statue would have been disagreeable and obnoxious to his aunt, were she living. She had, as plaintiff said, a great dislike to have her name brought into public notoriety of any kind, as she was a singularly sensitive woman and of a very retiring

31 L. R. A.

nature, anxious to keep her name from the public prints or newspapers. (5) That plaintiff's aunt had not been personally acquainted with Susan B. Anthony, and he was quite sure she had not sympathized with or approved the position taken by Miss Anthony upon the question of the proper sphere of woman and her treatment by the law, and it was disagreeable and annoying to have the memory of Mrs. Schuyler joined with principles of which she did not approve. These are substantially all the objections taken by plaintiff regarding the proposed action of the defendants. The plaintiff, in his evidence, said he did not claim that the defendants, in any of their actions or in any of their published notices threw any discredit, disgrace, or ridicule upon Mrs. Schuyler's memory, and he did not think they wished to do so in any way. The chief reason for bringing this action, the plaintiff avowed, was to establish a principle, that the right of privacy should be respected, and he was willing to bring such an action for the purpose of maintaining that principle.

After taking all these objections into careful consideration, we cannot say that we are in the least degree impressed with their force. The first ground of objection, even if well founded in fact, is not of the slightest importance. Whether the defendants were friends or not of Mrs. Schuyler, in her lifetime, does not seem to us to have any legitimate effect upon the question. If the motive were to do honor to a good woman, and if the work were to be done in an appropriate way, the relations towards the deceased of those who proposed to render this mark of honor to her memory, as one of the benefactors of her sex, would be a matter of very small moment,—entitled to no consideration whatever. No surviving relative, male or female, would have, in our judgment, the least ground of complaint that an action confessedly meant to do honor to the memory of a noble woman was proposed by those who in her lifetime had not the honor of her personal acquaintance or friendship, but whose proposed action was nevertheless the outgrowth of admiration of her character as a friend and benefactor of the sex of which she was herself so great an ornament. It appears, however, that in truth some of the defendants were known to Mrs. Schuyler personally, as members of the same association and interested in the same objects; and, although Mrs. Schuyler was undoubtedly more socially prominent than any of the defendants claim to be, yet there was enough personal intercourse between her and some of the defendants to account for the affection in which her memory is held, and for their desire to give some practical evidence of their feelings.

The second ground of objection, we think, is equally untenable. The fourth ground may properly be considered as a part of it. It is true that these defendants have assumed to take the preliminary steps leading to the making of the proposed statue without having consulted with or obtained the consent of the plaintiff, or the other immediate relatives of the deceased. This may be regarded as the

main objection, the others being but grounds for the refusal of any consent by plaintiff and his relatives, if such consent had been asked. The whole of the plaintiff's claim of the right of privacy in this case rests upon the lack of this consent. It is stated that Mrs. Schuyler was not in any sense a public character during her life, and consequently had not surrendered, to any extent whatever, her own right of privacy. This right, it is claimed, not having been surrendered by any act of the deceased in her lifetime, descends unimpaired to her immediate relatives, as the proper representatives of her feelings and her rights. Whatever the rights of a relative may be, they are not, in such a case as this, rights which once belonged to the deceased, and which a relative can enforce in her behalf and in a mere representative capacity; as, for instance, an executor or administrator, in regard to the assets of a deceased. It is not a question of what right of privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that term; and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased. A woman like Mrs. Schuyler may very well, in her lifetime, have been most strongly averse to any public notice, even if it were of a most flattering nature, regarding her own works or position. She may have been (and the evidence tends most strongly to show that she was) of so modest and retiring a nature that any publicity, during her life, would have been to her most extremely disagreeable and obnoxious. All these feelings died with her. It is wholly incredible that any individual could dwell with feelings of distress or anguish upon the thought that, after his death, those whose welfare he had toiled for in life would inaugurate a project to erect a statue in token of their appreciation of his efforts, and in honor of his memory. This applies as well to the most refined and retiring woman as to a public man. It is therefore impossible to credit the existence of any real mental injury or distress to a surviving relative, grounded upon the idea that the action proposed in honor of his ancestor would have been disagreeable to that ancestor during his life. We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants propose on the ground that, as mere matter of

fact, his feelings would be thereby injured. We hold that in this class of cases there must, in addition, be some reasonable and plausible ground for the existence of this mental distress and injury. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy. Such a class of mind might regard the right as interfered with and violated by the least reference, even of a complimentary nature, to some illustrious ancestor, without first seeking for and obtaining the consent of his descendants. Feelings that are thus easily and unnaturally injured and distressed under such circumstances are much too sensitive to be recognized by any purely earthly tribunal. A proposed act, which a court will enjoin because it would be a violation of a legal right, must, among other conditions, be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to any one possessed of ordinary feeling and intelligence, situated in like circumstances as the complainant; and this question must always, to some extent, be one of law. If the circumstances be such that it is to a court inconceivable that the feelings of any sane and reasonable person could be injured by the proposed act, then it is the duty of the court to say so, and to refuse an injunction which would prevent its performance. If the defendants had projected such a work in the lifetime of Mrs. Schuyler, it would perhaps have been a violation of her individual right of privacy, because it might be contended that she had never occupied such a position towards the public as would have authorized such action by any one so long as it was in opposition to her wishes. The fact that Mrs. Schuyler is dead alters the case, and the plaintiff and other relatives must show some right of their own violated, and that proof is not made by evidence that the proposed action of the defendants would have caused Mrs. Schuyler pain if she were living. A shy, sensitive, retiring woman might naturally be extremely reluctant to have her praises sounded, or even appropriate honors accorded her, while living; and the same woman might, upon good grounds, believe, with entire complacency and satisfaction, that after her death a proposition would be made and carried out by her admirers to do honor to her memory by the erection of a statue or some other memorial. For these reasons we are of the opinion that, regarding the facts thus far discussed, it was not necessary for the defendants to procure the consent of the plaintiff, or other immediate relatives of the deceased. We think that so long as the real and honest purpose is to do honor to the memory of one who is deceased, and such purpose is to be carried out in an appropriate and orderly manner, by reputable individuals and for worthy ends, the consent of the descendants of such deceased person is not necessary, and they have no right to prevent, for their own personal gratification, any action of the nature described.

The third ground of objection is based upon a claim made in the circulars issued by defendants, that Mrs. Schuyler was the founder of the Mt. Vernon Association, while in truth she was connected with it only as a vice regent from this state. There is no assertion that this error of fact was intentional, and there could obviously be no motive on the part of the defendants to make any undue or ill-founded claim on behalf of their subject. A single line calling their attention to the fact would undoubtedly have caused an immediate rectification of the mistake, and, of course, the removal of any foundation for the slightest adverse comment from any source as to the conduct of the surviving members of this family in permitting such a claim to have been made on behalf of one of its deceased members. This mistaken statement of the position of Mrs. Schuyler in regard to the Mt. Vernon Association, contained in the circulars, is the only ground for adverse comment in the newspapers, or for the disagreeable notoriety complained of by the plaintiff. If corrected, all ground of complaint of that nature would disappear. If not corrected upon application, the plaintiff would probably not be without a remedy which would prevent the circulation of such an untruth.

The fourth ground of objection has already been disposed of in treating of the second. The feelings of the deceased, if she were alive and confronted with such a proposition to do honor to herself, have no place in this action, which is founded upon the alleged violation of the plaintiff's own right of privacy.

The fifth ground is an equally vague and shadowy one. Whether Mrs. Schuyler sympathized with the work or the views of Miss Anthony, we must say, seems to us utterly foreign to the subject. There was no proposition looking towards the placing of the statues of these two ladies together, as representatives of the same ideas, or as in any way, even the remotest, united in the same works, or in inculcating the same principles in regard to the rights of women. The objection seems to rest wholly upon the proposition that these two proposed statues were to be exhibited in the same room of a building in the Chicago Fair Grounds,—one as the representative of a class of women philanthropists and the other as the representative of a class of women reformers. The placing of the statues in the same room for exhibition by the same association does not, in our view, tend in the slightest degree to confuse the identity of Mrs. Schuyler, or to lead in any way to the supposition that she was in sympathy with, or believed in the correctness of, the principles which have been advocated by Miss Anthony. The fact, if it be a fact, that Mrs. Schuyler did not sympathize with what is termed the "woman's rights movement," is of no importance here. The proposed placing of the two statues would, if carried out, have had no tendency to show that Mrs. Schuyler did so sympathize. Many of us may, and probably do, totally disagree with these advanced views of Miss Anthony in regard to the proper sphere of women, and yet it is impossible to deny to her the pos-

session of many of the ennobling qualities which tend to the making of great lives. She has given the most unselfish devotion of a long life to what she has considered would tend most for the benefit and practical improvement of her sex, and she has thus lived almost literally in the face of the whole world, and during that period there has never been a single shadow of any dark or ugly fact connected with her or her way of life to dim the luster of her achievements and of her efforts. Although we may utterly fail to sympathize with these efforts or achievements, it is plain enough that no one will have reasonable ground for objection to the placing of a bust of his or her own ancestor in the same room with the bust of such a woman, and under such circumstances as were originally contemplated by these defendants. This ground of objection, however, time has itself rendered valueless.

One other ground has been argued before us, upon which to sustain this injunction. It was urged that the proposed statue would be a fraud upon the public, because there was no portrait, likeness, or statue of Mrs. Schuyler accessible to defendants, from which any possible likeness of the deceased could be secured. The idea of an actual likeness was early abandoned, and it was stated that the statue would be an ideal one, and not a likeness. The court below has not found any fraud, and we are not of the opinion that any was shown.

While not assuming to decide what this right of privacy is, in all cases, we are quite clear that such right would not be violated by the proposed action of the defendants. The plaintiff's cause of action is, we think, wholly fanciful. The defendants' contemplated action is not such as might be regarded by reasonable and healthy minds as in the slightest degree distressing, or tending in the least to any injury to those feelings of respect and tenderness for the memory of the dead which most of us possess, and which ought to be considered as a proper subject of recognition and protection by civilized courts. It is, perhaps, needless, yet we will add that our decision furnishes, as we think, not the slightest occasion for the belief that under it the feelings of relatives or friends may be outraged, or the memory of a deceased person degraded, with impunity, by any person who may thus desire to affect the living. The rights of such persons will remain the same after as they were before our present decision, and will be wholly unaffected by it. We simply say that in this case the defendants have proposed to do nothing which ought to affect unpleasantly the mental condition of any sound, reasonable, and intelligent man or woman, and therefore an injunction ought to have been refused.

We have looked at the question of the appealability of the judgment, and are of the opinion that the court has jurisdiction. Nor do we think that the question is now merely an abstract one, because of the fact that it was the intention of the defendants, in causing the statue to be made, to place the same on exhibition in one of the buildings at the Chicago Exposition, now past and gone. That

was only one of the purposes of the defendants. They intended to retain the statue after the exhibition, and bring it back to New York, and place it in the studio of the Ladies' Art Association, a place which, so far as the evidence shows, is appropriate for the purpose. This intention is not illegal, and might be properly carried out, but for this injunction. Upon the whole, we are of the opinion that the plaintiff has made a mistake in his choice of this case as an appropriate one in which to ask for the enforcement of the right of privacy.

The judgment must be reversed as to the parties appealing, and the complaint dismissed as to them, with costs.

Gray, J., dissenting:

I must emphatically dissent from the decision of this court that there was no ground shown in this case for the equitable relief which was granted below. That a precisely analogous case may not have arisen heretofore, in which the peculiar power of a court of equity to grant relief by way of injunction has been exercised, furnishes no reason against the assumption of jurisdiction. This equitable jurisdiction of the court is determined by the particular circumstances of each particular case, and depends upon the existence of a state of facts which demonstrates a wrongful act performed, or threatened to be performed, to the prejudice of some right of property, and for which there is no adequate remedy at law. Upon the findings in this case, I think we are bound to say that the purpose of the defendants was to commit an act which was an unauthorized invasion of the plaintiff's right to the preservation of the name and memory of Mrs. Schuyler intact from public comment and criticism. As the representative of all her immediate living relatives, it was competent for him to maintain an action to preserve them from becoming public property, as would be the case if a statue were erected by strangers for public exhibition under such classification, with respect to the characteristic virtues of the deceased, as they judged befitting. I cannot see why the right of privacy is not a form of property, as much as is the right of complete immunity of one's person. If it is a property right with reference to the publication of a catalogue of private etchings, and entitled to be protected against invasion, as Lord Cottingham held in *Prince Albert v. Strange*, 1 Macn. & G. 25, 47, why is it not such with reference to name and reputation? We have some illustrations of the exercise by courts of equity of their peculiar powers in cases which have been cited, in principle not unlike this, where the publication of one's letters and the sales of photographic portraits have been enjoined, besides the case of the publication of the catalogue referred to. See *Gee v. Pritchard*, 2 Swanst. 402; *Prince Albert v. Strange*, 2 De G. & S. 652; *Pollard v. Photographic Co.* L. R. 40 Ch. Div. 345, and *Woolsey v. Judd*, 4 Duer, 379. These decisions are authority for the doctrine that equity will interfere to prevent what are deemed to be violations of personal legal rights, and the only limitation upon the application is that

the legal right which is to be protected shall be one cognizable as property. It seems to me clear that the jurisdiction of equity is not made to depend upon the existence of corporeal property, and that it is exercised whenever the complainant establishes his claim to the possession of exclusive personal rights, and their violation in definite ways, for which an action at law cannot afford plain and adequate redress. That is the case here. The defendants were a voluntary, unincorporated association, whose object was to erect a statue of Mrs. Schuyler, as the "typical philanthropist," and subscriptions were solicited from the public to create a fund for that purpose. It was found by the trial court that the acts of the defendants "have exposed the name and the memory of Mrs. Schuyler to adverse comment and public criticism, of a nature peculiarly disagreeable to her relatives, and have caused disagreeable notoriety, for which they are in no way responsible." It was found that "annoyance and pain have been caused thereby to the plaintiff and to the immediate relatives of Mrs. Schuyler," to their great distress and injury, by the notoriety incident thereto. However opinions may differ with respect to the substantial nature of the injury to the feelings of Mrs. Schuyler's relatives, we have the finding that it was in fact caused, and we should not say that it was merely fanciful. The theory of the case, which calls for equitable relief, is not that of a mere protection to wounded feelings, but the protection of a right which those who represent the deceased have to her name and memory, as a family heritage, and which had not become the public property. Why is that not a legal and an exclusive interest, and why are its possessors not entitled to be protected by the law from a notoriety which invites public criticism of the memory and reputation of the deceased relative? And if it be true that there is no known application at common law of the principle, does not that natural justice with which equity is synonymous require that equity supply the deficiency, or enlarge the operation of legal principles, and grant the shelter of the law to the name and memory of the deceased, at the instance of her relatives? The evidence does not establish that Mrs. Schuyler was a public character, or that she was in such public station, or so prominent in public works, as to make her name and memory public property. That she was engaged, throughout her life, in acts of benevolence and beneficence, may be perfectly true; but she was never a public character, and in no just sense can it be said that, because of what she chose to do in the private walks of life, she dedicated her memory to the state or nation, as public property. To hold that by reason of her constant and avowed interest in philanthropical works unconnected with public station, the right accrued to an association of individuals, strangers to her blood, to erect a statue of her, typifying a human virtue, through contributions solicited from the general public, is, in my judgment, to assert a proposition at war with the moral sense, and I believe it to be in violation of the sacred right of

privacy; whose mantle should cover not only the person of the individual, but every personal interest which he possesses and is entitled to regard as private, when through no act of his, nor by any peculiar circumstances, has the public acquired any right in them. Unless equity does interfere, the right of privacy will be lost, and that will become the property of the public, which, our sentiments and reason and our sense of justice tell us, is the private property of the relatives of the deceased person. That the plaintiff is entitled, if any one is, to a remedy, has been heretofore mentioned, and it is the finding of the trial court, and that that remedy may be preventive in its character seems to me to be within the reason and principle upon which equity proceeds. It is not necessary that the proposed statute of Mrs. Schuyler should be libelous in character. The wrong consists, not in that fact, but in the unau-

thorized acts of the defendants, which will invite adverse comment and public criticism upon the life and character of the deceased, bring her name and memory into more or less unenviable notoriety, and inflict upon her immediate relatives and representatives more or less injury in their feelings and their desires for that privacy which, in their private station of life, they have the right to enjoy. The threatened offense is of a permanent and continuing nature, and, in many senses, differs from cases of mere libelous publications. I think that a case was made out where equity was unfettered in its exercise by any legal principle, and where the decree of the court below should be affirmed.

All concur with **Peckham, J.**, for reversal, except **Gray, J.**, who reads for affirmance.

MONTANA SUPREME COURT.

STATE of Montana, *Resp't.*,

v.

Mary GLEIM, *Appt.*

(.....Mont.....)

1. **The statutory abolition of the distinction between accessories** before the fact and principals will not render a subsequent indictment charging a person as being an accessory in common-law form insufficient.
2. **Upon trial of one charged as being accessory** to a crime the record of the conviction of the alleged principal is admissible as prima facie evidence that the latter committed the crime as charged.
3. **The enforcement of a rule** that attorneys who testify in the case cannot without permission of the court argue the case to the jury is not reversible error, where the counsel did not before testifying explain his position and request the court's permission to sum up.
4. **An instruction in a criminal case depending upon circumstantial evidence**, that the jury must not be "satisfied beyond a reasonable doubt of each link in the chain of circumstances" relied upon to establish guilt, but that it is sufficient if they are "satisfied beyond a reasonable doubt that defendant is guilty," is erroneous.
5. **The court cannot instruct the jury** as to what weight should be given to testimony, even if it relates to admissions of the accused.
6. **A defendant in a criminal case cannot be questioned** as to matters wholly remote from the question of guilt and innocence of the crime charged, so as to amount to a general assault upon his character.
7. **A person who has a fixed opinion** as to the guilt or innocence of a person charged as

principal in a crime is not a competent juror upon the trial of one charged as accessory.

8. **The credibility of a witness cannot be impeached** by showing that she was addicted to the morphine habit, unless it is shown that she was under the influence of the drug when the incident occurred of which she has testified, or at the trial, or unless her memory is impaired.
9. **To produce moral certainty** the evidence must be such that the juror would venture to act upon the conviction produced by it in matters of the highest concern and importance to his own interests.

(October 7, 1895.)

A PPEAL by defendant from a judgment of the District Court for Missoula County convicting her of assault with intent to commit murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Toole & Wallace for appellant.

Messrs. H. J. Haskell, Attorney General, *Thomas H. Marshall*, and *Mrs. Ella Knowles Haskell*, for respondent:

Section 12, Fourth Div. Crim. Laws, Comp. Stat. has no reference to the manner of charging the offense or method of procedure.

Smith v. State, 37 Ark. 274; *Williams v. State*, 41 Ark. 178.

To charge the defendant with such facts as would show him to be an accessory at common law is to charge him with being a principal.

People v. Blien, 112 N. Y. 79; *Wagner v. State*, 43 Neb. 1; 1 Bishop, New Crim. L. §§ 682-685; *People v. Rozelle*, 78 Cal. 84; *State v. Littell*, 45 La. Ann. 655; *Territory v. Guthrie*, 2 Idaho, 398; *State v. King*, 9 Mont. 445; *State v. Anderson*, 89 Mo. 312; *Goins v. State*, 46 Ohio St. 457; *Shannon v. People*, 5 Mich. 72.

NOTE.—Among the interesting questions of criminal procedure presented in the above case, particular attention is called to that of the admissibility of a record of conviction of the principal as evidence against an accessory. The direct decisions upon this point are believed not to be numerous, and the opinion of the court in the present case is especially valuable for that reason.

The overruling of a challenge for cause, even if erroneous, is not ground for reversal, unless it be shown that an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges.

State v. Nickleson, 45 La. Ann. 1173; *Loggins v. State*, 12 Tex. App. 65; *Ford v. Umatilla County*, 15 Or. 314; *Spies v. People*, 122 Ill. 1; *Ex parte Spies*, 123 U. S. 131, 31 L. ed. 80; *State v. Aarons*, 43 La. Ann. 406; *Territory v. Campbell*, 9 Mont. 16.

Defendant was not entitled to an instruction on circumstantial evidence, as such an instruction is only proper when the evidence is wholly circumstantial, and is not proper when there is evidence of a confession by defendant, as there was in this case.

White v. State, 32 Tex. Crim. Rep. 625; *State v. Robinson*, 117 Mo. 649; *Territory v. Scott*, 7 Mont. 407; *Siebert v. People*, 143 Ill. 571; *Grant v. State*, 97 Ala. 35; *Faulkner v. Territory* (N. M.) 30 Pac. 905.

There is no reason why the record of the conviction of the principal should not have the same weight as tending to show his guilt, it being just as necessary to show the guilt of the principal, or rather the one who actually committed the crime, now as at common law, for unless this is shown the defendant is not guilty: the guilt of Mason being one of the facts necessary to be established in order to prove the guilt of this defendant.

1 Bishop, New Crim. L. § 667; Whart. Crim. Ev. § 606; *State v. Mosley*, 31 Kan. 355; *State v. Bogue*, 52 Kan. 79; *State v. Patterson*, 52 Kan. 335; *Lery v. People*, 80 N. Y. 327; *Arnold v. State*, 9 Tex. App. 435; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Anderson v. State*, 63 Ga. 675.

Hunt, J., delivered the opinion of the court:

Patrick Mason, Mary Gleim, and William Reed were jointly indicted for an assault with intent to commit murder, upon one Burns. Appellant Mary Gleim was separately tried after Mason had been convicted. She was found guilty, and sentenced to the penitentiary for fourteen years.

1. Appellant contends that the indictment will not support a verdict and judgment of guilty, "because it nowhere charges that said Mary Gleim committed the crime of assault with intent to murder." The material charging parts of the indictment are as follows: "That one Patrick Mason, late of the county of Missoula, state of Montana, on or about the 13th day of February, A. D. 1894, at the county of Missoula, in the state of Montana, did feloniously, deliberately, premeditatedly, and of his malice aforethought, make an assault in and upon one C. P. Burns, and certain giant powder and other highly explosive substance, a more particular description of which is to said jurors unknown, in, upon, around, and under the house where the said C. P. Burns was then and there present and sleeping, did feloniously, deliberately, premeditatedly, and of his malice aforethought, put and lay, and the same did then and there, feloniously, deliberately, premeditatedly, and of his malice aforethought, explode, and cause to be exploded, with intent

in him, the said Patrick Mason, to kill and murder the said C. P. Burns. And that before the commission of the said felony, at the time and place aforesaid, one Mary Gleim and William Reed did feloniously counsel, aid, incite, and procure the said Patrick Mason to commit, in manner and form aforesaid, the said felony. All of which is contrary to the form of the statute," etc. The indictment is substantially a common-law charge against Mason as principal and Mary Gleim as an accessory before the fact. It follows the precedents of Wharton (1 Whart. Precedents of Indictments & Pleas, § 97) and of Archbold (Archbold, Crim. Pr. & Pl. pp. 67, 77). Bishop on Criminal Procedure (vol. 2, § 8), quoting Chitty on Criminal Law, lays down the course to be: First, to state the guilt of the principal, as if he alone had been concerned; and then, in case of accessories before the fact, to aver that the procurer, "before the committing of the said felony, in form aforesaid, to wit, on, etc., with force and arms, etc., did maliciously and feloniously incite, move, procure, aid, and abet (or counsel, hire, and command) the said principal felon to do and commit the said felony, in manner aforesaid, against the peace, etc."

The statutes (Crim. Prac. act 1887, §§ 176, 177) provide that:

"Sec. 176. Any person who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted, in the same manner as if he were a principal.

"Sec. 177. An accessory before the fact, to the commission of a felony, may be indicted, tried, and punished; though the principal be neither indicted nor tried."

By section 12, chap. 2, p. 502, Comp. Stat. 1887, it is provided: "Any person who stands by, and aids, abets, or assists, or who, not being present, hath advised and encouraged the commission of a crime, shall be deemed a principal offender, and shall be punished accordingly."

It is plain that the old distinctions between accessories before the fact and principals are abolished by these statutes (*State v. King*, 9 Mont. 445); but we see no objection to the form of an information charging a person as an accessory rather than as a principal. To so charge is to the advantage of a defendant, because it notifies him of the attitude which the state will assume when the case is brought to trial, by setting out the facts constituting the offense with greater certainty than is requisite where an accessory is indicted as a principal. This point was directly raised in *People v. Rozelle*, 78 Cal. 84, where the court held that an information stating facts sufficient to constitute a defendant an accessory at common law charges him with guilt as a principal under the statutes, and that to allege such facts as would have been sufficient against him as an accessory at common law is charging him as a principal under the statute. We are of opinion that the rights of the defendant were not prejudiced by the form of the charge. *State v. Littell*, 45 La. Ann. 655; *Territory v. Guthrie*, 2 Idaho. 398.

2. On the trial of the appellant, Gleim, the court, over the objection of the defend-

ant, permitted the record of the conviction of Mason, the principal actor, to be introduced, and after having fully instructed the jury that it was essential, in order to convict the defendant Gleim, that they should find that Mason was guilty of having committed the crime charged, instructed as follows: "That the record of the trial and conviction of Patrick Mason was introduced in the trial of this case, for the purpose of establishing as a fact, prima facie, the guilt of said Mason. The record is prima facie evidence of the guilt of said Mason, but it is not conclusive evidence. It, however, remains prima facie evidence of the fact which it was introduced to prove, unless you believe from the evidence in this case that the defendant Mary Gleim has introduced evidence in this case which raises in your minds a reasonable doubt (as explained in these instructions) of the guilt of said Mason; but, if such testimony raises in your minds such reasonable doubt of the guilt of Mason, then you should find the defendant Gleim not guilty. But, unless the evidence introduced by the defendant Gleim does raise in your minds a reasonable doubt (as explained in these instructions) of the guilt of the said defendant Mason, you should receive such record of trial and conviction as evidence establishing the guilt of said Patrick James Mason. But, in determining the question of the guilt or innocence of the said Patrick James Mason, you are not confined to the record of trial and conviction introduced in this case, but you should carefully consider all of the evidence introduced in this case tending to prove or disprove the guilt of said Mason; and if, after a full and careful consideration of all the evidence in the case, in connection with the record in evidence, you have a reasonable doubt of the defendant Mason's guilt, you should find the defendant Gleim not guilty." While it is true that the statute makes an accessory before the fact a principal, yet the evidentiary facts by which the accessory is to be incriminated may materially differ from those which are necessary and sufficient to convict the principal. In this case, for instance, to incriminate the appellant, Gleim, at all, under the theory of the state, as charged and contended for, it was not only necessary to prove the guilt of Mason, as alleged, but to go further, and to demonstrate beyond a reasonable doubt that the appellant, Gleim, counseled, aided, and abetted Mason in the perpetration of the crime charged. Therefore, although the accessory might be deemed a principal under the statute, and was indicted with the principal, it became impossible for the state to convict appellant upon the same evidence applicable to the principal, because the agency of the accessory in the perpetration of the crime charged operated by a radically different method from the principal's. The statute, in simplifying the procedure, has obliterated old distinctions between principals and accessories, but the object of the simplification is largely to enable a guilty accessory to be punished without making his guilt depend upon the conviction of the principal. The facts, however, that the principal offense was committed,

and that the principal who was charged to have committed it was guilty, were among the essential elements upon which must be predicated the guilt of the accessory Gleim. And right here is to be observed an important distinction between proof of a charge against a principal, and an accessory made principal by the statute alone (but indicted with the principal, as in this case), and proof of a charge against several persons, ordinarily jointly indicted as simple codefendants, and who are in fact principals. In the one instance, the accessory before the fact being confessedly absent at the time of the commission of the principal offense, there can be no conviction without proof of the guilt of the principal; while, in the other case, whether or not any defendant other than the one on trial participated in the criminal act is immaterial, and forms no essential part of the case against the defendant on trial. Where, therefore, as in this case, the guilt of the principal must be proved as part of the case against the accessory, we cannot think that it is necessary for the state, where the principal has been convicted, to do more on its prima facie case than to offer the record of conviction of the principal as prima facie evidence of his guilt of the crime charged against him. We do not think that the fact that the principal has been convicted is proof of the guilt of the accessory. But it does make out a prima facie case of the principal's guilt, and unless rebutted by evidence of the accessory, as it may be, is competent to prove that material element of the crime charged against the accessory, and upon the truth of which must depend the guilt of the accessory; namely, the commission of the crime of the principal, for which she is held responsible in law, provided she procured or aided and abetted the principal to commit the same. Although there are some cases holding a contrary view, we are satisfied with the reasoning of the authorities which permit the introduction of the record of the conviction of the principal. *Maybee v. Aery*, 18 Johns. 352; *People v. Buckland*, 13 Wend. 598; *Lery v. People*, 80 N. Y. 327; *State v. Mosley*, 31 Kan. 355; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Abbott*, Trial Brief (Cr.) § 624; *Anderson v. State*, 63 Ga. 675; *Roscoe*, Crim. Ev. p. 171; 1 Russell, Crimes, p. 67; *Archbold*, Crim. Pr. & Pl. p. 83; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Studetill v. State*, 7 Ga. 2.

3. Joseph K. Wood, Esq., of counsel for appellant, was a witness in defendant's behalf upon the trial. He desired to participate in the argument for the defense. The court refused to permit him to do so, under a rule of court which provides that if the attorney of either party offers himself as a witness in behalf of his client, and gives evidence on the merits of the trial, he shall not argue the case or sum it up to the jury, unless by permission of the court. It does not appear by the record that, before the counsel testified, he explained to the court his position, and asked permission to argue the case. Under the circumstances, we cannot think that the enforcement of the rule was erroneous or even harsh.

4. The defendant asked the court to instruct the jury upon the law of circumstantial evidence, as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by an eyewitness or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be distinctly and independently proved by competent evidence beyond a reasonable doubt; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt." The court modified the instruction offered, and gave another upon the subject of circumstantial evidence, so that the jury were instructed as follows: "The testimony in this case is wholly circumstantial. And while it is not necessary, in order to warrant a conviction on a criminal charge, for the state to prove the commission of the act by eyewitnesses or by direct testimony, and while the guilt of the defendant may be established by circumstantial evidence, still, in order to support a conviction upon circumstantial evidence alone, each fact and circumstance necessary to complete the chain to fasten the guilt upon the defendant must itself be independently proved by competent evidence; and all the facts and circumstances, when so proven, must not only be sufficient in themselves to satisfy the mind of the guilt of the accused beyond a reasonable doubt, but they must exclude every other reasonable supposition except that of his guilt." "That the law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that you should be satisfied beyond a reasonable doubt of each link of the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking all of the testimony together, you are satisfied beyond a reasonable doubt that the defendant is guilty."

The charge that, in order to warrant a conviction, the jury must not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, but that it is sufficient if, taking all the testimony together, they are satisfied beyond a reasonable doubt that the defendant is guilty, is erroneous and prejudicial to the rights of the defendant. This identical instruction was reviewed by the supreme court of Colorado in the recent and somewhat celebrated *Dr. Graves Murder Case*. *Graves v. People*, 18 Colo. 185. The court there condemns the instruction upon principle, as tending to confuse a jury, and well expresses our views by saying that "the jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a

reasonable doubt to warrant conviction, as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established." An Illinois case (*Bressler v. People*, 117 Ill. 422) has approved of the instructions here complained of, but the reasoning supporting the conclusion of the court is not sound. "It involves," says Thompson on Trials (vol. 2, § 2514), "the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that, when one link of the chain is broken, the chain itself may still remain entire; ignoring the obvious conceptions that no chain can be stronger than its weakest link." The authorities disapproving of these instructions are collected in the Colorado decision to which we have referred. We believe it to be correct that the prosecution need not prove beyond a reasonable doubt every circumstance offered in evidence which tends to establish the ultimate circumstances or facts on which it relies for a conviction, but if the metaphor of a chain is used, and each circumstance relied upon forms a link, the link becomes a necessary part of the whole chain, and must therefore be proved beyond a reasonable doubt. The cable metaphor, as approved by the Colorado supreme court in *Clare v. People*, 9 Colo. 122, illustrates the force of circumstantial evidence more clearly perhaps than does the chain comparison. In the cable simile the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt; just as a few strands of the cable may part, and yet it still remains so strong "that there is scarcely a possibility of its breaking." We therefore think that, if the chain metaphor is to be used, the instruction, as offered, correctly stated the law, and that it is necessary for the state to prove each fact and circumstance necessary to complete the chain, . . . by competent evidence, beyond a reasonable doubt, etc., and that it was reversible error to charge to the contrary. *Territory v. McAndrews*, 3 Mont. 158.

There are other errors complained of by the appellant. The respondent contends that they are not properly before us for review, but, as the case must be tried again, we will briefly refer to them.

First. Error is assigned upon the following instruction: "That parol evidence of the verbal admissions of a defendant may be evidence of a most satisfactory character. If the jury can see, from the evidence, that the alleged admissions of the crime charged in the indictment were clearly and understandingly made by the defendant, and that they were precisely identified, and the language correctly and accurately repeated by the witness, then such testimony is entitled to great weight." It was error in the court to instruct the jury that testimony of admissions of defendant was entitled to great weight. The

jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion of the testimony. *State v. Sullivan*, 9 Mont. 174; 2 Thomp. Trials, § 2287.

Second. Upon the trial the counsel for the state, on the cross-examination of the appellant, propounded a great many questions calculated to degrade the defendant before the jury. The inquiry took a wide and varied range. She was asked if she had not rented houses for purposes of prostitution at various places in Montana; whether she had not been a kind of a backer for the prostitution of female persons in Missoula and Hamilton; whether she had not had a fight with a priest; whether she had not hugged and kissed a jurymen after she had been found not guilty of some misdemeanor upon one occasion; whether she had not had a fight with a French prostitute at some time; and whether, at another time, she had not "run a young gentleman through a saloon;" whether she had not been drunk when she was in jail; and, finally, if her picture did not hang in the Rogue's Gallery in the city of New York. We cannot conceive upon what theory of the law this line of testimony was allowed. It was not cross-examination of what appears by the record to have been the appellant's evidence in chief, nor did it legitimately tend to impair the credibility of the defendant as a witness. Its effect must have been highly injurious and prejudicial to the defendant in the minds of the jury. Most of the matters involved in the questions were wholly remote from the question of her guilt or innocence of the crime for which she was on trial, and the investigation seems to have drifted to a rambling assault upon the general character of the defendant, extending not only to all of the offenses with which she may have ever been at any time charged, or even suspected, whether rightfully or not, but likewise to cases where she was acquitted, and to her infirmities of habit, her obscenity of speech, and general depravity of life. Such an examination we most earnestly disapprove of. It was oppressive and unjust, no matter how wicked or degraded the defendant may have been by common report. We find a well-considered decision, censuring such an examination of a defendant, in the recent case of *People v. Un Dong*, 106 Cal. 83.

Third. It does not appear whether or not any of the jurors who sat upon the trial of this case had stated upon their *voir dire* that they had fixed opinions as to the guilt of Patrick Mason, the principal, but the appellant's counsel implies that they did, and argues the point in his brief. A juror who has formed a fixed opinion as to the guilt or innocence of the person charged to be the principal offender ought not to sit upon the trial of the person charged as an accessory. *Arnold v. State*, 9 Tex. App. 435.

Fourth. We see no error in refusing to permit a witness to be asked, on cross-examination, for the purpose of affecting her credibility, whether or not she is addicted to the morphine habit (*State v. White*, 10 Wash.

611), unless it is proposed to show that the witness was under the influence of the drug at the time the events happened about which she testified, or unless she is under the influence of morphine at the time she is testifying, or unless it is made to appear that her powers of recollection are impaired by the habitual or excessive use of the drug.

Fifth. The court defined a reasonable doubt in substantially the exact language of the *Webster Case*, 5 Cush. 320, 52 Am. Dec. 711, and which was expressly approved of in *Territory v. McAndrews*, *supra*. As part of the definition, however, of a moral certainty, the court charged that "moral certainty may be said to bear the same relation to matters relating to human conduct that absolute certainty does to mathematical subjects. It is a state of impression produced by facts in which a reasonable man feels a sort of coercion or necessity to act in accordance with it. It is not only what men in general will unhesitatingly believe to be true, but what they will be willing to act upon." If the definition of moral certainty is to be given at all, "to be thoroughly impressive it should be carried one step further. . . . Is the juror so convinced by the evidence of the truth of the fact sought to be proved that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain." *Territory v. McAndrews*, *supra*.

The condition of the record in this case is faulty. The transcript recites that the instructions given by the court are as follows. Then follow what, doubtless, were the instructions read to the jury. At the conclusion of many such instructions, however, we find the word "Given," and, at the conclusion of others, "Given as modified," without specifying what the instruction given was.

The error of the court in charging as it did upon circumstantial evidence is properly presented, and upon that point the case is reversed, and a new trial ordered.

Reversed and remanded.

Pemberton, Ch. J., and De Witt, J.,
concur.

BUTTE, ANACONDA, & PACIFIC RAIL-
WAY COMPANY, *Respl.*,

MONTANA UNION RAILWAY COM-
PANY *et al.*, *Appts.*

(.....Mont.....)

The exercise of the right of eminent domain to acquire land for a railroad is not precluded by the facts that the road is owned by a private corporation and is built for the benefit

NOTE.—The right of a railroad company to take, by condemnation, property previously acquired for railroad purposes by another company, is carefully developed in the present case. On the general subject, see also *notes* to *Barre R. Co. v. Montpelier & W. R. R. Co.* (Vt.) 4 L. R. A. 786; *Cary Library v. Bliss* (Mass.) 7 L. R. A. 765, and *Mifflin Bridge Co. v. Juniata County* (Pa.) 13 L. R. A. 431.

of private mines and ore houses, where the state laws make all railroads public highways, open to use by all who wish to do so.

2. The magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad in Montana to construct branches to mines and mining works as public uses, by virtue of the law of eminent domain.

3. The connection of mines and ore houses with a market is a public use in Montana, which will authorize a railroad company to acquire a right of way for that purpose by right of eminent domain.

4. A railroad to be constructed along the side of a mountain may be permitted to condemn for its right of way a portion of the right of way of a former road, where such portion is occupied by unexcavated rock and dirt, and there is no immediate prospect of the other road needing it, and its tracks are to be placed far enough away from the other's so as not to interfere with its operations; while that location is by far the most practicable that can be found, any other route would impinge as much upon the other road as this does, would affect many mining operations, would be enormously expensive, less convenient, and the one chosen manifestly best serves the interests of the public.

5. Absolute necessity is not necessary to enable one railroad to condemn a portion of another's right of way for its tracks, under a statute forbidding such appropriation unless the use to which it is to be applied is a "more necessary public use."

6. Land belonging to a railroad company by way of easement, and not actually in use by it or not actually necessary for the enjoyment of its franchise, is, with respect to the power of eminent domain, upon the same footing as the land of an individual citizen, if there is necessity that it should be taken for another use.

7. The use for which property already held for public use may be condemned need not be a different one under a statute permitting such condemnation for a more necessary public use.

8. A case of necessity is presented within Code Civ. Proc. § 601, permitting one railroad company to condemn a portion of the right of way of another, when the latter, traversing a mountain side in a mining section, has within its right of way tracks unused and in all reasonable probability not necessary for future use, and another road seeking the same objective point is obliged to take a part of such right of way to avoid circuitry, a different grade, much greater cost, and serious damage to mining properties, and would be obliged in any event to parallel the adversary road a part of the way.

9. The question of damages to be awarded upon the crossing of one railroad by another may be referred to commissioners under a statute providing that courts may regulate and determine the place and manner of making crossings.

10. A railroad seeking to cross another should be permitted to employ, and required to pay, the necessary watchmen at such crossings.

(July 29, 1895.)

A PPEAL by defendants from a judgment of the District Court for Silver Bow County
:31 L. R. A.

in favor of plaintiff in a proceeding to condemn lands for a right of way for a railroad and to obtain permission to cross tracks of defendant roads. *Modified and affirmed.*

Statement by **Hunt, J.:**

The plaintiff is a railroad corporation duly incorporated under the laws of Montana. The defendant the Montana Union Railway Company is also incorporated under the laws of Montana. The other defendants are organized under the laws of other states. The plaintiff alleges that it is authorized by its charter to construct, maintain, and operate a line of railway from the city of Butte, Silver Bow county, Mont., beginning at a point near the terminus or depot of the Montana Central or Great Northern Railway, at or near the city of Butte aforesaid, and running and extending thence in a general westerly direction, by way of the towns of Rocker and Silver Bow. In said county of Silver Bow, and through Silver Bow cañon, to a point near Gregson's Springs, and thence in a general northwesterly direction, skirting the westerly foothills of Deer Lodge valley, to the city of Anaconda, with such connections, branches, and spurs to mines and smelting works and other industries in said counties as may be deemed necessary or proper. That plaintiff is engaged in the construction of said main line of railway between the said cities of Butte and Anaconda, and also the branch and connection intended to connect on the east with the Mountain View spur and Montana Central Railway, and by means of that railway with the main line of plaintiff, at or near the Great Northern depot aforesaid, and also to connect directly with the main line of plaintiff at a point west of Butte City, to wit, at or near Rocker, and to extend to the various mines, mills, and other industries situate along said branch,—all of said branch and the points above mentioned being in Silver Bow county, Mont. That the public interest requires the construction of said railway, and the branch thereof above described, and that the lands proposed by plaintiff to be taken and condemned for the use of said railway are required and necessary for the construction and operation thereof, and for a right of way, tracks, side tracks, and general railway uses of plaintiff. That it is necessary to the construction and operation of said railway that the plaintiff should take, use, and enjoy, for the purpose of a right of way for its branch railway above described, certain portions of land in Silver Bow county, and all being within the limits of the right of way claimed by the defendants herein for a railroad now being operated by the defendant the Montana Union Railway Company. Then follows in the complaint an accurate description of the lands which the plaintiff wishes to use for right of way purposes. The description embraces a strip of land across the Nipper claim, and within the defendant's right of way; also a strip of land in the Last Chance addition to the city of Butte, and a portion of certain blocks of the Belle and Butte addition to the city of Butte; also a strip of land across the Clear Grit mining claim; also a strip of land across the Banker mining claim; also a strip of land across the Autocrat claim; also a strip across the Oro

Butte claim; also strips across the Pacific claim, the Poulin claim, the Humboldt claim, the Buffalo claim, the Little Mina claim, the Blackfoot claim, the Alexander claim, the Gambler claim, the Wake Up Jim claim, and the Emma Abbott claim. Plaintiff alleges that the defendants claim or own an interest or right to the property above described, and more particularly set forth by metes and bounds in plaintiff's complaint, and that the Montana Union Railway Company has no interest in said premises, except an easement for a right of way for railway purposes, and that although the property is within the limits of the right of way claimed by the Montana Union Railway Company, it has never been used by defendants or any of them for any purpose, and is not necessary for their use for railway purposes, or for any public use, and that the use for which plaintiff seeks to condemn said property and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which defendants could put said lands or any part thereof. The plaintiff further alleges that, in the construction of its said branch line it is necessary that said branch line should cross and intersect the Montana Union Railway, and certain spurs thereof. There are about twelve of these crossings,—one at the Modoc mine; one over the spur leading to the Anaconda ore house, marked B on the map; another crossing over the spur leading to the Anaconda ore house, marked C on the map; a crossing over the spur leading to the Gagnon mining claim, marked D; also a crossing over the Haggin spur, marked E; also a crossing over the Buffalo spur, marked F; also a crossing over the spur leading to the Mountain Consolidated mine, marked G; also a crossing over the spur leading to the Green Mountain and Wake Up Jim ore houses, marked H; also a crossing over the spur leading to the ore house of the High Ore mine, marked I; also a crossing over the Haggin spur, leading to the High Ore mine ore house, marked J; also a crossing over the spur leading from the Haggin spur to the boiler house of the Anaconda mine, marked K; also a crossing over the Haggin spur, near the timber shop at the Anaconda mine, marked L. It is alleged by plaintiff that these various crossings and intersections proposed are to be made in the manner most compatible with the greatest public benefit and the least private injury to the defendants, and that, as proposed, the crossings will not in any way interfere with the use, operation, or enjoyment by the defendants of their said railway lines or the spurs thereof. Plaintiff further alleges that it has been unable to agree with the defendants as to the amount of compensation to be paid for the taking of the above-described premises and the construction of the crossings, and that the interest in the premises sought to be condemned for plaintiff's use is only an easement for a right of way for the construction, maintenance, and operation of its railway. The plaintiff's prayer is for a judgment that the use for which plaintiff seeks to appropriate the premises is a public use; that the public interests require the construction of plaintiff's railway, and that the lands and the crossings proposed to be made are necessary for the purpose of said railway and said

branch railway, and that the plaintiff has a right to appropriate the premises and make the crossings; that the court ascertain the interest of said defendants in the premises described and sought to be condemned, and that an order be made appointing three competent and disinterested persons as commissioners to assess the damages by reason of the appropriation of the said property, and that on the coming in of the report of the commissioners, the court make such order in regard to the possession of said property sought to be condemned as may be proper; and that as to the crossings, the court adjudge, regulate, and determine the place and manner of making the same.

The material points of defendant's answer are a denial that the public necessity requires the construction of plaintiff's railway and the branch thereof, as set forth, or that the lands therein proposed to be taken and condemned are required or necessary for the construction or operation of plaintiff's railway, or for any use connected therewith. Defendants deny that it is necessary to the construction or operation of plaintiff's railway that it should take for right of way purposes any portions of the lands within the limits of the right of way claimed by the defendants, and set forth in plaintiff's complaint; deny that the property, or any part thereof sought to be condemned, has never been used or that the same is not necessary for railway uses for defendants; deny that the use for which plaintiff seeks to condemn the property is a more necessary public use than any use to which defendants could put the lands or any part thereof. They deny the necessity of the crossings or intersections pleaded by the plaintiff, and deny that such crossings are located in a manner most compatible with the greatest public benefit or least private injury to the defendants; deny that the proposed crossings will not interfere with the enjoyment of defendant's railway privileges. The defendants then allege that the Oregon Short Line & Utah Northern Railway Company is the owner of those various pieces of ground described in the complaint as parts of the various mining claims heretofore referred to, and aver that all of said ground was obtained by grant or by the exercise of the right of eminent domain, for the purpose of the construction of a railroad over the same, and for the operation of the Montana Union Railway, and that all of said ground became and was, and now is, absolutely necessary to the said defendants for the operation of said railway, and has always been used for such purposes by defendants, and defendants expect to continue to use the same, and that the same is absolutely necessary to defendants for railway purposes. Defendants further allege that plaintiff could easily, and at a slight increase of expense, construct its railway in a manner to avoid any conflict with or appropriation of any of the parts of the right of way of these defendants, but that the plaintiff seeks to appropriate a part of the right of way of defendants in order to save cost of acquiring right of way for itself, and not because said right of way is indispensable to the use of said plaintiff. Defendants further aver that if plaintiff's railroad is constructed in accordance with the plan as laid out by plaintiff, great and irreparable damage

will be done them, and that, aside from the fact of dispossessing the defendants from their right of way, plaintiff seeks to cross the railway and spurs of defendants at points that will interfere greatly with the operation of the road of defendants, and that defendants' road cannot be economically, profitably, or properly operated, if plaintiff is allowed to construct crossings across its lines or spurs, as proposed by the plaintiff. Defendants further allege that by slight increase of cost, plaintiff could avoid all the crossings, and that it is not necessary that the crossings be laid as plaintiff contemplates. It is further alleged that plaintiff has no right to enter upon the right of way or roadbed of defendants, except for necessary crossings or connections, and therefore has no right of condemnation over the right of way of these defendants.

The replication of plaintiff denies that all or any of the ground became or was or is at all necessary to defendants for railway purposes, or that it has ever been used by them for such purposes, or that the defendants expect to use the same; denies that plaintiff, at slight increase, could so construct its railway as to avoid any conflict with or appropriation of any parts of defendants' right of way, or that plaintiff seeks to appropriate the right of way in question to save cost to itself, or not because the said right of way is indispensable to the use of plaintiff; denies irreparable damage, or any damage; denies that the crossings will materially interfere with the defendants' operation of their railway, or that plaintiff could easily, or at all, avoid such crossings by slight increase of cost of construction; and denies that it is unnecessary that such crossing should be made as proposed by plaintiff; and, finally, denies that plaintiff has no right to enter upon the right of way or roadbed of these defendants, except for necessary crossings or connections, or that plaintiff has no right of condemnation over the right of way of these defendants, or any of them.

The cause was tried before the court, without a jury, in September, 1893. The testimony taken before the court is quite voluminous, and so much of it as is deemed pertinent and necessary to explain the decision of the court is embraced within the opinion following this statement. The judgment and order of the court, after its more formal recitals, sets forth that the judge of the district court, with a civil engineer chosen by each party, inspected the premises before the submission of the case, and thereafter it was decided "that the use for which the property described in the complaint, and hereinafter described, is sought to be appropriated by the plaintiff, is a public use, within the meaning of the laws of the United States and of the state of Montana; that the entire quantity sought to be appropriated ought so to be taken; that the appropriation thereof will not be detrimental to the public interest or welfare, and is required and necessary for the proper prosecution of the enterprise for which it is sought to be appropriated, and that the public interest requires the prosecution of the plaintiff's said enterprise; that the premises so sought to be appropriated by the plaintiff are not necessary for the use of the defendants' railway, nor for any public use, and is not now

in actual use by them, or any of them; that the use for which plaintiff seeks to condemn the same, and to which said property is to be applied by plaintiff, is a more necessary public use than any use to which the defendants have or could put said lands, or any part thereof. And, no sufficient cause having been shown why commissioners should not be appointed herein, it is hereby ordered that Clinton C. Clark, Justin Butler, and C. J. Stevenson, three competent and disinterested persons, residents of the said county of Silver Bow, be and they are hereby appointed commissioners to ascertain and determine the amount to be paid by the plaintiff to the defendants as compensation for their damages by reason of the appropriation of said property. The right sought to be obtained in this proceeding is an easement for railroad purposes, in and over the following described tracts and parcels of land, situate in the county of Silver Bow, state of Montana." The order particularly sets forth the ground embraced within the limits of the right of way of defendants, as described in plaintiff's complaint, and sought to be appropriated by the plaintiff. It was further ordered and adjudged that the crossings and intersections described by plaintiffs were necessary and proper.

After expressly granting the right to cross over the defendants' spur known as the "Gagnon Spur," on the Clear Grit claim, the court made the following proviso: "Provided, however, the defendants may, and if they do, within ten days after the date hereof, give notice in writing to the plaintiff, that they consent to the plaintiff's taking up their entire Gagnon spur, aforesaid, and placing and rebuilding the same on the south side of the defendants' main track, opposite or about opposite its present position, then, in that case, the plaintiff shall, at its own expense, and within a reasonable time after the giving of said notice, remove and place and rebuild the said spur on the south side of defendants' main track, opposite or nearly opposite its present position, and make the same convenient to approach by and for teams and wagons, and provide proper approaches thereto; and provided, further, that, if such consent be not given within the time and in the manner aforesaid, then the plaintiff may and shall extend its road across such spur at the present grade of the plaintiff's road, and the plaintiff shall not be obliged to put in any crossing, and in such case the defendants, if they desire to operate said spur or use the same, shall make the same conform to the grade of plaintiff's road and track, and put in a crossing at the grade of plaintiff's track, and maintain the same, all at their own expense."

It was also ordered that the plaintiff might cross the defendants' spur known as the "Buffalo Spur" at an angle of 16° 48'. In relation to this spur the court added as follows: "Provided, however, that the defendants may, and if they do within ten days from the date of this order, notify the plaintiff in writing that they consent to permit the plaintiff to raise the entire grade of the said Buffalo spur so that the plaintiff can cross the same at its own grade, then, in that event, the plaintiff shall, before making said crossing, raise the grade of the

whole of said spur, at its own expense, so as to make a feasible crossing with its road, and leave said spur in a reasonable condition for the use of the defendants; and provided, further, that, if the defendants do not give such consent within the said time and in the said manner, the plaintiff shall make said crossing at its own grade, in as reasonably safe manner as the same can be done without raising the grade of the entire Buffalo spur aforesaid."

It was also ordered by the court, in relation to the watching of the crossings, as follows: "That, except as otherwise hereinbefore provided, all said crossings shall be put in by the plaintiff at its own cost and expense, and shall thereafter and forever be kept up, watched, and maintained at the joint expense of the plaintiff and the defendants; that is to say, one half to be paid by the plaintiff, and one half to be paid by the defendants, or the successors in interest of said parties or either of them,—that is to say, that each road shall assume and be liable to an equal obligation in these respects. That any improvements or repairs necessary to said crossings, or expense necessary on account of maintaining the same, may be made or incurred by one road at the equal expense of itself and the others, if, after reasonable notice to such other, the latter refuses to join in the same. That defendants shall not interfere with the plaintiff while putting in said crossings, nor in any manner hinder or delay the same. That at the same time the plaintiff shall put the said crossings in place in a manner which shall cause no unreasonable inconvenience or delay to defendants' business. And it is further ordered and adjudged that the defendants shall be entitled to compensation from plaintiff for the privilege of making said crossings, but that defendants shall not be entitled, on account thereof, to any compensation or damages for the interruption or inconvenience occasioned to their business thereby. . . . That the standard of compensation shall be the reasonable value of the common use by plaintiff with defendants of the portions of the defendants' right of way occupied by said crossings. That the commissioners above named and hereinbefore appointed are hereby directed and authorized to determine and assess the value of said common use, subject to the restrictions above stated, and that, in making such assessment and determination of the amount to be paid by the plaintiff to the defendants on account of said crossings and common use, the said commissioners shall determine the amount to be paid for the common use of each crossing, separately, and shall in their report mention the same distinctly and separately. It is further ordered that the crossings, after being made, shall remain in the common use of both roads, and that both parties shall be required to observe all the laws of the state of Montana relating to the blowing of whistles, ringing of bells, and stopping at crossings. That neither party shall stop its engines, cars, or trains on any of the crossings, or so near thereto as to interfere in any manner with the operation of the other road. That neither party shall have a preference or right of way over the crossings, but that the party whose train first comes to the stop necessary to be made before crossing shall have the right of way of that crossing at that time. 31 L. R. A.

That in case trains on the different roads make such stops at the same time, or at or near the same time, or within twenty seconds of each other, the defendants' train shall have the right to make that crossing first. That no engine or train, in switching, shall be entitled to pass over a crossing more than once, if an engine or train on the other road be in waiting to cross, and the switching engine or train shall allow the waiting train or engine to cross before itself crossing again. That all needful signs and signals at and for crossings shall be constructed, erected, maintained, and operated jointly by the plaintiff and defendants, and at their joint cost and expense; provided, however, that in case it be necessary to employ any person or persons expressly for the operation of such signals, or any of them, plaintiff shall have the right to select, hire, and discharge such person or persons."

The defendants moved for a new trial, which was denied, and this appeal is prosecuted both from the judgment and the order overruling the motion for a new trial.

See opposite page for a copy of the plat introduced on the trial.

Messrs. Shropshire & Burleigh and Forbis & Forbis for appellants.

Messrs. M. Kirkpatrick, W. W. Dixon, and William Scallon, for respondent:

Plaintiff's railroad is a public highway and the public has a right to use it; it is throughout subject to legislative regulation and control and therefore its use is a public use.

National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 765.

The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission.

Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y. 100; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Tracy v. Elizabethtown, L. & B. S. R. Co.* 80 Ky. 259; *Moody v. Jacksonville, T. & K. W. R. Co.* 20 Fla. 597; *Shaver v. Starrett*, 4 Ohio St. 494; *Killbuck Private Road*, 77 Pa. 39; *Sadler v. Langham*, 34 Ala. 311; *Warren v. Bunnell*, 11 Vt. 600; *Colorado Eastern R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527; *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461, 6 L. R. A. 111; *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *State v. Hibernia Underground R. Co.* 47 N. J. L. 43; *Phillips v. Watson*, 63 Iowa, 28; *Palauiret's Appeal*, 67 Pa. 479, 5 Am. Rep. 450; *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. 103; *Hays v. Risher*, 32 Pa. 169; *Lewis, Em. Dom.* §§ 164, 167, 171; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434, note; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 686-707, note; *Chicago Dock & C. Co. v. Garrity*, 115 Ill. 155; *Mill v. Parlin*, 106 Ill. 60; *Truedale v. Peoria Grape Sugar Co.* 101 Ill. 561; *Sherman v. Buick*, 32 Cal. 242, 91 Am. Dec. 577.

In Montana mining is the dominant industry. The prosperity of the state is very largely due to the development of the mines. Under such conditions the business of mining is itself a public use.

Comp. Stat. p. 1058, §§ 1495-1507; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394.

See also *Dietrich v. Murdock*, 42 Mo. 279; *Phillips v. Watson*, 63 Iowa, 28; *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *New Central Coal Co. v. George's Creek Coal & I. Co.* 37 Md. 562; *Getz's Appeal* (Pa.) 3 Am. & Eng. R. Cas. 186; *Talbot v. Hudson*, 16 Gray, 423; *Olmstead v. Camp*, 38 Conn. 546, 89 Am. Dec. 221; *Todd v. Austin*, 34 Conn. 79; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 456; *Tide Water Co. v. Coster*, 18 N. J. Eq. 521, 90 Am. Dec. 684; *Cooley, Const. Lim. p. 659*; 12 Am. & Eng. Enc. Law, p. 940; 1 Wood, Railway Law, pp. 653, 654; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 484; *Farnsworth v. Lime Rock R. Co.* 88 Me. 440 (1891).

While cost of construction and right of way are and always must be an important consideration in the location of a line of railway, and may in many cases constitute the whole difference between a practicable and an impracticable route (*Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501 (1899)), yet in this case there were other considerations of equal importance which governed the location of plaintiff's line.

One public corporation cannot take the lands or franchises of another public corporation in actual use by it, unless expressly authorized to do so by the legislature, but the lands of such a corporation not in actual use may be taken by another corporation authorized to take lands for its use *in invitum* whenever the lands of an individual may be so taken, subject to the qualification that there is a necessity therefor.

1 Wood, Railway Law, p. 684; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Barre R. Co. v. Montpelier & W. R. R. Co.* 61 Vt. 1, 4 L. R. A. 790, note; *Colorado Eastern R. Co. v. Union P. R. Co.* 41 Fed. Rep. 293.

Lands not actually employed by a railroad company in its business, but merely held as a speculation or to supply possible future wants, are liable to be taken like the property of private individuals.

North Carolina & R. R. Co. v. Carolina Cent. R. Co. 88 N. C. 489; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174; *Sharon R. Co.'s Appeal*, 122 Pa. 533; *Re New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 68 N. Y. 326.

Land appropriated by one railroad company under the power of eminent domain, but not required for the exercise of its franchise or the discharge of its duties, is liable to be taken for the corporate use of another railroad company.

Cooley, Const. Lim. p. 652, note; *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273 (1891); *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, and 520; *United N. J. R. & Canal Co. v. National Docks & N. J. J. C. R. Co.* 52 N. J. L. 90; *Getz's Appeal* (Pa.) 3 Am. & Eng. R. Cas. 186, note; *Lewis, Em. Dom. § 267*; *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.* 27 Fed. Rep. 770.

Hunt, J., delivered the opinion of the court:

By this appeal we are called upon to decide questions of importance, not alone to the community at large, but especially so to railroad

corporations, possessed of such powers as may be granted to them under the Constitution and laws of the state. The topography of Montana, as characterized by its name, renders it of unusual significance that the laws of eminent domain be correctly expounded at this comparatively early period of the development of the state. The strict limits of all delegated authority to take the property of another must be cautiously and accurately guarded, lest private rights or those conferred be unnecessarily invaded. On the other hand, if the power to take has been delegated, that power must be precisely defined and upheld by the courts, as one vitally affecting the material interests of the state. The ways for railroads to reach remote mining camps, sometimes lying within small areas, upon precipitous mountain sides, at unusual altitudes, and in steep and rocky sections, are often very few, and only feasible at all by skillful engineering and vast outlays of money. Where, therefore, two or more railroads, in their mountainous routes, may seek the same objective mineral districts, in view of their probably necessary juxtaposition, their rights must be carefully established with relation to the law as applied to the physical, as well as other and more general, conditions controlling them in their obligations towards one another and to the public as well.

Two main propositions are presented for review: First. Are plaintiff's road and branches public uses? Second. Can the plaintiff company construct its road within the defendants' right of way, and is plaintiff's use of the ground a more necessary use than that of the defendant companies, and is the ground sought to be taken necessary to plaintiff's use, and not necessary to defendants' use?

It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material. *Talbot v. Hudson*, 16 Gray, 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small. *Phillips v. Watson*, 63 Iowa, 28; *Lewis, Em. Dom. p. 241*; *Sharer v. Starrett*, 4 Ohio St. 496; *Kettle River R. Co. v. Eastern R. Co.* 41 Minn. 461, 6 L. R. A. 111; *Randolph, Em. Dom. § 56*. The circumstance that the plaintiff road was built by a private corporation, and that its branches run within convenient contiguity of private mines or ore houses, does not materially affect the road and give a private character to its use or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. "It may be, in such cases, that it is expected, or even that it is intended that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." *Chicago Dock & C. Co. v. Garrity*, 115 Ill. 155; *Chicago, B. & N. R. Co. v. Porter*,

48 Minn. 527; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434.

The force of these observations is peculiarly apparent in a new mining state. Frequently, railroads are extended by spurs or lateral connections of main lines, or by independent lines, into mining camps where but a single mine is developed and capable of shipping freight. Such roads or spurs are not infrequently built by the private enterprise of those interested in the one mine to be benefited, and when constructed it is intended that the tracks will be used almost wholly by the mining company which constructed the spur. The supposed barrenness of the country contiguous to the road, or the undeveloped condition of the mountain in which the mine is lying, or perhaps the hitherto unrewarded search of the prospector, has encouraged the belief that, apart from the single mine owned by those who have built the railroad, there are no other paying properties upon which a railroad might rely for ores or supplies to transport. Such expected limited uses are but the results of the location of the mine and its inaccessibility. They do not in any way, however, exclude an equal right of use by others, perchance, desiring to ship freight or secure transportation over the road. To better illustrate our meaning, we have only to modify the instance just referred to of the railroad lateral built to a single mine. Suppose that a pioneer prospector has located and represented a claim contiguous to such railroad, but by reason of the impracticability or expense of constructing a wagon road, he has been obliged to simply keep what he believed was a good mine, hoping that in the future railroad facilities would afford him the opportunity to haul his ore to market. Suddenly, by the enterprise of others, and without any expectation on their part of aiding any project other than their own, a railroad is built, and he may attain the fruition of his hopes if he can use the railroad to ship his ore. Could it be contended with any merit that the railroad company, incorporated under the railroad laws of the state, can discriminate against him by saying: "We are a private enterprise, for private use, and are not generally open to the public, and for this reason refuse to haul your ore, or to bring your machinery and supplies into these hills, and you cannot compel us to act otherwise?" Or, to carry the illustration further, suppose many mines are located close to the new line of road, and a mining district opened of incalculable interest to the state, a town springs up, with its diversified trade relations, and that thus the railroad originally constructed and intended to subserve the single mine, with little or no thought of any greater use, may become a measure of great utility to many people; must this development stop, or be dependent upon the caprices or will or discriminatory orders of the incorporators or owner, based upon a claim that the road was constructed for private purposes, and cannot be made to answer the demands of the public?

We say, after full deliberation, that the express command of section 5 of article 15 of the Constitution, that "all railroads shall be public highways, and all railroads, transportation and express companies, shall be common carriers,"

and subject to legislative control," etc., supplemented by the statute (Comp. Stat. 1887, § 680, p. 809, div. 5) authorizing the construction of side tracks, branches, etc., has made them instruments of public service as well as private profit, and is sufficiently comprehensive to include, not only the railroad used to illustrate our views, but, by analogy, the particular railroads of appellants and respondent in their main lines, lateral branches, and spurs, to particular mines in and about the numerous mining dumps, shafts, and ore houses described in this suit, and situate upon the hills adjacent to the city of Butte. Furthermore, it is expressly provided by section 7, article 15, of the Constitution, that "all individuals, associations, and corporations shall have equal rights to have persons or property transported on and over any railroad, transportation or express route in this state. No discrimination in charges or facilities for transportation of freight or passengers . . . shall be made . . . between persons or places within this state. . . . No railroad or transportation company . . . shall give any preference to any individual, association, or corporation in furnishing cars or motive power, or for the transportation of money or other express matter." This provision, when considered with the previous one quoted, also demonstrates that the Constitution, in its letter, its spirit, and its policy as well, classes all railroads, with their feeders, such as respondent and appellants operate, as public highways, subject to use by the public of right, amenable to the laws governing common carriers forever forbidding all obnoxious favoritisms between any who desire to use such highways. *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434. This stable written policy is doubtless the outgrowth of pernicious systems of discrimination and preference which railroad corporations may have indulged in throughout the land where their powers are unrestrained by constitutional or other restriction. It puts them all on a plane, and under the facts before us, respondent and appellants, as to public highways, are alike the beneficiaries of its liberality, subject, nevertheless, to its restrictions and liabilities. Chief Justice Hawley, for the supreme court of Nevada, vigorously discusses a "public use," as meant by the Constitution of that state, and concludes that the necessities of the business of mining, milling, smelting, etc., are of direct interest to the people of Nevada, and that a statute is constitutional which authorizes land to be condemned for the necessities of such business. *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394. This decision was afterwards expressly affirmed in *Oerman Silver Min. Co. v. Corcoran*, 15 Nev. 147, and again recently approved by its learned author, in the United States circuit court for Nevada, where the court upholds a statute authorizing the appropriation of land for a mining tunnel as a proper exercise of eminent domain, on the ground of "great benefit and advantage to the mining industry." *Douglass v. Byrnes*, 59 Fed. Rep. 31. The supreme court of Georgia held, in *Hand Gold Min. Co. v. Parker*, 59 Ga. 419, that a section of an act of the legislature incorporating a gold placer mining company, and giving it power, under the Constitution, to take

the private property of the complainants for the use of their ditch for the purpose of extending the same to their own land, on payment of just compensation therefor, was constitutional. "Gold and silver," says the court, "is the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the use of the public, is for the public good, though done through the medium of a corporation, or individual enterprise." In a comparatively recent decision, *Oury v. Goodwin* [Ariz.] 26 Pac. 376, the court sustained an act of the territorial legislature permitting the condemnation of appellant's real estate for the purpose of an irrigating canal, basing its opinion upon the principle that a state may, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation. The Nevada and Georgia cases have been disapproved of by Lewis on Eminent Domain (§ 194), but the disapprobation is based upon the ground that a law which granted a right of condemnation for a purpose single and essentially private in its nature could not possibly subserve any public use or be of any public benefit, and hence is an invalid attempt to take private property for private use, and not upon the soundness of the argument that the magnitude of the interest of a state may be considered, for which alone we cite them. The reasoning of these cases, however imperfect the application to particular facts may have been, is well sustained. *Randolph*, Em. Dom. p. 50; *Wood*, Railway Laws, p. 822; *Mills*, Em. Dom. § 20; *Cooley*, Const. Lim. 538; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. L. 518, 54 Am. Rep. 197; 1 *Rorer*, Railroads, § 409; *Mont. Comp. Stat.* 1887, §§ 1495 et seq.

The public interests are benefited by railroads, and the right of eminent domain may be exercised through the medium of corporate bodies. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damages sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare. *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Lewis*, Em. Dom. § 170; *Dietrich v. Murdock*, 42 Mo. 279. Where the general public advantage is greatly promoted by the improvement of water power in the streams and waters of a country, private property taken for that purpose is taken for a public use, within the meaning of that term. *Hazen v. Esser Co.* 12 Cush. 475. Indeed, in New England we find the courts very emphatic upon the question. Chief Justice Perley, after speaking of the interests that New Hampshire had in the improvement of her natural water powers, wrote as follows: "No state of the Union is more interested than ours in the improvement of natural advantages for the application of water power to manufacturing purposes. Nature has denied to us the fertile soil and genial climate of other lands, but by way of compensation has endowed us with unrivaled opportunities of turning our streams of water to

31 L. R. A.

practical account. The present prosperity of the state is largely due to what has already been done towards developing these natural advantages; and there is no assignable limit to our resources in this respect if extended and connected enterprises for the improvement of the water power in this state should be successfully prosecuted hereafter. In no part of the world have the public a deeper interest in the success of all undertakings, which promise to assist in the development of these great natural advantages. Whether, therefore, we look to the interpretation which has been given in other jurisdictions to the term 'public use,' in reference to the right of taking private property for such a use, to the legislative practice under the provincial and state governments before and at the time when the Constitution was adopted, to the language of the Constitution itself, to the early and continued legislative practice under the Constitution; to the decisions of the courts in this state; or to the character of our business and the natural productions and resources of the state, we are drawn to the conclusion that the legislature have power to authorize a private right that stands in the way of an enterprise set on foot for the improvement of the water power in a large stream like this river to be taken without the owner's consent, if suitable provision is made for his compensation, and that the act of 1862 is constitutional and valid." *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Olsonstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221. See also *Scudder v. Trenton Delaware Falls Co.* 1 N. J. Eq. 695, 23 Am. Dec. 756; *Mills*, Em. Dom. § 183. So vital to the development of the agricultural interests of Montana is water for irrigation that, as a part of the bill of rights of the Constitution, it is provided: "The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, distribution, or other beneficial use, and the right of way over the lands of others, for all ditches, drains, flumes, canals, and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use. Private roads may be opened in a manner to be prescribed by law, but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited." *Mont. Const.* art. 3, § 15. The improvement of Boston harbor by reclamation of a large body of land for commercial purposes was held to be of great public advantage. *Moore v. Sanford*, 151 Mass. 286, 7 L. R. A. 151. "The ever-varying condition of society is constantly presenting new objects of public importance and utility, and what shall be considered a public use or benefit may depend somewhat on the situation and wants of the community for the time being." The underlying principle remains, that there must be a public use or benefit. "But what that shall consist of, or how extensive it shall be to authorize an appropriation of private property, is not easily reducible to general rule." *Scudder v. Trenton Delaware Falls Co.* supra; *Talbot v. Hudson*, 16 Gray, 417;

Buffalo & N. Y. C. R. Co. v. Brainard, 9 N. Y. 109.

In thus grafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs, to mines and mining works, as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that "the good of the whole" is the very foundation of the Constitution. Indeed, it may be said that upon this latter axiom of all government by the people rests the principle itself. The force of the principle may vary in different communities. What cogently applies to Montana, with its mountains and quartz, would be an absurd process of reasoning to urge in Louisiana, where scarce an undulation marks the surface, or a mineral lies beneath it. Therefore, to correctly define what that force is in the case before us, it is eminently reasonable and appropriate that the conditions of the whole people to be affected should be considered. In this state, where almost wholly through the facilities and advantages of railroads, the quartz mines have been developed to such an extent that the mineral output of the state is only exceeded by that of one or two older mining states, the publicity of the use of railroads into the camps is too obvious to require more extended comment. In the language of the eminent counsel who so lucidly presented respondent's side of the case: "Again, in Montana, mining is the dominant industry. Throughout a large portion of the state, and in the county of Silver Bow especially, it is the all-important pursuit upon which all other industries are dependent. In the mining, smelting, and reduction of ores the great mass of the population finds employment and support. The prosperity of the state is very largely due to the development of the mines." Having determined that the respondent's railroads and laterals, branches, and spurs are all public highways, within the legal bounds of public uses, it follows that the law of eminent domain, was available to them, provided: (1) "The use to which the respondents have applied the ground taken is a use authorized by law. (2) That the taking was necessary to such use. (3) If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use." Code Civ. Proc. § 601.

That a necessity exists which requires property to be taken is obvious. This follows as a conclusion of the determination that the purpose of the plaintiff is a public use. *Moore v. Sanford*, 151 Mass. 286, 7 L. R. A. 151. But, insist the appellants, although we grant a right of way is necessary, if it is held that the Butte, Anaconda, & Pacific Railway is a public use, nevertheless, at the very threshold of this branch of the case we deny the necessity of the particular land for the railroad uses for which respondent seeks to appropriate it. The district court found that the ground included within the defendants' right of way was neces-

sary to the plaintiff for the proper construction and maintenance of its road, that such ground was not necessary for the use of defendants' railway, and was not in actual use by them at the time of the order, and that the use for which plaintiff sought to condemn the same was a more necessary public use than any use the defendants have or could put the same to. Without more prolixity than we think is essential to make clear our opinion, we will state the concluded facts, apparent to us. The country through which the contending railroads run is one of the mountains of the main Rocky Mountain range, and known as the "Butte Hill" above the city of Butte. The railroads about the hill are really great broad-gauge spurs of their respective main lines. From these great spurs many short ones project, running to ore houses and mining shafts. The principal object of both railroads, in their branches about the "Hill," is to haul ores from and supplies to the several quartz mines indicated upon the map, to wit, the St. Lawrence, Anaconda, Wake Up Jim, Buffalo, Moscow, and others. The Butte, Anaconda, & Pacific (respondent) tracks for the most part lie north of the Montana Union tracks. The Montana Union right of way was 25 feet on either side of the center of its tracks. It had, however, graded along the hill only to an extent a little more than necessary for the actual space occupied by its roadbed. In many places the hill is so very steep, or so rocky, or both, that the rails must have laid very close to the bluffs just north of the tracks. There was no actual use of such bluffs or other ground adjacent to the Montana Union tracks, nor could they actually occupy the same without heavy excavation work on the upper side. Commencing at a point on the hill within the limits of the Nipper quartz-mining claim, the Butte, Anaconda, & Pacific, with its road, was graded and excavated on the upper side of appellants' roadbed, and is within the right of way of the Montana Union for about a mile and a half. At places the south rails of the Butte, Anaconda, & Pacific road are within 10 feet of the northern rails of the Montana Union, but as a rule there is some 17 to 22 feet between the centers,—that is, from the center of the Montana Union tracks to the center of the Butte, Anaconda, & Pacific tracks. These distances, excluding the crossings, are sufficient to prevent any interference between the successful operation of the two roads. The strips of ground which the plaintiff would condemn and appropriate vary in width, the variance being evidently based upon what the plaintiff deems necessary for the operation of its road, considering the points to be reached, and the distance which would and must separate the two roads when constructed. Prior to the institution of this action—that is in 1893—various lines and means of getting to the several ore houses marked upon the map were projected. All these ore houses are at the same level as to the grade of the two roads; several of them, however, being below the level of the Montana Union main track. By the abrupt rise in the hill and its rocky character, and because of the necessity of the Butte, Anaconda, & Pacific crossing divers spurs of the Montana Union, it is necessary that the

right of way of the Butte, Anaconda, & Pacific be laid down to the same level as the Montana Union. This necessity could only be obviated by requiring the Butte, Anaconda, & Pacific to either cross the spur of the Montana Union at grade, or construct its road high enough to go overhead or low enough to pass beneath the spurs. To go under them would require the plaintiff to undertake an engineering task so far beyond what is deemed practicable or reasonable that it need not be considered at all. To build its line overhead would compel the Butte, Anaconda, & Pacific to construct its road at more than 20 feet above the crossings, so that, when it passed the ore houses which the two roads go to, the plaintiff's road would be useless, unless after running beyond the ore houses, switch backs were constructed down the hill, by which they could reach the objective points. To follow this plan would require the plaintiff to run into the mountain at points beyond the ore houses at enormous expense of construction, and right of way, probably; and the road, when thus constructed, would be very impracticable to successfully run or operate. If the Butte, Anaconda, & Pacific constructed its line above the Montana Union, it follows that the cuts through which it would have to run would be very much heavier than its present line, and at their objective points it would still be necessary for the two roads to be within a few feet of one another. Another objection to running higher up the hill is that such a route would materially interfere with the operation of the mines on the mountain. In such case shaft houses would be cut through, dumping grounds intersected, and quartz-mining operations seriously interfered with. The route chosen was deemed by far the most feasible and practicable one. Other routes could have been selected according to the engineers' evidence, but any practicable one which might have been chosen would have crossed the main line of the defendants, as well as many of their spurs. The plaintiff by going upon the right of way of the defendants, widened the cuts which defendants had already made in many places, but when we consider that the hill had remained in its natural state until further excavated by the plaintiff, it is plain that no material damage was done to the defendants by the plaintiff by the mere act of excavating as it did. On the contrary, such excavations are a benefit from a mere standpoint of construction. Upon one part of the right of way, lying within the Belle of Butte addition to the city of Butte, the natural physical obstacles to selecting another route were not so great as higher up the hill; but, in order to conform with the grade necessarily chosen to reach the points higher up the hill, the most practicable route was that selected through the Belle of Butte addition, particularly in view of the fact that had they kept off of the right of way of the defendants, the plaintiff would have been compelled to pay for a number of dwelling houses and the lots which they were on, and other parts of their line would have been affected. An experienced engineer, Mr. N. C. Ray, testified in behalf of the defendants that he had, at a time long prior to the institution of this suit, and at a time when there were not

so many houses about the foot of the hill, and not so many mines developed and ore houses built on the mountain, made a survey for another railroad, with a view of finding a practicable route. His proposed line ran on the south or lower side of the present Montana Union track. It was proposed by this route to make most of the crossings of the Montana Union spurs grade crossings. It appeared also that the Ray route, if followed, would necessitate for a long distance a retaining wall to be put up to maintain the slope of the Montana Union roadbed, and keep it from falling over on the proposed roadbed. It would require very heavy fills or trestlework, and withal a scale of a map made when this projected route was first surveyed showed that there were not 200 feet difference in the longitudinal conflict between the Bay route and the present Butte, Anaconda, & Pacific route and the Montana Union right of way, as they appear on the maps. The total length of the present lines is about 3 miles, or a little less. From certain given points there was, between such proposed route and the actual route of the Butte, Anaconda, & Pacific, a difference of $\frac{1}{4}$ of a mile, the greater length being the Ray route. The Ray route necessitated five grade crossings of the main track of the Montana Union, all of which, it satisfactorily appears, were more undesirable than an equal number of crossings would be over spurs. Moreover, the Ray line, if run at the time this litigation first arose, would have encountered buildings, shaft houses, and dwelling houses which were not in existence when the line was first proposed. It would have been vastly more expensive, by reason of the enhanced value of the right of way, and we think it only fair to say that, as the conditions existed at the time that the testimony was taken in this cause, his route was impracticable. Moreover, the Ray route was not projected with a view to serving all of the various ore houses touching plaintiff's and defendant's roads; the only branch appearing on the Ray map being to the High Ore house, and a branch to the Anaconda and the Humboldt.

One of the objections interposed by the defendants to the occupancy of their right of way was the difficulty of throwing out switches or side tracks to the north of the Montana Union, but the engineers swear that if they have distances to centers between tracks of 22 feet, there is room between the two tracks for another track, and if the Butte, Anaconda, & Pacific elevation is so high that the Montana Union cannot get over by crossing at right angles, a spur can be run at any distance in order to attain the proper elevation. Another objection vigorously urged was the difficulty of handling ties where the roads were very close together. But it appears that some of the greatest railroads in the country notably the Pennsylvania system, have three tracks abreast, with centers of the two outside tracks 22½ feet apart. Ties are successfully handled on such roads, and we see no reason why they should not be upon the roads of the contending parties at bar. Besides, the hill, as it stood, was certainly a much greater obstacle to necessary conveniences in this respect than it is as excavated to a level with appellants' roadbed. It

was also urged that the right of way taken by the defendants was necessary in case of future double tracks or sidings, but as these needs are mere future possibilities, not based upon reasonably apparent traffic needs, we do not think the showing is strong enough to merit very serious consideration. A great deal of testimony was also taken upon the inconvenience to the defendants in the operation of their trains at various crossings where the construction of plaintiff's road prevented the defendants from handling as many cars at one time as they could handle if the plaintiff's road were not in their way. Eliminating the consideration of the Gagnon, Buffalo, and Haggin spur crossings, which are referred to hereafter, we are constrained to hold that, as the law expressly gives the right of crossing and intersecting (Const. art. 16, § 5), the interference is only such as is essential to any method of operation of two railroads where they cross and intersect one another on the side of a mountain, where their respective ways are necessarily very limited, and where both may have lawful rights of way to their respective but identical objective points.

It is well to bear in mind, in the application of the principles underlying the law of eminent domain, that the state has an inherent political right, pertaining to sovereignty and founded on what has been expressed to be a "common necessity and interest," to appropriate the property of individuals to great necessities of the whole community where suitable provision is made for compensation. *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. L. 451; Lewis, Em. Dom. § 8. This right says the Constitution of Montana (§ 9, art. 15), "shall never be abridged nor so construed as to prevent the legislative assembly from taking the property and franchises of incorporated companies and subjecting them to public uses, the same as property of individuals." The public welfare is therefore the particular base upon which must be laid the correct application of the doctrine itself. The right of eminent domain may be of the greatest value to the respondent, or to any other corporation which may exercise its privileges, but that is an incident which must be subordinated by the courts to the question of public use, and to the consideration of the benefits to accrue to the public by the construction of the contemplated project. There is, however, a rule of construction, sustained by the great weight of well-considered authority, to the effect that this power to take the property of private citizens or other corporations for public use must be exercised and can be exercised only so far as the authority extends, either in terms expressed by the law itself, or by implication clear and satisfactory. *Re Buffalo*, 88 N. Y. 167; Sutherland, Stat. Constr. § 888; Mills; Em. Dom. § 46. In our opinion the testimony in this case shows that the particular location of respondent's railroad is by far the most practicable which could have been found, and, considering the fact that any other route would have impinged upon the appellants' right of way very nearly as much as the present route does, and that such other route would have affected many mining operations, would have been enormously expensive, and much less

convenient or somewhat less safe, and that it is manifestly to the best interests of the public generally that railroads be constructed throughout the mountains over such routes as will enable the public to receive the best and most expeditious service which can be attained, we think that the taking of the portions of the right of way of appellants' road was necessary to the use, which was public, of the respondent's railroad.

Now, however, having advanced to this point of the case, we are met with the argument that this right of way was already appropriated, and that there was no delegation of power to any corporation under the eminent domain laws of the state to take property already appropriated to a public use, unless as provided by the last clause of the 3d subdivision of § 601, Code Civ. Proc. 1887, "the public use to which it is to be applied is a more necessary public use." We have already concluded that this land was necessary to respondent's use, and the question therefore is, Is respondent precluded from condemning these necessary lands because they have already been condemned for public use by the appellants? If the question were limited merely to this single inquiry (unless some other statute authorized a taking), doubtless, under rules of construction, we should hold that the respondent could not invade the right of way of the appellants. But our legislature has imposed upon the court the additional responsibility of judicially determining whether the use to which the appellants did or would put the particular lands is a more necessary one to the public than that to which they have already been appropriated by the Montana Union Railway. We therefore find the whole proposition resolves itself, under the facts, to this: A part of the right of way of the Montana Union Railway Company has never been used by it for railroad purposes for the several years during which the road has been constructed and in operation, and it is not reasonably requisite for future uses. The Butte, Anaconda, & Pacific Railway Company, in the location of its only really practicable route, desires to take parts of such unused portions of the Montana Union right of way; such portions being necessary for their actual use, and unnecessary for the actual use of the appellants. We have used the word "necessary" advisedly throughout this opinion, and when we say that the route chosen by the Butte, Anaconda, & Pacific requires the taking of the land in question as necessary for public use, we do not mean that there is an absolute necessity of the particular location they seek. But, under the statute, such an absolute necessity is not a prerequisite to the exercise of the law of eminent domain. We are aware of the decision of the supreme court of Pennsylvania (*Sharon R. Co.'s Appeal*, 122 Pa. at page 545), that land once appropriated by a railroad company to public use under the right of eminent domain cannot afterwards be appropriated by another company to the same use, except in the case of "absolute necessity." There one road sought to take part of the yard of another. The facts warranted a finding by the master that the lands sought to be taken were convenient and necessary to enable the plaintiff company to

economically and expeditiously carry on its present and prospective business, and it was upon such a finding that the court held as it did. If the learned judges meant by an absolute necessity to exclude entirely the element of reasonableness in the measure of their words, we are constrained to take a different view of the law in interpreting our statute, and in so doing we find ourselves in thorough accord with three of the justices of the same court in their dissenting opinion, reported in *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511, and decided just two years before the absolute necessity rule was laid down in the case hereinbefore cited. The appeal in the *Pittsburgh Junction Co. Case* in its facts are much closer to the case at bar than *Sharon R. Co.'s Appeal*, *supra*. The Allegheny Valley Railroad Company claimed to own certain property in the city of Pittsburgh, extending from Forty-Third street to Forty-Seventh street, and from an unnamed street on the south to low-water mark on the Allegheny river on the north, all of which property it claimed to have in constant use in connection with the operation of its railroad. The Pittsburgh Junction Company entered upon a part of this property, and commenced to lay ties and rails thereon, and to tear up the track that had been used by plaintiff for many years, and it was alleged that, if the defendant was permitted to go on, it would seriously interfere with and cripple the operation of the plaintiff's road, and would ruin its road-bed, and render it unable to perform the duties imposed upon it towards the public. The defendant contended that it was authorized to locate its road between certain points, and it was obliged to run along the bank of the Allegheny river, and that it had a right to run where it did, and denied that all the property used by the plaintiff in connection with the maintenance and operation of its railroad was used, or that it was all indispensable to plaintiff's use. The supreme court held that the plaintiff road could consider the needs of the future, and that the defendant could not interfere with the present or future use contemplated by the plaintiff, and that no actual encroachments would be allowed. Perhaps the decision turned, in the opinion of the majority of the court, upon the ground that the defendant could, without any trouble besides expense, have constructed its road at another point, as the court says: "We are not embarrassed with the questions that would arise if the defendant company could not build its road without laying its track through the plaintiff's yard." The minority opinion by Judge Trunkley is very brief, and we quote so much of it as is applicable to the facts at bar: "In this case the testimony clearly shows, and it was so found by the master, that there is ample room next the river where the appellant could lay its tracks without material injury to the property of the appellee. The inconvenience to and cost of changes by the appellee could be compensated in damages. The prudent appropriation of a parcel of land extending from low water mark on the river to the hillside by the appellant, the whole of which land is not necessary for the uses of its road, ought not to bar the construction of another railway in the valley by a company subsequently chartered."

11 L. R. A.

About the same time that the Pennsylvania rule of absolute necessity was announced, the supreme court of Alabama, in *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, discussed with a learning which generally characterizes the decisions of that respected court, the right of a railroad company to take by condemnation proceedings part of the property of another railroad company already devoted to a public use, and says: "As a general rule, a corporation to whom the right of eminent domain is delegated, having the right to locate the line of its road between the terminal points, has also the correlative right, to some extent, to select the lands to be taken. But the discretion must be reasonably exercised, so as to cause as little damage as is practicable; and if abuse in the selection is made apparent, the court before whom the proceeding is pending should interfere to control the discretion and prevent the abuse by refusing an order of condemnation. *Re New York C. & H. R. R. Co. v. Metropolitan Gaslight Co.* 63 N. Y. 326; 6 Am. & Eng. Enc. Law, p. 541. According to the rule stated above, the liability of any portion of the right of way of the Mobile & Girard Railroad Company, though not in actual use, to condemnation for the use of the Alabama Midland Railway Company, is subject to the qualification of a necessity therefor. It would be difficult to lay down any specific rule as to the measure of the necessity, of sufficient scope to include all cases. It may be observed generally that necessary, in this connection, does not mean absolute or indispensable necessity, but reasonably requisite and proper for the accomplishment of the end in view under the particular circumstances of the case. On the evidence, there is little room for doubt that the route selected by the Alabama Midland Railway Company to get into the city of Troy, and out to the west, is the most practicable, if not in its proper sense the only practicable, route." *Annisson & C. R. Co. v. Jacksonville, G. & A. R. Co.* 82 Ala. 297.

Again, the absolute necessity rule not only will not consist with the express delegated authority to take the property of a corporation by virtue of eminent domain, but, if we carry it to its logical results, it is this, that where one corporation to which has been granted the right of taking property by eminent domain has exercised that right, it cannot be interfered with, except for crossings and intersections. This is fallacious. In mining districts it leads to exclusion. When a similar question arose in Illinois, Judge Breese, for the court, thus tersely disposed of it: "The argument, when reduced to its proper measure, is, that whilst the land of all other persons and corporations lying on the route of a railroad is subject to the power of eminent domain, that belonging to a railroad company is not thus subject—such land must remain intact. We cannot assent to this proposition." *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174. We find the Federal court for the district of Colorado taking substantially the same view of the necessity rule as the Alabama court did. *Colorado Eastern R. Co. v. Union P. R. Co.* 41 Fed. Rep. 203. The Colorado Eastern Railway Company sought to condemn certain property within the

limits of the city of Denver, claiming that the ground was necessary for its use for various railroad purposes. The defendant contended that the land was not of such necessity to the plaintiff as to justify the taking from defendant, and that the land had already been appropriated by defendant to its own use as a public railroad, and was eminently necessary to its prospective business. Phillips, J., decided that the ground was necessary to the petitioner, because it was the only piece of ground available to petitioner without entirely changing the survey line and undertaking to accomplish its destination by a circuitous route, and that it would not be a wise judicial discretion to compel the petitioner to adopt a road highly inconvenient, longer, and less available. It was plain in that case that another route could have been selected, and, aside from the matter of economy, with very much more ease than could the respondent, in the case at bar, choose another route for the Butte, Anaconda, & Pacific road; but the court evidently refused to follow the absolute necessity rule, and based its decision upon the more just doctrine of the necessity of the petitioner, founded upon the practicability, economy, facilities, and other considerations which should govern the determination of what the necessities may be, always considering the rights of the senior company, yet never forgetting the benefits to the public.

The laws of the state authorized the respondent to locate its railroad. It had a right to select the most feasible route, provided in doing so it did no unnecessary injury to the public or to the appellants. The law does not give to the respondent any predominant right over the appellants, though certainly the line of respondent should be so run as not to materially interfere with the efficiency of the Montana Union. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.* 38 Conn. 196. We find no violence done to these principles. The inconveniences inevitably incident to the crossing of one road by another are not violations of the principles. On the other hand, lands belonging to the Montana Union by way of easement and not actually in use by such company, or not actually necessary for the enjoyment of their franchise, should be upon the same footing as the land of the individual citizen. *Peoria, P. & J. R. Co. v. Peoria & S. R. Co. supra.* It was never contemplated by the Constitution that competition between railroads should not be sanctioned. On the contrary, our construction of the law is that it is the policy of this state, voiced in its Constitution and statutes, to encourage competing railroads, rather than to deter them. If this were not so, why did the legislature expressly include the right to take lands already appropriated by one corporation and devote them to public use where the latter use was a more beneficial one than the former. The mere fact that the easement is held by a corporation, and that another corporation takes it to subserve public use, cannot affect the principle so long as the second taking is for the greater public good. *Northern Railroad v. Concord & C. Railroad*, 27 N. H. 188. Nor can the claim of a superior equity of respondent be urged as a sound argument, based upon the fact that the appellants already have appropriated the prop-

erty for public use. *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill. 338. The Montana Union accepted its easement with the reserved right in the state to retake it whenever the public necessity might require, provided, always, just compensation should be made when it might be retaken. One public corporation cannot take the lands or franchises of another public corporation in actual use by it unless expressly authorized to do so by the legislature. But the lands of such a corporation not in actual use may be taken by another corporation, authorized to take lands for its use *in invitum*, whenever the lands of an individual may be taken, subject to the qualification that there is a necessity therefor. 2 Wood, Railway Law, p. 856. We think this to be the true rule, and that opposing corporations may be limited to the enjoyment of that property in actual use by them, and that which is reasonably necessary for the safe, proper, and convenient management of their business, and the accomplishment of the purposes of their creation. *Mobile & G. R. Co. v. Alabama Midland R. Co. supra.* Upon this proposition we again refer to the opinion of Judge Phillips (*Colorado E. R. Co. v. Union P. R. Co. supra.*), where it was held "that mere priority of acquisition, or even of occupation, gives no exclusive right, except in so far as the condemnation trenches on the greater necessities of the other franchise." As has been stated heretofore in this opinion, the right of way prayed for by the respondent in this case was not occupied, and the mere priority of the acquisition of the Montana Union must give way, under our laws, to the superior uses and greater needs of the Butte, Anaconda, & Pacific Company, as more necessary to the public.

The learned counsel for the appellants have cited us to many cases besides the Pennsylvania ones already referred to. We will notice one or two principal ones. *Barre R. Co. v. Montpelier & W. R. R. Co.* 61 Vt. 1, 4 L. R. A. 785, simply decided that one railroad company to avoid a sharp curve in its road, could not take the land of another company, as condemnation was sought upon the ground of convenience rather than necessity. We find nothing in the case to the effect that if the necessity existed still the ground could not be taken. *Boston & M. Railroad v. Lowell & L. R. Co.* 124 Mass. 368, was decided upon the ground that there must be an express legislative grant to authorize a longitudinal road to be built upon the right of way of another road, and that the statutes did not contemplate such a taking, but the court recognized that cases may arise where the authority to take land already devoted to another railroad may be implied, either by the language of the act or from the application of the act to the subject-matter, as where the railroad could not be laid, in whole or in part, by reasonable intentment, on any other line. We are cited by the appellants to the case of *Illinois C. R. Co. v. Chicago, B. & N. R. Co.* 122 Ill. 478. In that case one railroad sought to run within the right of way of another for a distance of 11 miles. A majority of the court held that one company could not take any part of the right of way of another except at a point of crossing, intersection, or union. The Illinois statute granting

rights of way to railroad companies was substantially like the first portion of fourth subdivision of § 600 of the laws of eminent domain (Mont. Comp. Stat. 1887, p. 216), which is as follows: "All rights of way for any and all purposes mentioned in § 598, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed or intersected by any other right of way, or improvements or structures thereon." It was argued to the court that the provisions of such a statute were broad enough to permit the taking of the right of way of one company by another but it was decided that the taking contemplated was limited to crossings, intersections, or unions, and not taking for another road longitudinally. Two judges dissented from that opinion, and although we do not find it necessary to approve or disapprove of the law of that case, we note that our statute seems to go further than the Illinois law, for with us it is expressly provided, in the latter part of the section just quoted: "They shall also be subject to a limited use in common with the owner thereof when necessary; but such use, crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury." If the property to be subject to limited use in common with the owner means, generally, rights of way, longitudinal as well as other, and the statute does not restrict the application of the pronoun "they" to rights of way immediately connected with crossings and intersections, but enlarges the use to all rights of way when necessary, it would seem by no means unreasonable that conditions like those presented in the case under consideration were in the minds of the legislature at the time that this section became a law, and that of necessity all rights of way shall be subject to a limited use in common with the owner thereof. Perhaps the statute may have meant, by using the word "owner," the owner of the fee, to whom all rights in the property might revert if there were no longer any public use thereof, or it may mean the easement for use of the corporation which had acquired an easement over the property by virtue of the law of eminent domain. We simply refer to this matter in view of the citation made. In the case of *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323, it appears the court did not consider the effect of any statute similar to ours granting the right to take land once appropriated, if, indeed, there was any such statute in existence in California when that decision was rendered in 1863. It was held that there was no right to condemn or appropriate land along or upon a previously located line of another railroad company except for crossing purposes. The court announced that, by its priority of location and appropriation, a railroad company acquired a "vested right to its line of road and the land necessary for its construction, as prescribed by the railroad laws, of which it cannot be divested by another company who seeks to appropriate the land for the same use." We must decline to assent to this proposition as it is stated, without careful qualification and modification.

31 L. R. A.

We cannot agree that the statute which authorizes lands to be appropriated for a more necessary public use means a different public use in all cases. If the legislature had intended that construction to be put upon the statute, instead of carefully restricting the right to a more necessary public use, they could easily have said a different public use. Besides, the view which we have discussed is consonant with those clauses of the Constitution inhibiting discriminations, as already enumerated. If the appellants' construction were adopted, the practical result would be the exclusion, oftentimes, of more than one railroad on mountain sides or in mountain gorges or precipitous gulches, or routes not embraced within the definitions of cañons, defiles, or passes, especially provided for by law. Comp. Stat. 1887, div. 5, § 688, title *Railroad Corporations*. Consider a practical application. A railroad company would take a maximum right of way. Now if the right of eminent domain is not conferred upon the junior company to take lands for a public use unless for a different use, the first railroad would be enabled to prevent any and all competition, because, oftentimes, any route off the right of way of the first would be, if not an absolutely impassable one, so impracticable and so enormously expensive that it must as a reasonably necessary consequence deter another corporation from building at all.

To conclude, we adopt that construction which is more jealously careful of the best interests of the state, and say that, where a railroad company traversing the side of a mountain in a mining section has within its right of way tracts of ground not necessary to the proper, successful, and safe operation of its system of tracks and spurs, and not used by it in connection with any such operations, and in all reasonable probability not necessary for any such future use, if another road seeks the same objective points, and in doing so is obliged to take part of such unused right of way to avoid a considerably more circuitous route, at a different grade, of very much greater cost, and of serious damage to many mining properties in their subterranean and surface operations, and withal would be obliged by the topography of the mountains to parallel the adversary road a part of the way, under such conditions the use of the unused parts of the right of way of the one company by the other is a more necessary public use than that to which such unused portions are already appropriated. Wherefore, the law will permit the taking, regarding the interference as a "tolerable one," to be compensated by damages to be paid. *Re Buffalo*, 68 N. Y. 167. In concluding this opinion the court expresses its acknowledgment for the argument and research of counsel on either side. By their aid we have been greatly assisted to determine between the parties whether plaintiff could invoke the law of eminent domain in this case,—that power in the exercise of which, a modern writer (Randolph) says, is invariably provoked a direct issue between man and the state.

Spurs and Crossings.

Gagnon Spur Crossing. The order of the district court in relation to the Gagnon spur:

is more fully set forth in the statement of facts appended to this opinion. Its use to the defendants was for the delivery of supplies and fuel to the Gagnon mine. It was on the north side of the Montana Union track, while the mine is on the south side of the track and at such a distance from the railroad that supplies are hauled by wagon from the spur to the mine. Where the plaintiff's track crosses the Gagnon spur it is at the same level as the defendants' track, but the spur descends from the time it leaves the Montana Union track and the grade of the plaintiff's track at the point of crossing is considerably above the spur grade. In view of the fact that it would be plainly for the greater convenience of the appellant company to have the spur on the south side of its main track, the order of the district court in relation to this spur is modified, and unless plaintiff and defendants otherwise agree, the order of the district court will be that the Butte, Anaconda, & Pacific Railway Company, at its expense, construct a spur, or rebuild the one already constructed upon the south side of the Montana Union main track; and, further, that the said Butte, Anaconda, & Pacific Company at its own expense construct and provide suitable and convenient approaches to said spur for teams and wagons, having due regard to the nature and facilities of transportation between the Gagnon mine and the Montana Union Company.

Buffalo Spur Crossing. There is a slight difference of elevation of grades of the two roads at the Buffalo spur. The only practicable way of crossing at the point marked F on the map was to raise the grade of the track of the respondent from the switch of the main track as far as the crossing by the Butte, Anaconda, & Pacific. No change was to be made on the main line, and the grade of the spur is to be the same as formerly from the crossing to the end of the spur. We think that the respondent should construct this crossing in the manner proposed, and at their expense entirely, unless it is agreed otherwise between the parties themselves.

Haggin Spur Crossing. The civil engineers take very different views of the feasibility of this crossing. A short distance from the crossing the Butte, Anaconda, & Pacific Company found it necessary to construct a reverse grade leading to the Montana Union track. This made a "hump," as railroad men call it,—that is, an uphill and a downhill grade,—on the Butte,

Anaconda, & Pacific road a very short distance from the crossing. This, of course, was necessary to enable the Butte, Anaconda, & Pacific to cross without disturbing the grade of the Montana Union track. The principal objection to it by the Montana Union witnesses was that it was impracticable and unsafe because of passing over the hump, and, considering the general grade of the railroad, the Butte, Anaconda, & Pacific trains would break in two, and thus, by wreckage and other mishaps, the Montana Union tracks would be obstructed and their traffic materially interfered with. It is difficult for us to say, in the radical disagreements of skilled engineers, what the probable effect of this hump may be, but it occurs to us that, as its dangerous tendencies are all primarily towards accident to the Butte, Anaconda, & Pacific, and only indirectly to the Montana Union, the risk, if any, and the scientific error, if any, will fall much more heavily upon the respondent than upon the appellants, and that therefore it is proper for us to affirm the order of the district court.

We see no error in referring the question of damages for crossings to the commissioners, as was done by the order of the court. The statute covers the matter. Comp. Stat. 1887, p. 218, § 607. The last objection of the appellants is to the order of the court giving the power and authority to the Butte, Anaconda, & Pacific Company alone to employ and discharge watchmen at the crossings, for whose wages the plaintiff and defendants are jointly responsible. In view of the fact that the respondent company invokes the right to make these several crossings, it would seem quite just that the expenses of a watchman to guard the Haggin Spur crossing and others, if any, where the district court ordered watchmen, should be borne by the respondent alone. We see no objection to permitting the watchmen to be chosen by the Butte, Anaconda, & Pacific Company, and it will be directed by this court that the order of the district court shall be modified so as to impose the expenses of watchmen entirely upon the respondent corporation.

Let the judgment and order of the district court be remanded for modification in conformity with the views expressed in this opinion, and when so modified it will stand as affirmed. *Modified and affirmed.*

Pemberton, Ch. J., and DeWitt, J., concur.

MARYLAND SUPREME COURT OF APPEALS.

BALTIMORE & POTOMAC RAILROAD COMPANY, *Appt.*,

v.

William T. SWANN *et al.*

(81 Md. 400.)

1. One who purchases a ticket for a regular passenger train has a right to be

NOTE.—*Duty of railroad carrier in respect to furnishing proper cars for passengers.*

The question here considered embraces the ap-
31 L. R. A.

conveyed in a passenger coach instead of a baggage car, unless the latter is as safe a vehicle as can be procured by the utmost care and diligence.

2. Reasonable effort at least to make a baggage car safe and convenient for a passenger is necessary when this is the only vehicle that can be furnished for passengers in a regular passenger train.

propriateness of the carriage rather than its safety or freedom from defects.

The principles which govern this question go-

3. **A woman who takes passage in a baggage car** when no passenger cars are provided for a passenger train, and pressing domestic duties call for her immediate transportation, does not thereby renounce her right as a passenger to safety and protection.
4. **Injury to a passenger on a train** is prima facie evidence of the carrier's negligence.
5. **An instruction requested by a carrier**, comparing the injuries received by a passenger on a baggage car and those to which a passenger would have been liable in a regular passenger coach, is properly refused.

(June 18, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Charles County in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to

have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bernard Carter, L. Allison Wilmer, and Samuel Cox, Jr., for appellant.

Messrs. Adrian Posey and John H. Mitchell for appellees.

Bryan, J., delivered the opinion of the court:

William T. Swann and Elizabeth, his wife brought suit against the Baltimore & Potomac Railroad Company for bodily injuries sustained by the wife. Verdict and judgment being rendered in their favor, the defendant appealed.

The female plaintiff, about midday on the 11th day of May, 1893, accompanied by her child ten months old, traveled on the mixed

back to the stage-coach days, and seem to have been regarded as so well settled then that the modern decisions rather recite or refer to the law than define or establish it.

In *Caveny v. Neely*, 43 S. C. 70, the court in speaking of the proprietor of a stage coach says that a carrier of passengers for hire is required to furnish suitable vehicles.

In *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, the court, after a thorough examination of the question with reference to the liability of the proprietor of a stage coach says carriers of passengers are bound to use the utmost care and diligence in the providing of sufficient and suitable coaches.

The owner of a stage coach must have a coach and harness of sufficient strength and properly made. *Crofts v. Waterhouse*, 3 Bing. 319.

In *Curtis v. Drinkwater*, 2 Barn. & Ad. 169, the court, in speaking of the liability of the proprietor of a stage coach for injuries to a passenger, held that the malconstruction of a coach would be negligence in the defendant.

The rule as stated in those cases has been generally adopted and applied in cases of railroad carriers.

The obligation imposed upon a carrier by its contract with a passenger is that its apparatus is suitable, sufficient, and as safe as care and skill can make it. *Nashville & D. R. Co. v. Jones*, 9 Heisk. 27.

In *Shoemaker v. Kingsbury*, 79 U. S. 12 Wall. 369, 20 L. ed. 432, the court in contrasting the liability of persons engaged in the construction of a road and who undertake to carry a person as a private carrier, and that of a passenger carrier, says that the latter is bound to see that "the cars are strong and safe for the accommodation of passengers."

A carrier of passengers for hire must provide cars or vehicles adequate, that is sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with greatest strictness. For the slightest negligence or fault in this regard from which injury results to a passenger the carrier is liable in damages. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141.

In *Treadwell v. Whittier*, 80 Cal. 574, 5 L. R. A. 498, the court in considering the responsibility for the safety of an elevator compares it to that of a passenger carrier, and states that such carrier is under obligation to use the utmost care and diligence in providing safe, suitable, and sufficient vehicles for the conveyance of passengers. That they are bound to adopt the most approved methods of construction in known use in the business. And that they must keep pace with science, art, and modern improvement in supplying safe obtainable vehicles for their use.

31 L. R. A.

In case of common carriers of passengers the highest degree of care which a reasonable man would use is required, and this rule applies to the character of the vehicle. *Derwort v. Loomer*, 21 Conn. 245.

As to the selection of suitable cars, both as to the manner of construction and materials used, the carrier of passengers is obligated to use the highest reasonable and practicable skill, care, and diligence. *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9.

The court will not say as matter of law that a railroad company has performed its whole duty as a carrier of passengers when it has furnished for their carriage a car which will run with safety upon the track but which will not resist the crash when thrown from the track. *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462.

Where a common box car had been substituted for the regular caboose on a mixed train which carried passengers, the court held that it was the bounden duty of the company to furnish the passengers a reasonably well equipped car to ride in, and that if by an accident the regular caboose usually provided for passengers could not be used and the improvised box car used on that occasion was more dangerous to the passenger than the caboose, the degree of care on the part of the company was thereby increased. *Missouri P. R. Co. v. Holcomb*, 44 Kan. 332.

In speaking of a street-car company the court, in *Hadenkamp v. Second Ave. R. Co.* 1 Sweeney, 490, said: "When a common carrier of passengers accepts a person as a passenger, and receives from such person the full established fare, he is bound to furnish such passenger with a safe and comfortable vehicle and a safe and comfortable place or position in or on it."

A railroad company owes the duty to its passengers of furnishing comfortable and safe cars. *Gonzales v. New York & H. R. Co.* 39 How. Pr. 47.

A carrier of passengers is bound to provide a proper vehicle, and if bridges or obstructions are placed so near the track as to injure limbs of passengers which are slightly protruded from the window, a car is not safe which does not have bars at the windows to prevent such protrusion. *New Jersey R. Co. v. Kennard*, 21 Pa. 203.

But that case was overruled in *Pittsburg & C. R. Co. v. McIlurg*, 56 Pa. 294.

But the court in the later case still recognized the rule that the providing of a safe and convenient car is one of the duties which the company owes to its passengers.

Wheels too narrow for the gauge of the road are not properly used upon a vehicle for the carriage of passengers. *Holyoke v. Grand Trunk Railway*, 48 N. H. 541.

train of the defendant, composed of passenger coaches, and freight cars, from Pope's Creek to Cox's station, intending to return on the evening of the same day. She purchased a ticket at Cox's station for the purpose of taking the passenger train which would in ordinary course leave that station about 7 o'clock P. M. The passenger coaches were "switched off" at Cox's, and only a baggage car was run from that station on that evening to Pope's Creek. She entered that car, and was conveyed to Pope's Creek. The evidence in behalf of the plaintiffs tended to show that the accommodations were very uncomfortable and unsuitable for travelers; and that, in consequence of the absence of all conveniences, she "was shaken up, and knocked about from side to side, and slammed against the side of the car several times; and that immediately after one of these slams, when she was struck in her

right side by the side of the car, she experienced a pain there, which was followed by a pain in her back." The evidence also tended to show that the woman was pregnant, and that the injuries which she received caused a miscarriage, and that she had suffered pains in her back and side almost constantly for six months. The evidence for the defendant tended to show that she was not thrown about or jostled. It was further testified that the cars could not be shifted at Pope's Creek without special danger, unless a drag rope was used, and that the drag rope used for this purpose had been broken in two on the evening of the 10th, having been before that time weakened by being run over by cars; that the conductor had telegraphed for one on the morning of the 9th, and thereafter, on reaching Baltimore, had applied at the office of the company, but that none was received until the morning

So, a recovery may be had against a railroad for injuries resulting from a derailment of the train caused by attempting to run in the train cars with a gauge wider than the gauge of the track. *East Line & R. R. Co. v. Smith*, 65 Tex. 167.

If a car is so defective and dangerous in its construction as to make its use gross negligence the company will be liable for injuries caused by such defect. *Gulf, W. T. & P. R. Co. v. Ryan*, 69 Tex. 665.

The obligation of the carrier requires it, by the exercise of the greatest care and precaution against the occurrence of accidents, to provide cars for the safe transportation of all conditions of people entitled to be carried. The old and the young are alike entitled to be carried safely. While a car may be safe for an adult person, it may not be safe for the conveyance of children of tender years. *Metropolitan R. Co. v. Falvey*, 23 Wash. L. Rep. 53.

Duty to adopt improvements.

The rule requiring suitable cars requires reasonable conformity to the advancing state of the art.

It is the imperative duty of railroad companies to adopt and use all improvements in cars calculated to insure safety to employees and passengers, and to discard all such unsafe and dangerous cars or parts thereof as may be dangerous to use. *St. Louis & S. E. R. Co. v. Valirius*, 56 Ind. 511.

Railroads must keep pace with science and art and modern improvement in their application to the carriage of passengers, but they are not responsible for the unknown as well as the known. *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 561.

A railroad company undertakes that its carriages are road worthy and properly constructed and furnished according to the present state of the art. *Nashville & C. R. Co. v. Messino*, 1 Sneed, 220.

If a safety beam, to prevent accidents upon the breaking of axles upon passenger coaches, is an article of such established utility and so extensively known that it ought to have been used on the cars of a particular carrier, it may be found negligent in not having adopted it. *Hegeman v. Western R. Corp.*, 16 Barb. 353.

In *Caldwell v. New Jersey S. B. Co.*, 47 N. Y. 282, the court in considering the case of an accident on a steamboat says that the carrier of passengers in conveyances and vehicles propelled by steam is bound to use every precaution which human skill, care, and foresight can provide in adopting new improvements to secure additional precaution.

Some of the courts are inclined to make a distinction between roads of small business and those with large business and correspondingly large in-
31 L. R. A.

comes. Thus it has been held that all carriers are not required to adopt like expensive provisions for the safety of passengers. A railway constructed through a thinly settled country moving but little freight and but few passengers and running its trains at slow rates of speed cannot be expected to be equipped and operated in the same manner as is necessary in the case of a railway running through a densely populated territory and moving a large volume of traffic. The line of the railway may be short and the business done by it so small as to make it unreasonable to require it to run separate trains for freight and passengers. But if the business is sufficiently large and profitable to warrant it, and the safety of the passengers is endangered or diminished by having the passenger coaches mixed in the same train with freight cars, it would clearly be the duty of the railroad company to run separate trains. *Arkansas Midland Railroad v. Canman*, 52 Ark. 517.

Passenger carriers are bound to adopt such apparatus and appliances as science and skill shall from time to time make known and experience prove to be valuable in a considerable degree in diminishing the dangers of railroad travel, provided such improvements can be procured at an expense not greater than ought to be incurred to obtain them. But it will be unreasonable to require companies of small means and business to provide every appliance or machine that may be found to be valuable in diminishing dangers of railroad travel and which may come into use on the Great Trunk lines. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208.

But a railroad company is bound to provide rolling stock suited to the nature and extent of business which it assumes to do. And the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition or the amount of its earnings. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

Rule as affected by character of train.

A passenger on a freight train cannot require all the conveniences and safeguards against danger that he may demand upon trains devoted to passenger service. But he has a right to demand such safeguards and conveniences as are usually found upon such trains. *Chicago & A. R. Co. v. Arnol*, 144 Ill. 261, 19 L. R. A. 313.

If a passenger chooses to go by freight train and ride in the caboose, the company fulfils its duty if it has the caboose as safe as such vehicles usually are. *Chicago, B. & A. R. Co. v. Hazzard*, 26 Ill. 373.

H. P. F.

of the 12th. The female plaintiff was a laboring woman, being in the habit of washing, cooking, and working in the field. She lived about $1\frac{1}{2}$ miles from Pope's Creek, and at the time of these occurrences she had three children. She went to Cox's on a visit to the family of Thompson, a section hand on the railroad, who lived about $\frac{1}{2}$ mile from the station. There was some conflict of evidence in reference to the cause of the alleged miscarriage; the defendant's testimony supporting the theory that it was more likely to have been caused by the woman's exertions and the excitement consequent upon them before she entered the cars, and after she left them, than by any injuries received while traveling in them.

When the female plaintiff purchased a ticket at Cox's station, she acquired a contract right to be conveyed to Pope's Creek in one of the defendant's passenger coaches. If we assume that causes beyond the defendant's control prevented the use of a passenger coach on that occasion, the obligation still remained to carry the passenger safely, so far as it could be done by the exercise of the highest degree of care and skill which was consistent with the nature of the undertaking. If the baggage car was as safe a vehicle of transportation for passengers as the defendant could procure by the utmost care and diligence, it fulfilled its duty in this respect. There is no evidence to sustain such an hypothesis, and probably it is contrary to the usual experience of travelers. And yet, as the defendant substituted it for the passenger coach which it was bound by its contract to furnish, the least which could be demanded of it would be some reasonable effort to make it safe and convenient for a passenger. If the passenger was injured in the defendant's cars in the course of her journey, and in consequence of some fault or defect in the vehicle of transportation, the defendant is clearly liable for the injury, unless it can show the utmost care and diligence on its part; and we think that these are the proper inquiries for the jury in this case. It cannot be alleged against the passenger as fault or negligence that she took passage in the baggage car. She had a right to be conveyed by the defendant, and she was constrained to travel in this way or not be conveyed at all. Domestic duties of the most pressing kind required that she should return that night to Pope's Creek. It would be unreasonable to hold that she had made a voluntary choice, whereby she had in this way renounced the right to safety and protection which she had purchased.

The court granted six prayers in behalf of the plaintiff. Exception was taken to only three of them. They are as follows: (1) If the jury believe from the evidence that the defendant was the owner of the railroad mentioned in the declaration, and sold the plaintiff Elizabeth a ticket entitling her to travel on said railroad, and received and accepted her as a passenger to be carried from Cox to Pope's Creek, on the line of said railroad, then defendant was bound to exercise on said trip, for plaintiff's safety, the highest degree of care and skill which was consistent with the nature of its undertaking. (2) If the jury believe from the evidence that the plaintiff Elizabeth

Swann was injured whilst a passenger on a train of the defendant, the fact of such injury is prima facie evidence of negligence on the part of the defendant, throwing upon it the onus of rebutting the presumption, by showing there was no negligence on its part. (3) That, in order to rebut the presumption of negligence on its part, the defendant must show that the injury sustained by said plaintiff while traveling as a passenger on its train, if the jury find that she was so injured, could not have been prevented by the utmost care and diligence, not only in the running and management of the train, but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers.

These prayers are taken almost verbatim from opinions of this court. *Baltimore & O. R. Co. v. Worthington*, 21 Md. 283; *Baltimore & O. R. Co. v. State, Hauer*, 60 Md. 462; *Heves v. Philadelphia, W. & B. R. Co.* 76 Md. 159.

The three prayers of the defendant which seek to excuse the failure to use a passenger car because of the want of a drag rope do not require the jury to find that the defendant made a diligent use of the means at its command for the purpose of enabling it to use the car. The first prayer puts it to the jury to find that the drag rope was broken on the evening of May the 10th, and that no other was obtained until the morning of May the 12th; but they are not by the prayer required to find that the defendant made a diligent effort to obtain the rope, or that it made any efforts to supply other means of running the car to Pope's Creek; and none of these prayers required the jury to find that the baggage car was a safe conveyance for passengers. The sixth and seventh prayers deny the plaintiff's right to recover if the miscarriage was caused in part by the action of the female plaintiff in making physical exertions and undergoing excitement before she entered the baggage car and after she left it. But, even if there could be no recovery for the miscarriage, the pain inflicted and injury sustained in the car would support a verdict, if found by the jury. The same remark will apply to the ninth prayer, which denies a recovery unless the miscarriage was caused directly and exclusively by injuries sustained on the trip on account of the negligence of the defendant. The eighth prayer makes no reference to the question of the safety of the baggage car as a conveyance for passengers. The tenth prayer institutes a comparison between the injuries complained of and those to which the female plaintiff would have been liable if seated in a regular passenger coach. It is altogether conjectural what she might have suffered in a regular passenger coach, and such a conjecture cannot be made a basis for the verdict of a jury. The ground of recovery is the absence of the proper degree of care and diligence on the part of the defendant, provided it is shown to the satisfaction of the jury, and not what might have occurred elsewhere. The eleventh and twelfth prayers present the question of contributory negligence. There is no evidence from which any negligence on the part of the female plaintiff can be inferred, ex-

cept such as tends to show that the miscarriage may have been caused in some measure by the fatigue which she underwent before she reached the cars at Cox's, and after she left them at Pope's Creek. We have already stated our views on this question. But we may further say that the plaintiff's fourth

prayer, granted by the court confines the recovery to the injuries sustained by the female plaintiff while "making said journey." All the defendant's prayers which we have been considering were rejected by the court, and we approve of the ruling.

Judgment affirmed.

ARKANSAS SUPREME COURT.

D. W. WALLACE, *Appl.*,

v.

James D. DRIVER.

(.....Ark.....)

An island formed in a navigable river where land had been washed away years before does not belong to the owner of the remainder of the tract, unless the washing away was sudden and perceptible and the limits of the change or channel of banks can be determined, or unless the formation of the island is made by accretions beginning at the water line of his remaining land.

(*Bunn, Ch. J., dissents.*)

(January 4, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Mississippi County in favor of plaintiffs in an action brought to recover possession of certain real estate. *Reversed.*

Statement by **Battle, J.:**

The N. W. fractional $\frac{1}{4}$ section 30, in township 13 N., and range 11 E., Mississippi county, state of Arkansas, was entered from the United States government by Harrison Phillips, in November, 1848, and contained at that time 154 acres, which land was afterwards conveyed by Phillips to the plaintiff, Driver, and James H. Edrington; and the said Edrington conveyed his undivided interest to the said Driver, who now claims to be the sole owner of said N. W. fractional $\frac{1}{4}$ section. Subsequent to the entry of said land from the government, a large portion thereof caved into the Mississippi river, and where said caving took place became a portion of the bed of the river, and so remained for some twenty-five years, after which an island was formed out in front of the main shore, and of the residue of the $\frac{1}{4}$ section not washed away, within the metes and bounds of said $\frac{1}{4}$ section as originally entered from the government, and in the place where was a portion of said $\frac{1}{4}$ section before the same washed away. Between the island so formed and the main shore there is a chute through which the water flows when the Mississippi river is high; but such chute, during low water, is dry, with the exception of a few water holes, and is not now a part of the bed of the river, having been filled by the deposit of the river. The defendant, D. W. Wallace, is now in possession of 35

acres of the land made by the formation of said island within the original boundaries of said fractional $\frac{1}{4}$ section at the time of its entry from the government. The jury found that the defendant was in the unlawful possession of 85 acres of the land sued for, and the court rendered judgment accordingly.

Mr. Charles P. Harnwell for appellant.
Messrs. S. S. Semmes and G. W. Thomson, for appellee:

If a man owns lands that are washed away or that are submerged, and these lands are made back again or are uncovered, they become his property, provided he can locate them, and provided they have not become accretion to some other riparian owner.

Minton v. Steele, 126 Mo. 181; *Buse v. Russell*, 86 Mo. 209; *Murphy v. Norton*, 61 How. Pr. 197.

Battle, J., delivered the opinion of the court:

The water boundaries of land on running streams, wherever they may be in the beginning, whether the thread of the stream, the water's edge, ordinary high or low water mark, always remains the same when they change gradually, as by the process of accretion or attrition. They gradually shift as the water recedes or encroaches, and the area of the riparian owner's possession varies as they change by this process. Whatever constituted them at first still constitutes them so long as it remains permanent or shifts gradually and imperceptibly. Hence lands formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. This rule has been vindicated by some one on the principle "that he who sustains the burden of losses and of repairs, imposed by the contiguity of water, ought to receive whatever benefits they may bring by accretion. By others it is derived from the principle of public policy that it is the interest of the community that all land should have an owner, and most convenient that insensible additions to the shore should follow the title to the shore itself." *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 717, 9 L. ed. 573, 594; *Jefferts v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186; *Gould, Waters*, § 155; 2 Bl. Com. 262.

In order to constitute an accretion, it is not

NOTE. See, with this case, those of *Cooley v. Golden* (Mo.) 21 L. R. A. 300, and *Crandall v. Allen* (Mo.) 22 L. R. A. 591.

For note as to division of water front or alluvion flats, see *Northern Pine Land Co. v. Bigelow* (Wis.) 21 L. R. A. 776.

necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that it is an addition to riparian land, "gradually and imperceptibly made by the water to which the land is contiguous;" but the true test "as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. *King v. Lord Yarborough*, 3 Barn. & C. 91, is a good illustration. In that case the court held that 450 acres of land formed by the gradual deposit of ooze, sand, and soil from the sea belonged to the owner of the adjoining land as an accretion. Other cases to the same effect may be cited. *Jefferis v. East Omaha Land Co.* 184 U. S. 178, 83 L. ed. 872.

What has been said of accretions is equally true of the loss suffered from the gradual encroachments of running streams. As their beds change imperceptibly, by the gradual washing away of the banks, the boundary lines of contiguous lands change with them; and the owner, having, in the beginning, acquired no fixed freehold in them, but one that shifted with the changes, is limited and confined in the extent of his rights and possession by the new boundaries. *St. Louis v. Rutz*, 188 U. S. 226, 245, 84 L. ed. 941, 949; *Canaden & A. Lanu Co. v. Lippincott*, 45 N. J. L. 405; *Welles v. Bailey*, 55 Conn. 292; *Steele v. Sanchez*, 72 Iowa, 65; *Niehau v. Shepherd*, 26 Ohio St. 40; *Wilson v. Shireley*, 11 Or. 215; *Dunlap v. Stetson*, 4 Mason, 349, Fed. Cas. No. 4, 164; *Re Hull & Selby Railway*, 5 Mees. & W. 327; *Scrutton v. Brown*, 4 Barn. & C. 485; *Foster v. Wright*, L. R. 4 C. P. Div. 438; Gould, Waters, 2d ed. § 155.

In *Welles v. Bailey*, 55 Conn. 292, in speaking of rights acquired by changes gradually made by rivers, it is said: "If a particular tract was entirely cut off from a river by an intervening tract, and that intervening tract should be gradually washed away until the remoter tract was reached by the river, the latter tract would become riparian as much as if it had been originally such. This follows necessarily from the ordinary application of the principle. All original lines submerged by the river have ceased to exist; the river is itself a natural boundary, and every changing condition of the river in relation to adjoining lands is treated as a natural relation and is not affected in any manner by the relations of the river and the land at any former period. If after washing away the intervening lot it should encroach upon the remoter lot, and should then begin to change its movement in the other direction, gradually restoring what it had taken from the remoter lot, and finally all that it had taken from the intervening lot, the whole by the law of accretion would belong to the remoter but now proximate lot. Having become riparian it has all riparian rights. This general principle is recognized by all the text writers and by numerous decisions of the English and American courts. The river boundary is treated in all cases as a natural boundary and the rights of the parties as changing with the change of its bed."

In *Foster v. Wright*, L. R. 4 C. P. Div. 438, "the plaintiff was lord of a manor held under

grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river [Lune] running through it. Some manor land on one side of, and near but not adjoining the river, was enfranchised and became the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there." The court held "that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on the defendant's land." Judge Lindley said: "Supposing, therefore, that the plaintiff's right to fish on the Lune depends on his ownership of the soil of the river bed, I am of the opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title."

In *Cox v. Arnold* (Mo.) 81 S. W. 592 (which was decided by the supreme court of Missouri), it appeared that "a portion of a fractional section bordering on a navigable stream was washed away by the current," and that "an accretion formed from an island in the river, and extended within the boundaries of the section, but did not connect with the new shore line." The court held that the owner of the section had no title to any part of the accretion. Justice Burgess, in delivering the opinion of the court, said: "It is well settled in this state, by an unbroken line of decisions, that a riparian proprietor on a navigable stream only owns to the water's edge. . . . When a riparian owner becomes the owner of land, he acquires, as incident thereto, without prior, whatever may be added to it by gradual and imperceptible accretion, while, at the same time, he assumes the risk of losing it all by its being gradually washed away by the waters of the river; but his line always remains in the water's edge, wherever that may be. His line expands as the waters recede and accretions form to his land, and contracts as the waters encroach upon and wash away his land. The only way that plaintiff could have regained what land he had lost by its being washed away, and its *situs* submerged by the waters of the river, was by gradual and imperceptible accretion, beginning at his line at the water's edge. In this way, he would become the owner, and entitled to the possession, of all land accreted to his original tract, or that portion of it which had not been washed away. . . . Plaintiff's line being at the water's edge, he was not entitled to recover in this action, notwithstanding the land began to reform within the boundaries of the original sur

vey of said quarter section, at a place where the land was, at the time of said survey, uncovered by water; and it makes no difference that defendant may not be the legal owner, or that he may be in its wrongful possession."

In *St. Louis, I. M. & S. R. Co. v. Ramoey*, 58 Ark. 314, 8 L. R. A. 559, it was held by this court that "a riparian owner upon a navigable stream, deriving title from the United States" to lands in this state, "takes only to high-water mark, and not to the middle of the stream, the title to the bed of the stream being in the state;" and that this high-water mark "is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil." According to the cases we have cited, the high-water mark, as thus defined, being the boundary line of the riparian owner in this state, it is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party. In that case the gradual and imperceptible addition, which is necessary to constitute an accretion, would be lacking.

The reverse of what has been said of accretions and erosions is true of avulsions. Where a stream which forms the boundary line of lands from any cause suddenly abandons its old, and seeks a new, bed, or suddenly and perceptibly washes away its banks, such change of channel or banks (if its limits can be determined) works no change of boundary. The owner still holds his title to the submerged land. If an island or dry land afterwards forms upon it, the same belongs to him. *St. Louis v. Rutz*, 138 U. S. 226, 34 L. ed. 941; Gould, Waters, 2d ed. §§ 158, 159, and cases cited.

The burden in this case was on the plaintiff to prove that he was entitled to the land in controversy. The evidence showed that it was entered in November, 1848, and contained at that time 154 acres, and after that a large portion of it "caved" into the Mississippi river. There was no satisfactory evidence as to how large this portion was in excess of 35 acres, or any evidence as to how long it was in caving, or whether it caved gradually and imperceptibly, or *vice versa*, or that the land in controversy was added to his own by accretion, beginning at his line, at high-water mark. He failed to sustain his claim.

The instructions given to the jury were fatally defective. It is unnecessary to point out the defects, as we have already said what the law governing the case is.

Reversed and remanded.

Bunn, Ch. J., dissenting:

I do not deem it necessary to reiterate the familiar rules of the common law governing the rights of riparian owners, and the prerogatives of the Crown and sovereign power, as to tide-water streams, and the lands beneath and bordering thereon. The great difficulty with Americans has always been not to understand these rules as applied to the condition of things existing in England, but rather to make them applicable in any reasonable sense, under the 31 L. R. A.

circumstances which surround us, especially in the newer or western and southwestern states of the Union. Our system of surveying, admeasurement, and conveyance of lands, the great magnitude of our lakes and rivers, and our dual form of government, all conspire together to create difficulties in the way at every step in our efforts to conform to the principles of the common law. That a riparian owner, as such, under the common law, owns to the middle thread of the fresh-water river on his border, and to the upper margin or high-tide mark of the tide-water river, which forms his boundary, and in the latter case is subjected to the results of erosion, and is entitled to all gains by accretion and reliction, are truisms that all are expected to be familiar with; but how far we may be able to adapt these venerable rules to our changed conditions is not without the greatest difficulty in any given case. It is altogether probable that a case just like the one we have under consideration could never have arisen under the strict common-law system. In the first place, in England rivers and other bodies of water were the natural boundaries of lands, and that idea entered into the description contained in all their conveyances. To speak of one's land being bounded on the north or south, east or west, by the Thames, the English would readily understand the nature of the landed estate sought to be described. If it was above tide-water, they would readily know that the owner owned to the middle thread of the stream, and his peculiar boundary was therefore as varying and as variable as the stream itself. On the other hand, if the domain lay below the point where the stream was affected by the ebb and flow of the tide, they understood readily that the riparian owner was subjected to loss by erosion, and at the same time was entitled to whatever might be added to his land by accretion or reliction; and this was so, not on account of the rule of the gambler's justice, where the possibility of gain was one's due for the mere risk of loss, which some have attempted to assign as a reason for the rule, nor, as others say, because public policy demands that there shall be no unappropriated public lands, but because the boundary, being the bank of the river, will be the same, in name, 100 years hence, though that bank has moved very far laterally the one way or the other. It will still be the bank of the river, though the owner's domain has diminished in size by erosion, a fourth or a half, or has increased, by accretion, to the same extent. At the end of the century, from the date of the grant, the sheriff, armed with his writ of ouster, would still be enabled to find the land, so far as the river front is concerned, because he finds the line of the high tide, and that is the "metes and bounds," although it has actually changed much since the original grant was made. It is still written in that same language and form in the deed. Now, our system is imaginary, parallel, and perpendicular lines, forming parallelograms, and the fractions of such, as occasion may make necessary. But they are fixed lines, permanently located, and 100 years from the date of the grant will include exactly and definitely the same portion of the earth's surface, although that may then be wholly or

in part in the river, whereas it was all dry land at first; and the sheriff, armed with his writ, wherein the description, as in the other case, is in the exact language first written, locates the land by it and not by any extraneous evidence whatever, though he find the lines on the water instead of the dry land. This is the portion of the earth's surface sold to the individual by the Federal government, which, in its acts of cession to the state, reserved to itself the title to all lands, and the absolute and unconditional right to dispose of them, with the fair understanding that its grants to the individual must never be molested or interfered with, whatever may be the assumed rights of the state as against all others, even as against the Federal government.

Outside the boundary lines within which the land belongs to the individual by Federal grant, the state disposes by whatever rule or law she may choose to make on the subject, but she cannot curtail the right of the owner by any arbitrary rule, although it may have the sanction of judicial accommodation of the common-law principle to the circumstances of the case. It must be borne in mind that, when the land involved was purchased from the government, the common law was in force in all its plenitude in both Federal and state governments. Even the modified rule announced in the case of *The Genesee Chief*, 58 U. S. 12 How. 443, 13 L. ed. 1058, had not then been announced; but the old English rule was still in force, and the purchaser purchased with that rule as a part of his contract. That rule regulated the riparian owners on the Mississippi river as owning to the middle thread, it not being a tide-water stream. Such was the common law, and Arkansas had adopted the common law, and has never adopted any other rule unto this day, unless we are to regard the court-made law of legal decisions of recent date as a change of the rule. There is not a word in our statutes going to show us what the state has accepted as her interest in the bed of the Mississippi, or any land or island that may form therein. This court may say that the common-law rules are not applicable in our case, but that does not mean that the court can arbitrarily make other rules that will be applicable, for it is the right of property we are now dealing with. The decision of the court in the case at bar is based mainly upon *Cox v. Arnold* (Mo.) 31 S. W. 592, and *Naylor v. Cox*, 114 Mo. 232, both Missouri cases, in which the suggestion of the point I have endeavored to make was passed over by a mere repetition of the common-law rule, as if the very point was not the inapplicability of the common-law rule. Besides, the description there was very nearly as a common-law description of riparian lands. In *St. Louis, I. M. & S. R. Co. v. Ramsey*, 58 Ark. 314, 8 L. R. A. 559, the point was neither raised nor discussed. The sand bar or gravel bed in that case had not as yet risen high enough to be denominated "land," and was held still to be the property of the state, as the bed of the river over which steamboats plied in trade and commerce. The farcical part of that case was that Ramsey would have gained title to something he never pretended to buy had he not been in such a hurry to bring his suit, for, presumably, the bar would have

raised its head out of the water after awhile. In *Cox v. Arnold*, *supra*, Chief Justice Brace dissented; and, while he did not file a written opinion, we may conclude that his dissent was on similar grounds as his dissenting opinion in another case. Gould, in his work on Waters (page 813, § 155), says: "But when the line along the shore is clearly and rigidly fixed by a deed or survey, it is not so certain that it will afterwards be changed because of accretions [and of its erosions], although, as a general rule, the right to alluvion passes as a riparian right;" referring to *Fulton v. Frandoliq*, 63 Tex. 380; *James v. Howell*, 41 Ohio St. 606, and *Burns v. O'Brien*, 42 La. Ann. 527, and to which may be added *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270; *Minton v. Steele*, 135 Mo. 181; *Butler v. Grand Rapids & I. R. Co.* 85 Mich. 246, and authorities there cited. In the New York case cited, the court said: "In an action of ejectment, plaintiff claimed under a deed conveying the premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.' Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water in the pond receding, although the gradual and imperceptible result of natural causes." It seems that this pond was a river dammed up, and that to such ponds the courts in New York apply the common-law rules. In *Mulry v. Norton*, 100 N. Y. 424, 53 Am. Rep. 206, the court said: "No lapse of time during which the submergence has continued bars the right of the owner to enter upon the land reclaimed and assert his proprietorship when the identity can be established by reasonable marks, or by situation, extent of quantity, and boundary on the firm land." And, further: "And so if an island forms upon the land submerged [as in this case], it belongs to the original owner. The sovereign [the state] succeeds to the ownership of such islands and formations only as are originally created and located in tideways, outside of the boundaries of property which has been the subject of individual ownership."

In the Missouri cases the island was not within the metes and bounds of the riparian owner, but belonged to another. In a contest between this island and the main shore owner the court held that the accretions were to the former land. I think the court was probably correct in that, only the islander's right should have stopped at the nearest boundary of the shore owner; otherwise, his grant from the Federal government would be interfered with, which cannot be. In the case at bar the island rose up within plaintiff's boundary, and the only possible claimant is the state, and she makes no claim. In this state of things, I think the plaintiff has title superior to all others, if not superior to the state, who holds, if at all, not as an individual, but as a sovereign. The judgment, in my opinion, should be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TEXAS & PACIFIC R. CO., *Plff. in Err.*,

v.

Gessner T. SMITH, Widow of Paoli A. Smith.

(67 Fed. Rep. 524.)

1. A civil engineer of a railroad company, traveling on duty for the company upon a pass exempting the company from liability for injuries to person or property, occupies the position of an employee, and not that of a passenger, upon the train upon which he is carried.

2. A railroad engineer whose duties are to look after the building and maintenance of bridges and trestles assumes the risk of injury from the failure of the company to provide a watchman at a bridge which gives way under the train upon which he is traveling in discharge of his duties, as he must be presumed to know that no watch is kept upon such bridge.

3. A railroad official particularly charged with the care and maintenance of the bridges upon the line of the railroad is at fault for failure to maintain a sufficient watch upon a bridge, which will prevent recovery for his death from the fall of such bridge under the train upon which he is traveling in the discharge of his duties.

(February 5, 1895.)

NOTE.—*Railroad employees or officers as passengers.*

The rule seems to be that if the employee is traveling in connection with his duties to the company he will be regarded as an employee, while the courts are divided in opinion as to his position if he is traveling free by reason of his relation of employee to the company, but is traveling for purposes of his own.

Riding in course of, or as part of, employment.

In such cases the traveler is not a passenger nor entitled to be cared for as such.

An employee riding on a train for the purpose of clearing snow from the track is not, while so engaged, a passenger. *Howland v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 226.

One engaged in ballasting the road, whose duties require him to ride back and forth on a gravel train, is not, while so riding, a passenger, but is a mere employee. *Kumler v. Junction R. Co.* 33 Ohio St. 150.

Persons engaged in loading and unloading a gravel train are not passengers in riding back and forth between the places of loading and unloading. *Ohio & M. R. Co. v. Tindall*, 13 Ind. 363, 74 Am. Dec. 259.

A person employed to paint the buildings and bridges of a railroad company, and transported from one to another in a small steam car used only by officers and employees of the road, is not a passenger nor entitled to the rights of one. *McQueen v. Central Branch U. P. R. Co.* 30 Kan. 689.

An employee on a construction train while going with the train is not a passenger. *Chicago & A. R. Co. v. Keefe*, 47 Ill. 108.

One who is injured while attempting to get on a train under command of his boss to be transported to work in another place is still in the line of his employment so that he cannot recover for the injuries, although they are caused by the negligence

31 L. R. A.

ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. *Reversed.*

The facts are stated in the opinion.

Before McCormick, Circuit Judge, and Bruce and Toulmin, District Judges.

Messrs. W. W. Howe and S. S. Prentiss for plaintiff in error.

Messrs. B. F. Jonas and J. H. Hall for defendant in error.

Bruce, District Judge, delivered the opinion of the court:

This suit was brought in the court below by Mrs. Gessner T. Smith, widow of the late Paoli A. Smith, suing in her own behalf and also as guardian and in behalf of her minor child, Paoli Smith, to recover damages from the Texas & Pacific Railway Company for the death of her husband. Paoli A. Smith was at the time of his death, and for some time preceding had been, resident engineer for the Texas & Pacific Railway Company, residing at Marshall, Tex., and on the 30th day of January, 1892, he started on a passenger train of the railroad company from Marshall, Tex., to New Orleans, under orders from his company, for duty in his position as engineer. On the trip,

of the employer's servants. *Capper v. Louisville, E. & St. L. R. Co.* 103 Ind. 305.

A foreman of a wrecking crew, who boards a train to take him to the place of a wreck, is a fellow servant of the engineers of the train and the colliding train, although not in service at the time, so that he cannot recover for injuries caused by their negligence. *Abend v. Terre Haute & I. R. Co.* 111 Ill. 202, 53 Am. Rep. 616.

A workman employed at gas works operated by defendant for its own use, who was in discharge of his regular duty going from one set of works to another over the railroad without paying fare, was killed by an accident, and the court held that he was clearly within the ordinary course of his duty when the accident occurred, and that the company was not liable for it. *Hando v. London & C. R. Co.* Q. B. May 6, 1886, cited in 2 Wood on Railway Law, p. 1044.

If the injury occurs while the employee is traveling as the servant of the railroad, there can be no recovery. *Hutchinson v. New York, N. & B. R. Co.* 6 Eng. Ry. & Canal Cas. 580.

Rule in case of one being transported to or from work.

There is some conflict among the cases upon this question. The larger number of them hold that an employee while being transported to and from work without paying fare is still to be regarded as an employee, while others hold that before his day's work begins and after it is over he is not an employee, and must have some other relation towards the company. According to the rule adopted by the first class of cases, it is held that:—

A conductor traveling to take charge of his train is an employee of the company, and not a passenger, within the rules relating to the care which carriers owe to their passengers and employees. *Manville v. Cleveland & T. R. Co.* 11 Ohio St. 424.

21

at a point on the road near the village of Robeline, in Louisiana, on the 30th day of January, 1892, the train on which he was traveling ran upon a burning bridge, which gave way, and precipitated the train to the ground below. The car on which he was traveling was telescoped with another car of the same train, and his leg was caught between the two cars and the broken timbers, and crushed and mangled. The car took fire, and he was dragged violently from under the timbers, to save him from being burned to death, and in consequence of which injury it was found necessary to amputate his leg above the knee, and from the injuries received he died February 7, 1892. The petition in the court below charged negligence upon the company, its officers and employees, and specifies the following:

"Petitioner alleges that there was no guard or watchman at said burning bridge, as there should have been; that it had been burning for hours, and, as petitioner believes, and expects to prove, was fired by sparks from the engine of another train of the said company, which passed some hours before; and petitioner alleges that there were no track walkers or watchers upon said railway at or in the vicinity of said bridge, or on said section of said railway, and none of the vigilance, watchfulness, or care was exercised by said company, its officers, agents, or employees, such as is required by law and custom for the protection of the lives and safety of railway passengers, and through the proper presence and exercise of which the said accident could and would have been averted."

A surveyor on a railroad is, while being transported from his home to his place of work free of charge, a coemployee with the conductor on the train, so that he cannot hold the company liable for the conductor's negligence. *Ross v. New York C. & H. R. R. Co.* 5 Hun, 488, Affirmed, 74 N. Y. 617. The court says, if the servant of a railroad company divests himself of his character as a servant, and becomes a paying passenger on the cars of the railroad, he would doubtless require and possess all the rights of a passenger or a third person unconnected with the master, but the lower court in the *Russell Case* held that after the day's work was over the relation of master and servant ceased, and that having paid for his passage by his labor during the day the laborer was entitled to be treated as a passenger. *Russell v. Hudson River R. Co.* 5 Duer, 39.

If the contract provides that an employee shall be conveyed to his home on the train every night after his day's work is done, he cannot recover from the company for an injury caused during such trip by the negligence of the engineer of the train. *Russell v. Hudson River R. Co.* 17 N. Y. 134; *Vick v. New York C. & H. R. R. Co.* 85 N. Y. 267.

A car repairer while being carried free of charge between his home and his place of work daily according to his contract of service is not to be considered as a passenger but as an employee. *Gilman v. Eastern R. Corp.* 10 Allen, 233, 87 Am. Dec. 635.

A carpenter employed by the day to work on the line of the railroad company's road, and carried by its cars to the place of such work without paying fare, cannot maintain an action for injuries received while being so carried by the negligence of the employees of the company. *Seaver v. Boston & M. Railroad*, 14 Gray, 466.

A common laborer cannot recover for injuries received while riding on a gravel train to his place
31 L. R. A.

To this the defendant company, plaintiff in error, answered by a general denial, and, further answering, respondent avers that, even if said deceased was injured through any fault, negligence, or want of care on the part of respondent, its officers, agents, or employees, or those for whom it was responsible (all of which is denied), yet, even in such case, plaintiff cannot recover, because said deceased, Paoli A. Smith, was careless and negligent in said premises, and by his fault and negligence contributed to the accident complained of, and the results; that just before the said accident, he, said Smith, negligently and without necessity left the car, and, while the train was in motion, went out on the platform between two cars,—a place which is dangerous, and where he had no right to be; and he, said Smith, was injured because he was on said platform, as aforesaid, and he would not have been injured had he remained in the car; and said Smith in other ways contributed, by his fault and negligence, to said accident and its results. Or, respondent avers, said accident and its results were caused by the fault and negligence of fellow servants of said P. A. Smith, engaged in a common employment. Respondent further avers that said Paoli A. Smith was not a passenger on said train, but was traveling on a pass, under which he assumes all risks of accident and damages to his person or property, whether caused by the negligence of the railway company, its agents or servants, or otherwise. Respondent further avers that said P. A. Smith assumed all risks of his employment; and fur-

of work by the negligence of the persons in charge of the train. *Gillshannon v. Stony Brook R. Corp.* 10 Cush. 228. The court, says, if the plaintiff was by the contract of service to be carried by the defendant to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining an injury from the negligence of other servants. If the contract had not embraced this transportation, it leaves the case to stand as a permissive privilege granted to the plaintiff of which he availed himself to facilitate his labors and service, and is equally connected with it and the relation of master and servant, and therefore furnishes no ground for maintaining this action.

An employee riding from his home to his place of employment in a caboose car without paying fare according to the custom of the road, from which car all persons except employees are excluded, is not a passenger but only an employee. *Kansas P. R. Co. v. Salmon*, 11 Kan. 83.

If without any contract with the carrier an employee gets into one of its cars to be carried to work, the carrier is not liable for an injury to him, especially if he takes a dangerous position. *Moss v. Johnson*, 22 Ill. 633.

If the injury occurs when the employee is being carried according to contract from the place of service to his home, there can be no recovery. *Tunney v. Midland R. Co.* L. R. 1 C. P. 291, 12 Jur. N. S. 691.

In *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384, where the injury occurred while plaintiff, a laborer engaged to load gravel on a car, was being conveyed to the place of work, the court says: "He was not a mere passenger on the defendant's cars, because his travel upon them was really an incident of a different relation, that of a servant, and this is the character in which we must regard him here."

ther shows that at the time of said accident, and for some time prior thereto, said P. A. Smith, as resident engineer aforesaid, had full charge and direct control and supervision of the bridges and buildings on said railroad in Louisiana, etc., including the trestle or bridge mentioned in the petition which was burned; and said P. A. Smith was superintendent of the bridges and buildings department, and responsible for the condition of said bridge last named, and for the inspection, guarding and watching the same; and it was his duty to decide on what bridges watchmen should be stationed, and he was aware of all the facts connected with the said bridge or trestle, and assumed all the risks of his employment.

There is really little dispute about the facts in the case, and, in the view taken of it, we need not dwell upon them. The main question is the relation of the deceased to the company at the time of the accident when he received the injury which resulted in his death. He was civil engineer of the appellant company, residing at Marshall, on the line of the railroad, and was traveling on duty for his company at the time of the accident. The fact that he was traveling on the train and in a sleeping car did not make him any less the engineer of the company, charged with the duties and responsibilities of his position. It was doubtless contemplated in his contract of employment that he would be required, in the discharge of his duties, frequently to pass over the line of the railroad. Passengers ordinarily, at least, pay fare for their transportation, but the de-

ceased was at the time traveling upon a pass, such as was usual for employees to travel on over the line of the road, which it may be noted had in it an exemption from liability for injuries to person or property; and the conductor, knowing, as he testifies, the deceased, and knowing his relation to the road, did not call for and did not see the pass. Witness Grant, vice president, general manager, and chief engineer of the railroad company, says: He (the deceased) was, first, assistant civil engineer; after that, resident engineer. The duties of his position were to "look after the buildings and maintenance of bridges, water tanks, and trestles of the railroad company." An employee is one whose time and skill are occupied in the business of his employer, and we think that the deceased was an employee of the appellant company, and not a passenger on the train of the company at the time of the injury which resulted in his death.

In the case of *Texas & P. R. Co. v. Minnick*, decided by this court, and reported in 10 C. C. A. 1, 61 Fed. Rep. 635, a case growing out of the same accident as this case, which resulted there in the death of the locomotive engineer, this court held: "An employee assumes the risks ordinarily incidental to his employer's business, and to the employer's known manner of having it performed, where there is no unknown defect of machinery or other unknown hazards,"—citing authority. The court continues: "He [Minnick] knew, or with the exercise of the ordinary care incumbent on him in his employment would have

He was no more a passenger than is the coachman, or wagoner, or carter, who is in the employment of another. He was simply a servant, with the privilege of riding, as part of his business, in the gravel train, which was one of the instruments of his work."

In some of the cases in which a tendency is shown to recognize a relation different than that of employer and employee, there are circumstances which may perhaps suffice to take the case out of the general rule and so harmonize the decisions. But this is not true in all of the cases.

In *Pool v. Chicago, M. & St. P. R. Co.* 53 Wis. 657, 56 Wis. 227, a person employed as a detective on the road was directed to proceed from his home to another place on the road, and the company provided a hand-car to take him. The court held that, even though the relation of carrier and passenger did not exist, there was a legal duty to have the car safe to complete the journey.

A bridge carpenter who, in consideration of a reduced price per day, is carried to and from his work in the cars of the employer, and whose duties have nothing to do with the running of the train, is, while so traveling, a passenger and not an employee. *O'Donnell v. Allegheny Valley R. Co.* 50 Pa. 239, 98 Am. Dec. 336.

Fitzpatrick v. New Albany & S. R. Co. 7 Ind. 436, was decided on the doctrine that the employees were not fellow servants within the rule that the master is not liable to one for the negligence of the other, but the court takes occasion to say that the plaintiff, who was riding to his place of work at a gravel bed, was not a mere passenger; his travel upon the cars was an incident to the business in which he was employed, but under an agreement with defendant that he was to be regularly conveyed to and from his work. This includes an implied engagement that the company would convey

him as safely and securely as if he really had been a passenger in the ordinary sense of the term.

An employee of a railroad company riding to his home on a free pass after the usual services of his employment are over for the day is in fact a stranger to the company and entitled to recover for injuries caused by a negligent collision. *State, Abell, v. Western Maryland R. Co.* 63 Md. 433, 19 Rep. 494.

In case of a person using a bridge by permission of a pass given him by his employer for use in going to and returning from work, the court held that he was a passenger over the bridge, and that the owner was liable to him for defects in the bridge which caused injury to him, although the owner sustained the relation to him of employer. *Pembroke v. Hannibal & St. J. R. Co.* 32 Mo. App. 61.

A bridge carpenter who is directed to go to a certain place and assist in loading timbers is, while traveling to such place, a passenger, and the carrier will be responsible to him as such for injuries caused by its negligence. *Gillenwater v. Madison & I. R. Co.* 5 Ind. 399, 61 Am. Dec. 101.

A section man of a street-car company, who by direction of his foreman takes a place upon one of its trains to be carried to his home, is not a mere trespasser, but for the purpose of determining the liability of the company for injuring him must be regarded as rightfully upon the train. *Denver & B. P. Rapid-Transit Co. v. Dwyer*, 20 Colo. 132.

A civil engineer in the employment of a railroad company, who when ordered to do so rides on a train over a new track the laying of which he is superintending, does not assume risks resulting from negligence on the part of the company's servants in failing to keep the roadbed and track in good condition after it is laid, and in running the train at too great a speed, and he may recover from the company for injuries caused by such negligence. *Meloy v. Chicago & N. W. R. Co.* 77 Iowa,

known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no track walker kept on that part of the track, or watchman kept at this bridge. He knew and understood the features and workings of the engines, and the character and extent of the watch that was kept on this bridge. He therefore, according to the settled rule just given, assumed the risk of being injured by the use of such machinery on the track and bridges thus watched."

This rule, applied in that case, seems to be equally applicable in the case now before the court, and finds support in many decided cases both in Federal and state courts. In *Northern P. R. Co. v. Herbert*, 116 U. S. 642, 29 L. ed. 755, the court says: "The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow servant in a common employment, is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: 'He cannot, in reason, complain if he suffers from a risk which he has voluntarily

assumed, and for the assumption of which he is paid,'"—citing *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 877-883, 28 L. ed. 787-789.

There is another suggestion which seems proper to be considered in this connection. Deceased, as we hold, was an employee of the appellant company, and the grade and character of his employment may properly have some influence on the question under consideration. He was an official of his company, occupying a position of high responsibility in connection with the operation of the railroad, and was particularly charged with the care and maintenance of the bridges upon the line of the railroad. If there was negligence in the watch that was kept at this burned bridge, and if the bridge was of such magnitude and character as, in the judgment of prudent and experienced railroad men, required more than the daily watch which was kept, then the inference would be no more than fair that he and his company were at fault in the matter of the watch which should have been, but was not, maintained at that bridge at the time of the accident; and that for that reason neither he, if he had survived, nor his representatives, can recover under the admitted facts of the case. It is claimed that the evidence tending to show negligence in the watch of the bridge in question and the alleged defective character of the appliance used upon defendant's trains to prevent escape of sparks and fire from the locomotive was proper matter to be left to the jury, and from which the jury might infer

743, 4 L. R. A. 287. In that case the court says the plaintiff was not a passenger within the ordinary meaning of that term, nor was he a trespasser. He was rightfully on the train.

Person riding for purposes of his own.

If the employee is riding on a private errand of his own, and not in connection with the business of the railroad, although he is permitted by the conductor to ride free, he will not occupy the position of an employee but that of a passenger in respect to the right to recover for negligent injuries. *Washburn v. Nashville & C. R. Co.* 3 Head, 638, 75 Am. Dec. 784.

A grader who is riding on a gravel train from the camp to the place of work to get his coat which he left there when through work for the day is not a trespasser on the train, but is one to whom the company is responsible for defects in the tracks. *Rosenbaum v. St. Paul & D. R. Co.* 38 Minn. 173.

An employee having a monthly ticket given him which is good for more rides than he is required to take in attending to the business of the company, with the express privilege of using the others for his own purposes, is not, when traveling for purposes of his own, an employee, but is a passenger entitled as such to hold the company liable for injuries caused by the negligence of its employees. *Doyle v. Fitchburg R. Co.* 162 Mass. 66, 25 L. R. A. 157. The court says it is clear that a person may at one time be an employee when passing over a railroad and at another time in passing over the same road be a passenger, though continuing all the while in a popular sense in the employment of the company.

That a person is an employee of the road and is permitted to ride without paying fare will not preclude a recovery from the company for negligent injuries, if, at the time he was injured, he was traveling upon purposes of his own and had nothing to

do with the business of the company. *Ohio & M. R. Co. v. Muhling*, 30 Ill. 2, 81 Am. Dec. 336.

But in *Higgins v. Hannibal & St. J. R. Co.* 36 Mo. 418, it was held that a person who is still in the employ of the company, although he had been off duty for a few days, and who boarded a train to go on a private errand of his own, but who took a place in the baggage car as an employee and was recognized as such and did not claim the rights of a passenger, was not a passenger within a statute regulating the duty of carriers to passengers.

So, it has been held that a former employee of a railroad riding on a freight train by permission of the conductor without paying fare while looking for work is not entitled to require the care from the company which it is required to give passengers. *Powers v. Boston & M. R. Co.* 153 Mass. 188.

So, a person is an employee and not a passenger who is running to get on to a train in obedience to the orders of his foreman, which is to convey him to the place where the men are paid off in accordance with the monthly custom of the road. *O'Brien v. Boston & A. R. Co.* 138 Mass. 387, 52 Am. Rep. 273.

Employees who borrow a car and engine to attend a meeting for purposes of their own do not sustain the relation of passengers to the railroad company so as to make it liable for injuries received during the trip. *Davis v. Chicago, St. P. M. & O. R. Co.* 45 Fed. Rep. 543; *Chicago, St. P. M. & O. R. Co. v. Bryant*, 65 Fed. Rep. 909.

The mere fact that the conductor of the train receives and treats the employee as a passenger will not make him such if he was in fact acting in the capacity of a servant at the time. *Texas & P. R. Co. v. Scott*, 64 Tex. 549.

An employee whose contract includes transportation to and from work is entitled to retain a seat which he is occupying in the car to which he has been assigned, even as against a passenger who has paid for his passage. *New York, L. E. & W. R. Co. v. Burns*, 51 N. J. L. 340.

H. P. F.

negligence on the part of the railroad company. That would be of force if the case turned upon the question of negligence as shown or not shown by the proof. This evidence, however, with all the inferences which the jury could fairly draw from it, leaves us in doubt, at least, if it was sufficient to justify the verdict for the plaintiffs; but, however that might be held, the general charge for the defendant should have been given in the court below, and *the judgment below is reversed*, and the cause remanded for proceedings in accordance with the views expressed in this opinion.

Toulmin, District Judge, dissenting:

I concur with the court in the conclusion that this cause should be reversed and remanded, but I do not concur in the opinion that the court below erred in not giving the peremptory charge for the defendant. I think there was sufficient evidence as to negligence *vel non* on the part of the defendant, and as to contributory negligence on the part of deceased, to require the case to be sent to the jury. But I think that the court erred in giving the charges noticed in the 4th and 5th assignments of error. These charges are as follows: "While it is true that the employee assumes risks incident to the service, the employer contracts with him not to expose him to other and greater risks than those necessarily incident to the service in which he is engaged;" and "that it was the duty of the defendant to furnish adequate material and resources for the work, and that a part of this duty was, when the plaintiff's hus-

band was traveling upon the cars of the defendant, engaged in its service, to furnish him with safe cars and a safe track." Those charges were erroneous, as applicable to the case, and were calculated to mislead the jury. While they recognize the relation of employer and employee as existing between the company and the deceased, they declare a rule too strict and arbitrary in such case. The first charge, in effect, asserts that the employee assumes only such risks as are unavoidable, and that the employer contracts not to expose him to greater risks than those unavoidably incident to the particular service. The correct rule, as I understand it, is that the employee assumes all ordinary risks incident to the service in which he is engaged, and that the employer contracts with him not to expose him to greater risks than those ordinarily incident to such service. *Minnick Case*, 6 C. C. A. 387, 57 Fed. Rep. 362, 13 U. S. App. 520; *Hough Case*, 100 U. S. 213, 25 L. ed. 612; *Ross Case*, 112 U. S. 382, 28 L. ed. 789; *Baugh Case*, 149 U. S. 331, 37 L. ed. 779. The second charge referred to is, in effect, that the company was bound to furnish the deceased, its employee, with cars and track absolutely safe. The rule is that the company is not an insurer or guarantor, but that it is required to take reasonable care and precaution to provide reasonably and adequately safe cars and track for the use of its employees. *Baugh Case*, 149 U. S. 386, 387, 37 L. ed. 780, 781.

For the reasons stated, the judgment should be reversed, and cause remanded.

ILLINOIS SUPREME COURT.

Mary Jane NELSON, Appt.,

v.

John R. DAVIDSON.

(160 Ill. 254.)

- Possession for seven years by one claiming under a deed purporting to convey** the interest of a remainderman, and sufficient to constitute color of title, coupled with payment of taxes for the same period, will bar the estate in remainder, notwithstanding the existence of the outstanding life estate, where the remainderman is under no disability and could have paid the taxes.
- A deed purporting on its face to convey the title of land to the grantee** is sufficient to constitute claim and color of title in the grantee, although the title, when traced back to its source, is not apparently legal and valid.

(November 1, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marshall County in favor of defendant in an action brought to re-

cover possession of certain real estate. *Affirmed*.

The facts are stated in the opinion.

Miss Effie Henderson, for appellant:

John Brown had curtesy in this land. The act of partition does not create a new title or give a new possession.

Kernan v. Baham, 45 La. Ann. 799; 2 Black, Judgm. § 660; *Christy v. Spring Valley Waterworks*, 68 Cal. 73; *Fleenor v. Driskill*, 97 Ind. 27.

A judgment in partition must be read with reference to the pleadings. All must be taken together to interpret the judgment or decree.

Christy v. Spring Valley Waterworks, *supra*; *Covas v. Bertoulain*, 44 La. Ann. 683; *Fleenor v. Driskill*, *supra*; *Loring v. Groomer*, 110 Mo. 632; *Gage v. Goudy*, 141 Ill. 215.

This decree was a substantial compliance with the statute, setting off John Brown's curtesy to him.

Knapp v. Gass, 68 Ill. 495.

John Brown's deed did not give title to Mrs. Nelson's fee in reversion.

1. John Brown was not her guardian. The letters of guardianship were void for want of jurisdiction. Such may be impeached in any collateral proceeding. The appointment must be made in the county where the ward resides.

NOTE.—For adverse possession against remaindermen and owners of future estates, see note to *Gindrat v. Western R. of Alabama* (Ala.) 19 L. R. A. 839.

31 L. R. A.

9 Am. & Eng. Enc. Law, pp. 94, 95; Ill. Rev. Stat. chap. 64, § 2.

2. The proceedings for sale were void for want of jurisdiction. Application must be made in the county where the ward resides.

Loyd v. Malone, 28 Ill. 42, 74 Am. Dec. 179; *Spellman v. Dowse*, 79 Ill. 66.

3. This sale and "deed" were void for want of approval or confirmation. This attempted sale was never in fact made—never completed. This deed itself shows the cause continued, and it shows no report nor investment as ordered, and no return and approval of sale nor confirmation of deed, as necessary by statute, in order to pass title to the ward's interest.

Ill. Rev. Stat. chap. 64, § 83.

No title passes till sale is approved.

Musgrave v. Conover, 85 Ill. 874; *Young v. Keogh*, 11 Ill. 625; *Young v. Lorain*, Id. 642, 52 Am. Dec. 463; *Rawlings v. Bailey*, 15 Ill. 179; *Ayres v. Baumgarten*, Id. 444; *Chapin v. Curtenius*, Id. 427; *Young v. Dowling*, Id. 482; *Miller v. McMannis*, 104 Ill. 427; *Cooter v. Dearborn*, 115 Ill. 509.

John Brown's deed did not give color of title to Mrs. Nelson's interest. It did not purport to pass her interest, not being signed by the grantor, *i. e.*, the sale not being completed by the court, the only grantor of her interest.

Tooley v. Kane, *Smedes & M. Ch.* 522.

This court has twice held a void guardian's deed not to be color of title, made in good faith.

Rawlings v. Bailey, 15 Ill. 179; *Cooter v. Dearborn*, *supra*.

At the best a guardian's deed is a quitclaim made by the court, on behalf of the ward, of the ward's present interest.

Hardin v. Gouveneur, 69 Ill. 144; *Bowman v. Wettig*, 39 Ill. 416.

An official deed having no foundation for lack of jurisdiction is a nullity.

Pardon v. Duire, 23 Ill. 572; *Horner*, Probate Law, § 869; *Spellman v. Dowse*, 79 Ill. 68; *Reid v. Morton*, 119 Ill. 119.

The statute of limitations has no application because of John Brown's outstanding curtesy of which the appellees were in possession.

Tiedeman, Real Prop. § 713.

Ejectment is an action for the possession and can only be maintained by one entitled to the possession.

Ill. Rev. Stat. chap. 45, *Ejectment*, § 28; *Batterton v. Yoakum*, 17 Ill. 288; *Turpin v. Baltimore, O. & C. R. Co.* 105 Ill. 11; *Wood v. Morton*, 11 Ill. 547; *Cobb v. Lavalle*, 89 Ill. 381, 81 Am. Rep. 91; *Kilgour v. Gockley*, 83 Ill. 109; *Higgins v. Crosby*, 40 Ill. 262; *Miller v. Pense*, 133 Ill. 149; *Rohn v. Harris*, 130 Ill. 581; *Orthwein v. Thomas*, 127 Ill. 555, 4 L. R. A. 484.

As no word or act of John Brown could by any legal possibility create a hostile and adverse possession to Mary Jane, the possession given by him to his grantees, or those under them, was not, and could not be, adverse to her estate in reversion.

McCorry v. King, 3 Humph. 278.

The statute will not run, even when the possession is both technically and in fact adverse,—if such a thing can be adverse in a legal sense,—unless there is a right of possession on the other side.

Miller v. Pence, *supra*; *Lewis v. Pleasants*,

2 R. A.

148 Ill. 289; *Dugan v. Follett*, 100 Ill. 581; 3 Wait, Act. & Def. p. 99; *Mettler v. Miller*, 129 Ill. 642.

At common law a conveyance in fee by the tenant for life forfeited the life estate, and those having the remainder or reversion became at once entitled to the entire estate. But this depended upon feudal principles that have no existence here, and hence a conveyance in fee by one having a less estate, not affecting those seized of ulterior interests in the land, is harmless and will operate simply to convey such interest in the land as the grantor in fact has.

4 Kent, Com. 83, 84; *Rogers v. Moore*, 11 Conn. 553.

If the deed represented the whole estate as belonging to Mary Jane Brown, that is in the nature of a covenant, and binds only John Brown.

Young v. Lorain, 11 Ill. 641, 52 Am. Dec. 463; *Prouty v. Mather*, 49 Vt. 415.

Where it is the duty of parties in possession to pay the taxes the limitation law of 1839 has no application to such a case.

Norris v. Ile, 152 Ill. 205.

The act of 1839 is a limitation law or it is unconstitutional.

Dugan v. Follett, 100 Ill. 586; *Norris v. Ile*, *supra*.

The statute of limitations did not begin to run till appellant's right to possession accrued by common, statute, and case law.

Beattie v. Whipple, 154 Ill. 280; *Borders v. Hodges*, Id. 508; *Angel*, Limitations, 6th ed. 415; *Jackson*, *Hardenbergh v. Schoonmaker*, 4 Johns. 390.

Mr. Winslow Evans, for appellee:

Any deed purporting on its face to convey title, no matter on what it may be founded, is color of title.

Dickenson v. Breeden, 30 Ill. 279; *Holloway v. Clark*, 27 Ill. 484; *Watts v. Parker*, Id. 224; *Dawley v. Van Court*, 21 Ill. 460; *Hinkley v. Greene*, 52 Ill. 223; *Woodward v. Blanchard*, 16 Ill. 433; *Fagan v. Rosier*, 68 Ill. 84.

Imperfections and irregularities of any part of the chain by which color of title is derived would not of themselves be regarded as evidence of the want of good faith by the holder of such color.

Dawley v. Van Court, *supra*; *Clapp v. Bromaghian*, 9 Cow. 558; *Morrison v. Norman*, 47 Ill. 477; *Davis v. Hall*, 92 Ill. 85.

A married woman could use her own money to pay taxes, and thus prevent the acquirement of a bar by the payment of the taxes by another.

Enos v. Buckley, 94 Ill. 458.

The plaintiff is estopped to deny that the guardian's deed conveyed title.

Pulaski County v. Stuart, 28 Gratt. 872; 1 Black, Judgm. §§ 274, 279; *Anderson v. Gray*, 134 Ill. 550; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457.

The ward may be barred by lapse of time or by his own acts from disaffirming his own acts or his guardian's unauthorized acts.

Schouler, Dom. Rel. 516; *Penn v. Heisey*, 19 Ill. 295, 68 Am. Dec. 597; *Fish v. Miller*, Hoffm. Ch. 267; 2 Herman, *Estoppel*, § 783; *Cross v. Lorimer*, 3 Macq. H. L. Cas. 829.

Bailey, J., delivered the opinion of the court:

This was an action of ejectment brought by Mary J. Nelson against Adam Davidson to recover lot 3, of the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 26, T. 12, N. of R. 8, E. of the 4th principal meridian, of Marshall county. The defendant pleaded not guilty, and the case being submitted to the court for trial without a jury, the court found the defendant not guilty and rendered judgment against the plaintiff for costs. From that judgment the plaintiff has appealed to this court.

The 80-acre tract of land of which lot 3 forms a part, was, with other lands, entered and purchased from the United States by Joseph Thompson, but before a patent was issued to him he died, leaving, among other heirs at law, Margaret Thompson, the mother of Mary J. Nelson, the plaintiff in this case. In a partition proceeding subsequently had, the 80-acre tract, with other lands, was partitioned and set off in severalty to Margaret Thompson (then Margaret Brown), she having intermarried with John Brown. After becoming seised of this tract as heir of Joseph Thompson, and about the year 1845, Margaret Brown died, leaving surviving her husband, John Brown, and Mary J. Nelson, her only child and heir at law. It seems that the parties then resided in Tazewell county, and the plaintiff being a minor, the county court of Tazewell county appointed John Brown her guardian. While they were residing in that county, in the year 1852, John Brown, as guardian for Mary J. Nelson, filed a petition in the circuit court of Marshall county, praying for an order and decree of that court authorizing and directing him to make sale of the title and interest of Mary J. Nelson in all of the N. E. $\frac{1}{4}$ of sec. 26, T. 12, etc., and in that proceeding a guardian *ad litem* was appointed for the minor, and the cause was referred to a master in chancery, and on the final hearing a decree was entered authorizing and directing the sale of the premises described in the petition, in pursuance of the prayer thereof. This order or decree was entered at the October term of 1852, and on the 25th day of November following, John Brown, as the guardian of Mary J. Nelson, conveyed to Thomas Keller and Justin L. Miner the N. E. $\frac{1}{4}$ of sec. 26, in T. 12, above mentioned. This deed recited the filing of the petition by John Brown, as guardian for Mary J. Nelson, for the sale of the premises described; also the order or decree of the court authorizing and directing him to sell the premises as such guardian; the advertising of the premises for sale by posting written notices in three of the most public places, etc., for twenty days prior to the sale, and that Keller and Miner were the highest bidders; that they bid \$300 for the tract, and that it was thereupon struck off to them. The deed was duly acknowledged by John Brown, as guardian for Mary J. Nelson, and recorded December 25, 1852. By a deed dated November 1, 1854, Thomas Keller and wife conveyed to Justin L. Miner the N. $\frac{1}{4}$ of the quarter section above described, and by warranty deed dated February 27, 1867, Justin L. Miner conveyed the same tract to Catharine Mannock. Subsequently Catharine Mannock, who through divorce proceedings had resumed

the name of Miner, her first husband's name, died seised of the 80-acre tract above mentioned, and in partition proceedings instituted by her heirs at the January term, 1879, of the circuit court of Marshall county, the 80-acre tract was divided into lots 1, 2, and 3—lot 1 being partitioned and set off to Justin L. Miner and Minnie Hull, lot 2 to Catharine Beebe, and lot 3 to Sophronia Miner, Catharine Miner, and Margaret Miner. By a quitclaim deed dated January 30, 1882, Carrie S. Wayne, who is shown by the evidence to be the same person to whom lot 3 was partitioned under the name of Catharine Miner, and G. W. Wayne, her husband; Maggie Sampson, shown by the evidence to be the same person to whom lot 3 was set off under the name of Margaret M. Miner, and Alfred Sampson, her husband; and Mary C. Sampson, being shown by the evidence to be the same person to whom lot 3 was partitioned under the name of Sophronia Miner, and Charles C. Sampson, her husband, conveyed lot 3 to Adam Davidson, the defendant. The evidence shows that Adam Davidson went into possession of lot 3 immediately after the execution of the deed thereof to him, and that he continued in the possession of the premises and claimed to own them under that deed up to April 26, 1893, the date of the commencement of this suit,—being over seven years,—and that during all that time he paid the taxes assessed against the lot. It seems to be conceded that John Brown, upon the death of his wife, in 1845, became tenant for life of the land in question by curtesy consummate. John Brown died November 21, 1892.

It is claimed by the plaintiff that the proceedings in the circuit court of Marshall county by the guardian of Mary J. Nelson, and the deed executed by her guardian in pursuance of the decree rendered in those proceedings, were void for the reason, first, that the proceedings were not in the county where the ward resided; and second, because there was no approval or confirmation of the deed. On the part of the defendant it is claimed that, even if that be so, the deed from Carrie S. Wayne and others to the defendant constituted claim and color of title made in good faith, and that by reason of seven years' possession and payment of taxes the defendant, under the provisions of § 6 of the statute of limitations, acquired a title to the land paramount to that of the plaintiff. The questions raised by this latter contention constitute the only matters which it will be necessary for us to consider in this case.

The position assumed by the plaintiff is that, as John Brown was entitled to a life estate in the land as tenant by the curtesy, the statute of limitations could commence to run as against her title only upon the death of the life tenant.

It should be noticed that even if the guardian's deed executed by John Brown is to be regarded as void for the reasons above stated, the chain of conveyances shown by the evidence is sufficient to establish the fact that the defendant entered into and holds possession of the land, claiming to be seised of the title formerly vested in the plaintiff. His title and possession were not in privity with the life tenant, but claiming, as he did, through the guardian's deed and mense conveyances, the title which

he claims is that of the tenant in remainder herself. The question presented then is, whether possession by the defendant adverse to the tenant in remainder, for seven years, coupled with the payment of taxes for that period, is sufficient to bar the estate in remainder, notwithstanding the existence of an outstanding estate for life.

The case would seem to fall within the rule laid down in *Enos v. Buckley*, 94 Ill. 458. That was a suit in ejectment brought by Agnes D. Enos and Zimri Enos, her husband, against Buckley, to recover lands described in the declaration. The defendant's title was, first, a tax deed, which, by reason of a defect in its description of the land conveyed, was void for uncertainty; and second, a deed from the grantee in the tax deed, with proper description, to one Bracken, the latter being set up as color of title. It appeared that possession was taken and held by Bracken under the latter deed for seven years. This was held to establish a good title in Bracken, and the defendant, who deraigned title from Bracken, was held to have established a good title in himself. It appeared in that case that the title to the lands then in controversy was vested in Mrs. Enos prior to 1846, when she married Zimri Enos, and that the husband thereby became seised of a life estate in the premises, and, consequently, that the wife had only an estate in remainder, and it was urged that the statute of limitations could not run against Mrs. Enos because she had no immediate right of action for a possession of the land. The court, after discussing the case of *Castner v. Walrod*, 83 Ill. 171, 25 Am. Rep. 369, and distinguishing it from the case then under consideration, held that the estate in remainder of the wife, as well as the possessory life estate of the husband, was barred. In reaching that conclusion the court said (p. 463): "The present case involves a different section,—§ 6, of seven years' payment of taxes with color of title and possession. To prevent the acquirement of the bar under this last section it was only necessary to pay the taxes. The outstanding estate in the husband here formed no impediment to the payment of taxes any time after the act of 1861. The taxes should have been kept paid, not on any one's particular interest in the land, but on the whole land. As between the owner of the life estate and the reversioner, it is undoubtedly the duty of the former to pay the taxes; but the statute requires the payment of the taxes on the entire interest in the land, no matter how it may be divided and owned, and if they be not kept paid the whole estate in the land may become barred, as against the owners, under the statute. If, by reason of the husband's estate in the land, the wife might not have been able to derive from it the means to pay the taxes, she might otherwise, under and in consequence of the married woman's act of 1861, have become possessed of such means and which she would not except for that act.

It will be noticed that in the present case the owner of the estate in remainder was laboring under no disability, and no question can arise as to her ability to acquire the means to pay the tax on the land, and thus interrupt the running of the statute of limitations. The rule

laid down in *Enos v. Buckley*, *supra*, would therefore seem to apply, and under it her title must be held to be barred.

In the present case the deed to the defendant was offered in evidence, not only as tending to prove title, but as color of title. There can be no doubt that it was sufficient to show color of title. It purported on its face to convey the title of the land to the defendant, and that was sufficient to make it constitute claim and color of title. An instrument of writing, to be effectual as color of title, must purport on its face to convey the title. It must apparently transfer title to the grantee. Not that the title, when traced back to its source, should prove to be an apparently legal and valid title, but the instrument under which the claimant holds and upon which he relies must profess to convey title to the grantee. *Dickenson v. Breeden*, 30 Ill. 279; *Halloway v. Clark*, 27 Ill. 484; *Woodward v. Blanchard*, 16 Ill. 433; *Fagan v. Rosier*, 68 Ill. 84; *Dawley v. Van Court*, 21 Ill. 460; *Watts v. Parker*, 27 Ill. 224; *Hinkley v. Green*, 52 Ill. 223. Where the deed purports, on its face, to convey title, it will be sufficient to show claim and color of title made in good faith unless bad faith is expressly shown,—and there is nothing in this case tending to charge defendant with bad faith or fraud on his part in relation to the claim and color of title set up.

But it is claimed that the rule laid down in *Enos v. Buckley*, *supra*, is inconsistent with the doctrine held in other and more recent cases. We have examined all the decisions having any bearing on the question to which our attention has been called, and find that all are clearly distinguishable from *Enos v. Buckley*. In *Mettler v. Miller*, 129 Ill. 630, a life tenant conveyed to a third person by a deed purporting to pass an absolute estate, and it was held that possession by the tenant for life cannot be adverse to the remainderman or reversioner, and that the possession of his grantee could not, during the continuance of the life estate, be adverse to the remainderman or reversioner, so as to set the statute of limitations running against the latter. In that case *Enos v. Buckley* and other similar cases were expressly referred to and held to be not in point. In the present case the defendant did not hold under or in privity with the life tenant, but adversely to the tenant in remainder. In *Miller v. Pence*, 132 Ill. 149, it was held that one entering into the possession of land under color of title acquired in good faith, by means of a tax deed, and continuing such possession for seven years, paying all taxes legally assessed thereon, will establish a good title to the land as against the prior owner resting under no disability, but not as against a merely inchoate right of dower. This was upon the principle that, the right of dower being only inchoate during the lifetime of the husband, the wife is under no duty to pay taxes on the land, or any part of it, for the protection of her inchoate right. In *Rohn v. Harrie*, 130 Ill. 525, the possession which was sought to be set up by way of limitation was taken and held under a conveyance from the life tenant, and it was held that the title of the reversioner was not barred.

Some other cases are referred to, but in none of them do we find a state of facts similar to

those appearing in *Enos v. Buckley*, *supra*, or to the facts appearing here. We are disposed to hold, therefore, that the case must be governed by the rule established in *Enos v. Buckley*, and under the doctrine of that case it must be held that the defendant had acquired title by limitation, as against the plaintiff, prior to the commencement of this suit.

The judgment of the Circuit Court will therefore be affirmed.

Rehearing denied.

J. J. WALSER *et al.*, Board of Education of School District No. 2, Township 39, Range 13, Cook County, Illinois, *Appts.*,

BOARD OF EDUCATION of School District No. 1, Township 39, Range 13, Cook County, Illinois, *et al.*

(160 Ill. 272.)

1. **A school district cannot, if it can recover at all, recover from another district** which has collected taxes upon lands within the former, through a mistake of the clerk as to the location of the lands, a greater sum than it would have collected had there been no mistake.
2. **A school district cannot recover from another district which has collected taxes** upon lands within the former, through a mistake of the clerk as to the location of the lands, any of the taxes so collected, although the rate per cent of the tax as extended in the former was thereby made greater than it otherwise would have been, where the full amount of the levy made by its board of education was collected, as the district does not become a trustee for one taxpayer of an excessive amount collected from another.
3. **Taxpayers in one school district, who voluntarily pay a tax** for another district levied by mistake upon their lands, cannot recover back the amount paid, where the books were kept open for inspection by them, and the means of knowledge existed to learn and know all the facts, although they supposed that they were paying the tax of the district in which their lands were situated.

(November 1, 1895.)

APPPEAL by plaintiffs from a judgment of the Appellate Court, First Department, affirming a judgment of the Circuit Court for Cook County in favor of defendants in an action to recover money erroneously assessed and collected as taxes by defendant upon territory belonging to plaintiffs. *Affirmed.*

The facts are stated in the opinion.

Messrs. Crafts & Stevens, for appellants:

Taxes for various municipal purposes must

be levied upon the property lying within the boundaries of the various municipal subdivisions of the state.

Cooley, *Taxn.* 2d ed. pp. 141, 142; *Madison County Ct. v. People, Toledo, W. & W. R. Co.* 58 Ill. 456; *Sleight v. People, Weller Trwp.* 74 Ill. 47; *Union School Dist. No. 4 v. New Union School Dist. No. 2*, 135 Ill. 464.

Cases of fraud, accident, or mistake, and cases of cloud upon the title of one's property, are cases with which equity can most effectually deal.

Cooley, *Taxn.* 2d ed. p. 761.

Equity would take jurisdiction to avoid a multiplicity of suits.

Story, *Eq. Pl.* 9th ed. § 112; 1 *Dan. Ch. Pr.* p. 190, and note; *Martin v. Dryden*, 6 Ill. 187; *Whitney v. Mayo*, 15 Ill. 251; *Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *Mandeville v. Riggs*, 27 U. S. 2 Pet. 483, 7 L. ed. 493; *Durburoo v. Niehoff*, 37 Ill. App. 403; Cooley, *Taxn.* pp. 769, 770.

If the said taxpayers had discovered the mistake of the county clerk before the tax had been paid, or before the defendant school district No. 1 had obtained possession of the fund, a court of equity would have enjoined the collection of the tax, or, if collected, would have enjoined the payment to the defendant, said school district No. 1.

Lemont v. Singer & T. Stone Co. 98 Ill. 94; *Irvin v. New Orleans, St. L. & C. R. Co.* 94 Ill. 105; *Drake v. Phillips*, 40 Ill. 888; *Vieley v. Thompson*, 44 Ill. 9; *Kimball v. Merchants' Sav. Loan & T. Co.* 89 Ill. 611; *Lebanon v. Ohio & M. R. Co.* 77 Ill. 539; *Lawrence v. Traner*, 136 Ill. 474; *Union School Dist. No. 4 v. New Union School Dist. No. 2*, 135 Ill. 464.

The territory described in the amended bill of complaint was liable to pay to school district No. 2 a certain amount of taxes for the year 1890, which amount at the rate prescribed or required in that district for school purposes was considerably less than the amount paid by the taxpayers owning said lands.

A payment can only be considered voluntary where the party pays with full knowledge of all the facts.

Falls v. Cairo, 58 Ill. 403; 1 *Story, Eq. Jur.* p. 24, ¶ 88.

On petition for rehearing.

There was nothing in the fact that the school tax was levied on their land to cause taxpayers to look for mistakes of the officers, for, as is averred in the bill, their land had been taxed for school purposes for several years prior, and they knew that it was liable to a school tax for that year.

They had a right to rely upon the presumption of law that the tax is just; that all the officers who have had any official connection with it have properly discharged their duties with respect to it.

Peoria, D. & E. R. Co. v. People, Scott, 116 Ill. 401; *Consolidated Coal Co. v. Baker*, 135 Ill. 545, 12 L. R. A. 247; *Chiniquy v. People*, 73 Ill. 570; *Buck v. People*, 78 Ill. 560; *Beers*

NOTE.—For the right to recover back payments of money for illegal taxes, including the matter of the distinction between voluntary and involuntary 31 L. R. A.

payments, see *notes* to *Phelps v. New York* (N. Y. 2 L. R. A. 626; *State, McCarty, v. Nelson* (Minn.) 4 L. R. A. 300.

v. People, 88 Ill. 488; *Mix v. People*, 86 Ill. 312; *Moore v. People*, 123 Ill. 645; *Todernier v. Aspinwall*, 43 Ill. 401.

If a tax paid into the hands of public officers is there without authority of law, it is not revenue at all, but belongs to the several taxpayers by whom it was paid.

Virden v. Needles, 98 Ill. 366; *Kerr v. Butz*, 34 Ill. App. 220; *Bradford v. Chicago*, 25 Ill. 411; *Stephenson County Supers. v. Manny*, 56 Ill. 160; *Falls v. Cairo*, 58 Ill. 408; *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165; *Aurora v. Chicago, B. & Q. R. Co.* 19 Ill. App. 360.

It was not a voluntary payment, because it was paid in ignorance of the mistake of the officer upon whom they had a right to rely as doing the work correctly.

Louisville v. Anderson, 79 Ky. 384, 42 Am. Rep. 220; *Covington v. Powell*, 2 Met. (Ky.) 226; *Galveston v. Sydnor*, 39 Tex. 236; *Boston v. S. Glass Co. v. Boston*, 4 Met. 181; *Tuttle v. Everett*, 51 Miss. 27, 24 Am. Rep. 622.

Mr. Henry R. Pebbles, for appellees:

The parties who paid the taxes in question, having done so voluntarily, and with full knowledge, or means of knowledge, of all the facts, cannot now recover back the amounts which they paid.

Lyons v. Cook, 9 Ill. App. 548; *Cooley, Taxn.* 565, and cases in notes; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165; *Swanston v. Ijams*, 63 Ill. 165; *Storer v. Mitchell*, 45 Ill. 213; *Falls v. Cairo*, 58 Ill. 403; *Lange v. Soffell*, 33 Ill. App. 624.

The fact that the school taxes here alleged to be illegal were paid at one time with the state, county, and other taxes, as to which there could be no defense, does not render the payment compulsory. In such case the illegal tax would vitiate the whole sale, and a deed issued thereon would be void.

Riverside Co. v. Howell, 113 Ill. 256; *McLaughlin v. Thompson*, 55 Ill. 249; *Gage v. Goudy*, 141 Ill. 215; *Drake v. Ogden*, 128 Ill. 603.

Phillips, J., delivered the opinion of the court:

Five residents and taxpayers of school district No. 2, township 39 north, range 13 east, in Cook county, Illinois, with the board of education of that district, exhibited their bill in the circuit court of Cook county in behalf of themselves and all other taxpayers of that district, making defendants the board of education of district No. 1 of the same township and the treasurer of the latter township. The facts alleged in the bill, briefly stated, are, that by mistake of the county clerk of Cook county certain described real estate in fact located in district No. 2 was entered upon the collector's book of 1890 as lying and being in district No. 1, where the same was taxed, and school taxes to the amount of \$2,195.90 were collected and paid over to the treasurer of the latter district, and paid out on orders of that district. The taxpayers who owned the above land had no knowledge of the mistake so made by the county clerk, and, knowing that their land was liable to taxation for school purposes in school district No. 2, paid their

tax when called upon by the collector, supposing that they were paying school tax for said district No. 2, and did not discover or know of the mistake until there had been collected by the collector all the tax on said land amounting to the sum of \$2,195.90, and paid over to the treasurer to the credit of said school district No. 1. As soon as the error was discovered, demand was made upon the board of education of said school district No. 1 for a return of money so wrongfully received by it, which demand it refused to comply with.

The defendants filed general demurrers to the amended bill of complaint, which demurrers the court sustained, and entered an order dismissing the bill and amended bill for want of equity. On appeal to the appellate court for the first district the decree was affirmed, and from the judgment of affirmance this appeal is prosecuted.

By the provisions of the act in relation to schools it became the duty of the proper officers of the district to levy a tax upon the property in the district and certify the same to the clerk, whose duty it was to compute and extend the tax on the taxable property of each person in the district. Had no mistake been made by the clerk the tax on the property in school district No. 2 would have been at the rate of about 1.88 per cent, as appears by the averments of the bill, but the rate extended by reason of such mistake was slightly more than 1.99 per cent, and the amount levied on the property in district No. 1, as extended, was at the rate of about 3.29 per cent. The actual amount extended on the books, and thus collected by the treasurer of district No. 1 on property belonging to district No. 2, was about \$2,195.90, whilst if the tax as assessed in district No. 2 had been extended on that property there would have been extended and collected for district No. 2 about the sum of \$1,255. The sum actually collected from the owners of the property by reason of the mistake of the clerk was about \$940 more than would have been collected had no such mistake been made. The bill seeks to recover the amount actually collected by the treasurer of district No. 1 on the property belonging to district No. 2, included in No. 1 by the mistake of the clerk.

Even conceding a right of recovery, under no circumstances could a right exist in district No. 2 to collect a greater sum than it would have collected had there been no mistake by the clerk. The full amount of the levy made by the board of education of district No. 2 was computed, extended, and collected on the property in the district other than that described on the collector's books as in district No. 1. No part of the levy as made by the district is unpaid. No right exists to recover more than the amount levied, and to hold the bill sufficient would authorize a recovery of a greater amount by indirection. District No. 2, under the averments of this bill, shows no right of recovery. Whilst the mistake of the clerk caused the rate per cent of tax as computed, and extended on property in district No. 2, to be greater than it would otherwise have been, yet the relation of one taxpayer to

another is not such as would authorize one to recover it from another because of a mistake in assessment by either omission of property from the collector's books by mistake, or by mistake in assessment or false or fraudulent valuation. The relation of the taxpayer is to the municipality, and as to each other a relation exists only by or through the municipality. The duties of the municipality are determined by law, and it may be required to discharge those duties, and it does not become a trustee for one taxpayer of the money collected from another.

The tax levied by district No. 1, as extended on lands belonging to district No. 2, was an illegal and void tax. That tax was paid by the owners of the property so illegally assessed, voluntarily. The books were open to inspection by the taxpayers, and the means of knowledge existed to learn and know all the facts. Money paid voluntarily by one with knowledge or means of knowledge of all the facts cannot be recovered back. *Elaton v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Lyons v. Cook*, 9 Ill. App. 543. To recover from a municipality taxes illegally collected and paid over, the tax must have been illegal and void, paid under compulsion, or, what would be equivalent thereto, received to the use of the municipality from the collecting officer. *Elaton v. Chicago*, *supra*; *Union P. R. Co. v. Dodge County Comrs.* 98 U. S. 541, 25 L. ed. 196; *Preston v. Boston*, 12 Pick. 14. The tax in this case was illegal and void, and received from the collecting officer by and for the use of the municipality, as appears from the averments of this bill. This would not be sufficient, but it must further appear that the payment was compulsory. A payment made to prevent the sale of real estate for an illegal tax is not under compulsion, but must be regarded as voluntary. *Stover v. Mitchell*, 45 Ill. 213; *Falls v. Cairo*, 58 Ill. 403; *Swanston v. Ijams*, 63 Ill. 165. A payment thus voluntarily made not being recoverable from the municipality by the taxpayer, and not having been paid for the use of another municipality or person in law or fact, no recovery can be had therefor.

No question is presented in this record as to the right to restrain, by injunction, the collection of an illegal tax. The only question here is the right of complainants to recover the amount of an illegal tax paid. All questions in reference to the levy and collection of taxes are statutory, and the rights and duties of the municipality are thus prescribed. The rule that an illegal and void tax voluntarily paid cannot be recovered from the municipality by the person paying being settled by the adjudications of this court, it must be held that what cannot be done directly cannot be done by indirection. No right exists in other taxpayers to recover such voluntarily paid tax. If there is an advantage acquired by the municipality receiving such tax, and a deprivation of a right of another municipality, the remedy to be provided is by legislative action. The bill did not state a cause of action.

The judgment of the Appellate Court is affirmed.

Rehearing denied.

31 L. R. A.

CICERO & PROVISIO STREET RAILWAY COMPANY, *Appl.*,

v.

Frank MEIXNER.

(160 Ill. 320.)

1. The sufficiency of evidence to go to the jury or to sustain a verdict cannot be passed upon on appeal further than to ascertain if at the close of the plaintiff's case there was evidence tending to prove the facts alleged in his declaration, and whether, at the close of all the testimony, the evidence with all the inferences which the jury could justifiably draw from it was insufficient to support a verdict for plaintiff.
2. The exercise of due care or caution in boarding an electric street car while in motion is a question for the jury.
3. To board or depart from an electric car while in motion is not negligence *per se*.
4. The doctrine of comparative negligence is no longer law in Illinois.
5. An error in instructions cannot be complained of by a party who subsequently asks and obtains the same instruction.

(October 11, 1895.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

Statement by **Phillips, J.**:

This was an action on the case by appellee against appellant to recover damages for personal injuries received by him while attempting to board an electric street car. The facts sufficiently appear in the opinion. A jury in the trial court returned a verdict of \$8,000 for plaintiff, on which judgment was rendered, and on appeal to the appellate court it was affirmed. The case comes to this court on appeal from the judgment of the latter court.

Messrs. William H. Barnum, John A. Post, and John B. Brady, for appellant:

Negligence may become a question of law where in the facts admitted or conclusively proved there is no reasonable chance of different reasonable minds reaching different conclusions. It may also become a question of law if a single material fact is conclusively shown or uncontradicted, the existence or nonexistence of which is conclusive of the right of recovery.

Wabash R. Co. v. Brown, 152 Pa. 484.

The "fact" is conclusively shown, and is "uncontradicted," that the motorman neither saw nor knew that the plaintiff intended to

NOTE.—The above case presents the important question whether an electric car is to be classed with horse cars or with ordinary railroad cars in respect to the matter of negligence in getting on or off while it is in motion.

For the law as to getting on or off ordinary railroad trains while in motion, see *note to Carr v. Bel River & E. R. Co.* (Cal.) 21 L. R. A. 364.

board the car, and that it was not for such reason that the speed of the car was slackened, if as claimed by plaintiff's witnesses it was so slackened.

In order to make a defendant liable for an injury, where the plaintiff has also been negligent or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injury.

Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475.

The facts established by the plaintiff's evidence do not show that the plaintiff at the time of the accident was in the exercise of ordinary care.

Hayes v. Norcross, 162 Mass. 546 (1895); *North Chicago Street R. Co. v. Williams*, 140 Ill. 281.

The negligence of the plaintiff was the more proximate cause of this injury.

Missouri P. R. Co. v. Moseley, 57 Fed. Rep. 921; *Holmes v. South P. Coast R. Co.* 97 Cal. 161.

Where a person sees or has the means of seeing that upon a certain course danger is imminent, he is charged with want of ordinary care if he pursues that course and is injured, where he pursues it merely for its supposed advantages, in the belief that he will be able to escape, declining another course which he sees and knows to be entirely safe.

Chicago & N. W. R. Co. v. Bliss, 6 Ill. App. 411; *Chicago & A. R. Co. v. Jacobs*, 63 Ill. 178; *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311.

Before the plaintiff could recover, the proof should show (1) that the defendant was negligent as charged; (2) that such negligence contributed to plaintiff's injury; (3) that plaintiff was himself exercising ordinary care; (4) that all these matters must be proved by a preponderance of the evidence; and (5) that unless all were so proved the verdict should be not guilty.

Little v. Superior Rapid Transit R. Co. 88 Wis. 402.

"Due and proper care" means ordinary care.

Calumet Iron & S. Co. v. Martin, 115 Ill. 367.

The doctrine of comparative negligence only has application in a case where a plaintiff has exercised ordinary care.

Toledo, St. L. & K. C. R. Co. v. Cline, 135 Ill. 48; *Peoria v. Walker*, 47 Ill. App. 194; *Calumet Iron & S. Co. v. Martin*, *supra*; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 513.

The doctrine of comparative negligence is no longer the law of this court.

Lanark v. Dougherty, 153 Ill. 163 (1894).

Messrs. Brant & Hoffmann for appellee.

Phillips, J., delivered the opinion of the court:

One of the errors assigned for the reversal of this judgment is the refusal of the trial court to instruct the jury at the close of the plaintiff's evidence, to find for the defendant, and the refusal of the court to give a like instruction that, as a matter of law, the plaintiff had failed to make out his case, which was asked at the close of the argument.

It is urged that the evidence of plaintiff did not warrant the jury in finding that the injury of plaintiff was the result of defendant's negligence, as charged in the declaration, and also that the evidence of plaintiff establishes that

he was not, at the time of his injury, in the exercise of reasonable care and caution. Both of these matters are ordinarily questions of fact, to be determined in the trial and appellate courts. As this court has frequently held, it is not our province to determine or pass upon such questions, further than to ascertain whether or not there was, at the close of plaintiff's case, evidence tending to prove the facts alleged in the declaration, and whether, at the close of all the testimony, when the motion to instruct for defendant was refused, the evidence, with all the inferences which the jury can justifiably draw from it, was insufficient to support a verdict for plaintiff, and that if one was returned it must be set aside. *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 30 L. R. A. 33; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215; *Purdy v. Hall*, 134 Ill. 298; *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132; *Bartelott v. International Bank*, 119 Ill. 259; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340.

Two elements alleged in the declaration, and necessary to be established by plaintiff before he could recover, were negligence of the defendant as charged, and that the plaintiff was in the exercise of due care and caution for his own safety. It is not the province of this court to say whether these facts are proved. The evidence before the trial court and jury tended to show that plaintiff, on August 10, 1891, was on Madison street, in Chicago, about two blocks east of Desplaines avenue. He was walking east on the north side of Madison street, intending to board an east-bound car on defendant's line. When a car approached and was distant 150 or 200 feet, plaintiff, still being on the sidewalk on the north side of the street, signaled to the motorman by throwing up his hand. He then proceeded diagonally to the middle of the street, and continued walking eastwardly in the space between the two street-car tracks. The next street crossing east of him was Thomas street. He continued between the two tracks some 25 feet east of this crossing, when the car overtook him. Plaintiff contends that before the car reached him he had seen the motorman turn the brake, so that when he attempted to get on, the car had slackened down to a speed of about 4 or 5 miles an hour. He was still on the left hand or the north side of the track, and desired to get on the front platform. As the car went by he caught the hand rails on each side of the front platform, when he says the speed of the car was suddenly accelerated, and he lost his hold, was dragged some 40 feet or more, and thrown under the wheels and his left hand crushed off. The material parts of plaintiff's testimony, as above set forth, were corroborated by two spectators who witnessed the occurrence,—one from the street and the other from an adjoining yard not far distant. Many of these facts were contradicted by the motorman and four passengers on the front platform, who testified that the car was running at a speed of 7 or 8 miles an hour when it reached plaintiff, and that the speed had not been decreased for the reason that no signal was seen, and that the speed was not accelerated, but, on the contrary, the current was turned off and the brake ap-

plied as soon as plaintiff attempted to get on. It was contended and testified to by these witnesses that plaintiff had his back turned to the car while walking, and as the car approached and overtook him he attempted to catch it with both hands; that the motorman at once attempted to stop the car, and did so within a space of 35 or 40 feet. Some passengers in the car also testified that there was no decrease in speed until after the accident occurred.

In the discussion of the question as to whether the court erred in refusing to instruct the jury to find for defendant, only the facts as presented and shown by plaintiff's evidence will be considered.

The serious results of the injury to plaintiff are not disputed. He was, a cabinet maker, and his skill as such depended on the use of both his hands. We have examined the record with the utmost care to ascertain if this judgment is by it sustained. Negligence is ordinarily a question of fact for the jury. In *Wabash R. Co. v. Brown*, 152 Ill. 484, this court said (p. 488): "Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on undisputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. . . . With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for a jury. Negligence may become a question of law where, from the facts admitted or conclusively proved, there is no reasonable chance of different reasonable minds reaching different conclusions." To hold that the trial court should have given the general instruction as asked, this court must hold that it was not a question of fact as to whether or not plaintiff was guilty of negligence contributing to the injury, but that it was a question of law, and was negligence *per se* for the plaintiff to attempt to board the car in question running at the rate of speed shown. If it was a question of fact, then it was properly submitted by the trial court to the jury.

This court has held in a number of cases that it is negligence for a passenger to get off a train, of which the motive power is steam, while the cars are in motion. *Illinois C. R. Co. v. Lutz*, 84 Ill. 598; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88; *Illinois C. R. Co. v. Chambers*, 71 Ill. 519; *Illinois C. R. Co. v. Statton*, 54 Ill. 133; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60.

In *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 596, this court said (p. 592): "If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on a train when in motion. If a person is guilty of such negligence in getting off a train of cars in motion as will preclude a recovery for an injury received, upon the same principle and for the same reason a person injured in getting on a train of cars in motion, and in consequence thereof, should be regarded guilty of such negligence as will prevent a recovery." The courts of other states have adopted the same rule that it is negli-

gence for a passenger to alight from a moving train of cars the motive power of which is steam.

The rule as applicable to steam railways is relaxed when applied to horse cars or street railways. *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Stoner v. Pennsylvania Co.* 98 Ind. 384, 49 Am. Rep. 764. Beach on Contributory Negligence (§ 90), says: "It is well settled that it is not contributory negligence *per se* for one to alight from or to board a moving street car, and here again we find the severity of the rule as applicable to steam railways essentially relaxed." Booth on Street Railways, (§ 336), lays down the same rule in the following language: "Although the act of boarding a car while in motion is always attended with some risks, the rules applicable to persons entering cars operated by steam are not usually applied with the same strictness to street railways operated by horse power. It is a general rule, established by numerous decisions, that if a person, who has the free use of his faculties and limbs, has given proper notice of his desire to be taken up, and the speed of the car has been slackened in the usual manner, it is not negligence *per se* to attempt to get on while it is moving slowly, and that if a passenger is injured under such circumstances the question of his contributory negligence is ordinarily one of fact for the jury."

The doctrine is established in nearly all of the states where the question has arisen, that it is not negligence *per se* for a passenger to board or alight from a street car operated by horse power, and the question of contributory negligence is one of fact for the jury. *McDonough v. Metropolitan R. Co.* 137 Mass. 210; *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 25 Am. Rep. 171; *Ganiard v. Rochester City & B. R. Co.* 50 Hun, 22; *Morrison v. Broadway & S. A. R. Co.* 130 N. Y. 166; *People's Pass. R. Co. v. Green*, 56 Md. 84; *North Chicago Street R. Co. v. Williams*, 140 Ill. 275. In the case of *Sahlgard v. St. Paul City R. Co.* 48 Minn. 232, where the motive power of the car was a cable, the same rule as above stated was held also to be applicable.

In large and populous cities, where cars are constantly receiving and discharging passengers at crossings, it is a well-known fact that many of such passengers board cars and alight therefrom before the car has come to a full stop, and that they do so usually with perfect safety. It is well-known, also, that street-car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible for a court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that if he attempted to get on or off he would be held guilty of contributory negligence. It would also be a great hardship, and unjust, to lay down a general rule that a passenger attempting to board a street car while in motion at all should be held in contributory negligence. Every person is supposed to know that the boarding of a moving train or car is attended with the danger of a misstep or

fall and a fall beside a moving car is liable to bring some part of the body or limbs in danger of being crushed. It is the duty of those having control and management of cars designed for traffic on the public streets, to bring such cars to a full stop at such places as are convenient and necessary for the purpose of discharging and receiving passengers, and it is no less the duty of passengers in getting on or off such cars to observe due precaution for their own safety. We cannot say, however, that it is inconsistent with ordinary care and caution for a person to board a street car while in motion. Whether one has not exercised due care or caution in so doing is to be determined by the particular circumstances in each case, and is therefore a question of fact to be submitted to the jury.

The cases heretofore cited, in which it has been held that it is not negligence *per se* for a person to board or alight from a street car while in motion, have reference in a great degree, to horse cars. Where such motive power is used the act is not in itself negligence, while in the case of cars propelled by steam the act is held to be negligence. Where the motive power is electricity, a question not entirely free from difficulty is presented. The modern progress of methods of transportation, the recent discoveries of the possibility of electricity as a motive power, and the perfection which it has within a few years developed and attained, have demonstrated a power popular as a method of transit. The purposes to which a power of this character is applied must, to some extent, be considered. Electricity has now in a great measure superseded horse power. The same style of cars, and often the same cars, are used, the same streets are traversed, and a like number of stops, and in like places, are made to receive and deliver passengers. Electricity as a motive power, while stronger and more powerful, and with possibilities of a greater speed, is at the same time more nearly under the control of the person in charge than horse power. The strict rule in force regarding the negligence of a person alighting from or boarding an ordinary train of steam cars had for it many good and sufficient reasons which are not applicable to the electric car as in general use. In the latter case, stops are frequent and opportunity for great speed is not presented; steps for passengers are near the ground, and the chances of a misstep or fall are not so great as in steam cars as constructed; streets on such lines are generally paved, and in that respect passengers may as safely depart from or board such cars in one place as another, whereas in the case of steam cars platforms are generally provided. While in electric cars the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approach those of horse cars that it must be held that the same rule of law which in the cases cited and a long line of other cases holds that it is not negligence *per se* to board or depart from such cars while in motion is also applicable to electric cars.

It follows, therefore, from this application of the rule, that in the case at bar it was solely a question of fact as to whether or not there was negligence in the acts of the defendant or contributory negligence on the part of the

plaintiff. There was evidence tending to prove the facts alleged in the declaration, and it was not error in the trial court to refuse the general instruction asked. It was proper for the court to submit the question to the jury.

It is also urged as error that the trial court refused certain instructions which should have been given, and modified certain other instructions which should have been given to the jury as asked, and that such modification was error. Sixteen instructions were asked on behalf of the defendant below, nine of which were given. Too much space would be occupied in considering in detail the objections to the instructions refused and modified. We find, upon examination, that the fifth instruction, to which a modification was made by the court instructing the jury on the doctrine of comparative negligence, should not have been so modified. The doctrine of comparative negligence is no longer the law in this state. *Lanark v. Dougherty*, 153 Ill. 163; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9. It appears, however, that in the 12th instruction asked by defendant below, and given by the court, the jury were instructed, in substance, the same as by the 5th instruction after its modification by the court. In the 12th instruction referred to, the jury were told that if they believed, from the evidence, that both the plaintiff and motorman were guilty of negligence contributing to the injury, they should find their verdict against the plaintiff, unless they believed that the plaintiff's negligence was slight and that of the motorman was gross in comparison. While it was not proper for the court to make the modification of the 5th instruction, appellant is not now in a position to complain of such modification, from the fact that it, by the 12th instruction, asked the court to instruct the jury that such was the law. The nine instructions given by the court to the jury for appellant fully covered the law and the facts in the case. There is no reversible error in the refusal or modification of instructions.

It is strongly urged by appellant that certain remarks of counsel for appellee on the trial of this case were such as should cause a reversal of this judgment. We have examined the record very carefully, and while we find the remarks and acts of counsel which are objected to, were not of the character a trial court should permit, we are not prepared to look at them with the degree of seriousness that counsel for appellant urge in their brief. We have frequently said that it is the duty of the trial court to control counsel, in the conduct of a trial and in the argument of a case, within reasonable bounds. It is not always possible to bring before this court the expression of counsel in making objectionable remarks, and the acts of counsel in connection therewith, so that what might in the trial court be extremely improper is not presented to us with the same force. We are not able to see, after having carefully examined this record, that the remarks and conduct of counsel for appellee were such as in themselves should call for a reversal of this judgment.

Finding no error of law in this record, the judgment of the Appellate Court for the First District is affirmed.

Rehearing denied.

L. R. A.

MISSOURI SUPREME COURT (In Banc).

ROGERS & BALDWIN HARDWARE
COMPANY, *Appt.*,

v.

CLEVELAND BUILDING COMPANY *et*
al. and JARVIS-CONKLING MORT-
GAGE TRUST COMPANY *et al.* *Respts.*

(.....Mo.....)

1. The appointment of a receiver by a Federal court after a judgment establishing a mechanic's lien against specific property and directing a sale of it to satisfy the demand will not defeat the right of the lien claimants to have the property sold on execution under the judgment.

2. A sheriff's sale for \$250, of property worth from \$40,000 to \$50,000, under a description so misleading that the sheriff did not know what property he was selling, on account of which he failed to give notice according to his custom to mortgagees, together with the fact that they had paid off or compromised other liens on the property and supposed that all were thus satisfied, may be set aside on the application of such mortgagees, although the owner of the fee of the property, who is insolvent, does not complain.

(*Barclay, J., dissents.*)

(February 5, 1896.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for Greene County setting aside a sale to enforce a mechanic's lien upon motion of respondents, mortgagees of the property. *Affirmed.*

The facts are stated in the opinions.

MERRIS, Massey & Tatlow, for appellant:

This case must be governed by the rule that refers to the conflict of jurisdictions of courts of co-ordinate jurisdiction, which is, that whichever court first acquired jurisdiction over the property in question—by either taking actual and physical possession of the property through its arm (its receiver), or constructive possession by a proceeding *in rem*, or a quasi proceeding *in rem*, such as attachments, mechanics' liens, action to foreclose mortgages or establish other liens, such court draws such property to it for the purpose of such jurisdiction and excludes it from the jurisdiction of any other co-ordinate court as completely and as fully as if such property was beyond the territorial jurisdiction of such court.

Heidritter v. Elizabeth Oil Cloth Co. 112 U. S. 294, 28 L. ed. 729; *Mack v. Winslow*, 59 Fed. Rep. 316, 16 U. S. App. 602; *Gates v. Bucki*, 53 Fed. Rep. 961, 12 U. S. App. 69; *Gaylord v. Ft. Wayne, M. & C. R. Co.* 6 Biss. 286; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981; *Cole v. Oil-Well Supply Co.* 57 Fed. Rep. 534; *Seibel v. Simeon*, 62 Mo. 255; *Peale v. Phipps*, 55 U. S. 14 How. 368, 14 L. ed. 459; *Hagan v. Lucas*, 35 U. S. 10 Pet. 400, 9 L. ed. 470; *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007; *Pulliam v. Osborne*, 58 U. S. 17 How. 471, 15

L. ed. 154; *Taylor v. Carryl*, 61 U. S. 20 How. 588, 15 L. ed. 1028; *Yonley v. Lavender*, 88 U. S. 21 Wall. 276, 22 L. ed. 536; *People's Bank v. Winslow*, 102 U. S. 256, 26 L. ed. 101; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390.

This action, being on a mechanic's lien under the Missouri statute, was a quasi proceeding *in rem*.

Boswell v. Otis, 50 U. S. 9 How. 336, 13 L. ed. 164; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 808, 19 L. ed. 931; *Gordon v. Torrey*, 15 N. J. Eq. 112, 82 Am. Dec. 273; *Heidritter v. Elizabeth Oil Cloth Co.*, and *Cole v. Oil-Well Supply Co.* *supra*.

Substituted process in actions quasi *in rem*, can only be sustained when, in the first instance, some act is done which gives the court dominion over the property; that is, by actual possession, or a recorded levy that gives constructive notice to the world of such dominion.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 187, 30 L. ed. 373; *Cooper v. Reynolds*, *supra*; *The Rio Grande v. Otis* ("The Rio Grande"), 90 U. S. 23 Wall. 458, 23 L. ed. 158; *Cole v. Cunningham*, 183 U. S. 116, 33 L. ed. 543; *Arndt v. Griggs*, 184 U. S. 316, 38 L. ed. 918.

As between courts of concurrent and co-ordinate jurisdiction the court that first obtains jurisdiction of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from a co-ordinate court.

United States, Riggs, v. Johnson County Supers. 73 U. S. 6 Wall. 196, 18 L. ed. 776; *Central Trust Co. v. South Atlantic & O. R. Co.* 57 Fed. Rep. 3; *Sharon v. Terry*, 36 Fed. Rep. 337; *Wickham v. Hull*, 60 Fed. Rep. 326; *Mack v. Winslow*, 59 Fed. Rep. 316, 16 U. S. App. 602; *Metzner v. Graham*, 57 Mo. 410; *Patterson v. Stephenson*, 77 Mo. 332.

If a court once acquires jurisdiction *in rem* or quasi *in rem*, it has a jurisdiction to proceed, not only to judgment, but to sale under final process, and give the party litigants entitled thereto the proper and appropriate fruits of such litigation.

United States, Riggs, v. Johnson County Supers. 73 U. S. 6 Wall. 187, 18 L. ed. 773; *Gates v. Bucki*, 53 Fed. Rep. 961, 12 U. S. App. 69; *Lafayette County Comrs. v. United States, Moulton*, 112 U. S. 217, 28 L. ed. 698; *Davies v. Corbin*, 112 U. S. 87, 28 L. ed. 628; *Rosenbaum v. Bauer*, 120 U. S. 450, 30 L. ed. 743.

By section 720 of the Revised Statutes of the United States, the United States courts are prohibited from granting any injunction to stay "proceedings in the state courts, which had first acquired jurisdiction."

Texas & P. R. Co. v. Kuteman, 54 Fed. Rep. 547, 18 U. S. App. 99; *Diggs v. Wolcott*, 8 U. S. 4 Cranch, 179, 2 L. ed. 587; *Peck v. Jenness*, 48 U. S. 7 How. 620, 12 L. ed. 844; *Dial v. Reynolds*, 96 U. S. 340, 24 L. ed. 644; *Parcher v. Cuddy* ("The Mamit"), 110 U. S. 742, 28 L. ed. 813; *Dillon v. Kansas City S. B. R. Co.* 43 Fed. Rep. 109; *Fisk v. Union P. R. Co.* 10 Blatchf. 520; *Whitney v. Wilder*, 54 Fed. Rep. 554; *Chicago Trust & Sav. Bank v. Bentz*, 59 Fed. Rep. 646.

If the court issuing the process has jurisdic-

NOTE.—The above case represents an interesting phase of the subject of exclusive jurisdiction in case of receiverships. As to general question, see note to *Re Schuyler's Steam Tow-Boat Co.* (N. Y.) 20 L. R. A. 301.

31 L. R. A.

tion in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and in the execution of such process he kept himself within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts.

Buck v. Colbath, 70 U. S. 3 Wall. 340, 18 L. ed. 260; *Conner v. Long*, 104 U. S. 228, 26 L. ed. 723; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981.

In an action to enforce a mechanic's lien, jurisdiction having once attached will not be divested by proceedings in bankruptcy instituted subsequent thereto, and execution can be sued out in such action so commenced in the state court, and the property sold, without first procuring leave from the Federal court, and such a sale will pass a valid title.

Seibel v. Simeon, 62 Mo. 255; *Fisher v. Lewis*, 69 Mo. 629.

Messrs. Beardsley, Gregory, & Flannelly and White & McCammon, for respondents:

A trial court has complete control over its own process, and can set aside an execution sale on motion at or before the return term of the writ.

Holzhour v. Meer, 59 Mo. 484; *American Wine Co. v. Scholer*, 85 Mo. 496; *St. Louis v. Brooks*, 107 Mo. 380; *McKee v. Logan*, 82 Mo. 524; *Ex parte James & Ray*, 59 Mo. 280.

Where gross inadequacy of price is coupled with accidents, mistakes, or misapprehension caused by a purchaser or others interested in a sale or by the officer's conduct, the court will set aside the sale.

Cole County v. Madden, 91 Mo. 615; *Walters v. Hermann*, 99 Mo. 529; *Hannibal & St. J. R. Co. v. Brown*, 43 Mo. 294; *Bouldin v. Ewart*, 63 Mo. 330; *Knoop v. Kelsey*, 121 Mo. 648; *Cobb v. Day*, 106 Mo. 300; *McKee v. Logan*, 82 Mo. 524.

The presumptions are all in favor of the correctness of the finding of the court below, who had the witnesses before him and was better able to determine all the facts.

Waddell v. Williams, 50 Mo. 216; *State, Reid, v. Griffith*, 63 Mo. 545; *Eidemiller v. Kump*, 61 Mo. 344.

The property was at the time of the levy and sale under the execution in the possession of the Federal court through its receiver, and the burden devolved upon defendants in the motion to show, even upon their own theory of the case, that the levy and sale were under and by virtue of proceedings in which a court of co-ordinate jurisdiction with the Federal court had first assumed jurisdiction of the property itself. This necessitates the proof of a valid judgment upon which to rest the levy and sale.

Since the proceedings were before a justice of the peace in a statutory proceeding to enforce a mechanic's lien, no presumptions will be indulged in favor of his jurisdiction.

Ewing v. Donnelly, 20 Mo. App. 6; *Corriگان v. Morris*, 43 Mo. App. 456; *State v. Metzger*, 26 Mo. 65; *McCloon v. Beattie*, 46 Mo. 391; *Rohland v. St. Louis & S. P. R. Co.* 89 Mo. 180; *Sanderson v. Fleming*, 37 Mo. App. 595; 31 L. R. A.

McKelvey v. Wonderly, 26 Mo. App. 631; *Hull v. St. Louis Ore & S. Co.* 90 Mo. 103; *Brandenburger v. Easley*, 78 Mo. 659; *Lecoutour v. Peters*, 57 Mo. App. 449; *Bailey v. Cook*, 8 Mo. App. 565.

The evidence failed to show the justice of the peace had jurisdiction, because there was no showing of a proper service on the parties to the contract under which work was done.

Wibbing v. Powers, 25 Mo. 599; *Wescott v. Bridwell*, 40 Mo. 146; *Steinmann v. Strimple*, 29 Mo. App. 482; *Johnson-Frazier Lumber Co. v. Schuler*, 49 Mo. App. 90.

The levy upon and sale of the property while in the possession of the Federal court made such levy and sale void.

Wisnall v. Sampson, 55 U. S. 14 How. 52, 14 L. ed. 322; *Ellis v. Vernon Ice L. & W. Co.* 86 Tex. 109; *Walling v. Miller*, 108 N. Y. 173; *Harrison v. Waterberry* (Tex.) 27 S. W. 110; *Robinson v. Atlantic & G. W. R. Co.* 66 Pa. 160; *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 787; *Walker v. Flint*, 2 McCrary, 341.

The jurisdiction of the justice of the peace in the suit brought before him for the enforcement of a mechanic's lien in no wise prevented the Federal court from entertaining jurisdiction of a suit for the foreclosure of a mortgage upon the premises, and from the appointment of a receiver in that case to take possession of the property.

Wilmer v. Atlanta & R. Air Line R. Co. 2 Woods, C. C. 409; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 983; *Heidritter v. Elizabeth Oil Cloth Co.* 112 U. S. 294, 28 L. ed. 729; *Buck v. Colbath*, 70 U. S. 3 Wall. 343, 18 L. ed. 260.

Burgess, J., delivered the opinion of the court:

This case was transferred to the court in banc, after an opinion reversing the judgment had been rendered. We adopt the statement of facts therein made, as well also as the first paragraph of the opinion by our learned Brother Barclay. They are as follows:

"The questions to be determined on this appeal arose upon a motion in the circuit court to set aside a sheriff's sale, which motion the court sustained. The plaintiffs appealed, after having taken proper steps to give the trial court opportunity to review its ruling, and saving the evidence and all exceptions, in the usual way. The original cause in which the motion appears is entitled: 'W. C. Rogers and A. A. Baldwin, Composing the Firm of Rogers & Baldwin Hardware Co., Plaintiffs, v. The Cleveland Building Co., A. B. Crawford, John D. Porter, Seth Tuttle, Marion Davis, W. H. Keyser, Owners, and Jarvis-Conkling Mortgage Trust Co., Mortgagees, and Samuel M. Jarvis, Trustee, W. W. Baldwin, Mortgagee, B. U. Massey, Trustee, Defendants.' Stated first in the shortest form the case is this: Plaintiffs obtained a judgment against the owners of the Baldwin theater or opera house property for a small amount, and of lien against the property under the mechanic's lien law. A special execution issued on that judgment, and the property was sold by the sheriff. Mr. McAfee became the purchaser, as trustee, on behalf of the plaintiffs and other holders of liens against the building for work

and materials furnished towards its construction. Before the sale, but after the judgment of lien, Judge Philips, at chambers, as judge of the United States circuit court for the western district of Missouri, appointed a receiver of the theater property, in the suit of Lubbock et al., plaintiffs, v. Marion Davis, Ellen Davis, and A. B. Crawford, defendants, to foreclose a mortgage upon the same property. The order of appointment was of wide reach, and is said to be a barrier to the execution of the mechanic's lien judgment, pending the receivership. The plaintiffs in this case are not named as parties to the proceeding in the Federal court. After the sale under the execution on the mechanic's lien judgment, the Jarvis-Conkling Mortgage Trust Company and Samuel N. Jarvis filed in the state court the motion which is the basis of this appeal. The principal grounds of the motion are that the sale was an interference with the receivership of the property established by the Federal court, and was hence void. There are other reasons assigned in the motion which will be mentioned further on.

'Passing now to some of the necessary particulars of the case, it will be convenient to keep the following dates in view: September 9, 1891, date of mortgage sought to be foreclosed in the *Lubbock Case* in the Federal court; December 5, 1891, beginning of plaintiffs' lien account; March 5, 1892, close of lien account; May 1, 1892, notice of lien; May 31, 1892, lien filed in the circuit clerk's office; August 17, 1892, plaintiffs' mechanic's lien suit begun; September 20, 1892, judgment in mechanic's lien suit for \$37.36, and of lien; March 13, 1893, transcript of the judgment filed in circuit clerk's office; March 16, 1894, petition for receiver in Federal court; March 17, 1894, receiver appointed by Judge Philips; March 19, 1894, receiver took possession of the property; October, 1894, special execution issued from circuit court on mechanic's lien judgment, returnable to January term, 1895; November 23, 1894, sale on special execution, property bought by Mr. McAfee; December 15, 1894, sheriff's deed recorded; January 14, 1895, motion filed to set aside sale; January 23, 1895, motion sustained, sale set aside. Although the mortgage first above mentioned ostensibly antedates the opening of the lien account, it seems that the bonds (for \$49,000) secured by it were placed later. When that mortgage was recorded does not appear. The investigation of the facts in regard to that instrument was cut short at the hearing by an admission by one of the attorneys for the motion, who conceded that the 'lien part' of the judgment (under which the sale took place) was a prior lien.

'The proceeding to enforce plaintiffs' mechanic's lien was begun before a local justice of the peace, after the filing of the lien in the circuit clerk's office, according to law. Rev. Stat. 1889, § 6161. The defendants in that original cause were the parties named as such at the outset of this opinion. The moving parties in the present motion are the trust company and the trustee, Mr. Jarvis, both defendants in that case. Five of the defendants were personally served; the others (including the trust company and Mr. Jarvis) were ultimately

brought in by posting advertisements, as prescribed in such cases. Id. § 6163. The justice's judgment refers to the mortgage or deed of trust in which Mr. Jarvis was trustee for the Jarvis-Conkling Trust Company, and finds plaintiffs' demand (for the amount of judgment rendered against the owners) to be paramount to the mortgage, and adjudges that it is a lien on the property described, including the estate or interest of these defendants. A transcript of that judgment was duly filed in the circuit clerk's office, and the execution sale now in question took place upon process issued for the circuit court upon that judgment. No appeal from the latter was ever taken, and the judgment became final in due time.

The order made by Judge Philips in the foreclosure suit is quite long, and need not be fully recited now. Its substance is that, upon a hearing before the judge at chambers, Mr. Jewell was appointed receiver for the United States circuit court for the western district of Missouri, and directed to take immediate possession of the property (which was described), and to 'carry on the business connected with said opera house, and carry out contracts already made by the respondent A. B. Crawford in connection with said opera-house business and the procurement of amusement enterprises therefor, to make new contracts in that respect,' etc. The usual directions in regard to funds and accounts were included. The receiver was authorized, among other things, to pay 'any sums necessary for the payment of taxes, or which from time to time may be required to save from sale or sacrifice the said real property.' The order further declared 'that the respondent A. B. Crawford, his agents, employees, and all other persons, whether claiming through or under him, or otherwise, are hereby enjoined and restrained from attaching, seizing, levying upon, or otherwise taking or interfering with any of the property above described, or with the said receiver in his possession, control, and management of the said property.

'Other facts will be stated in the course of the opinion, in connection with some subordinate points on which they bear.

'1. The chief issue concerns the relation of the original lien case to the receivership in the Federal court. It will be seen that, by the terms of the order appointing the receiver, 'all persons,' whether claiming through the defendant Crawford 'or otherwise,' were enjoined from 'attaching, seizing, levying upon, or otherwise taking or interfering with any of the property,' etc. This language might reach the proceedings under the lien execution in the state court against this property. But if the property, at the time that order was made, had been already subjected to the judicial control of the state courts, which had not yet concluded their action upon the property, then the Federal order might be disregarded by 'all persons' (not parties to the foreclosure suit, at least) who were entitled to demand the exercise of the state court's jurisdiction upon said property. The question is whether or not the mechanic's lien proceedings subjected the theater property to the judicial power of the state courts until that jurisdiction was exhausted, so that no other court might meanwhile remove the prop-

erty from the control necessary to make the use of that jurisdiction effective. The comity which should govern the actions of courts of concurrent jurisdiction in such circumstances has passed into a rule of law, now generally recognized in the United States, and which has been thus stated by the highest Federal tribunal: 'When the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction.' *Heidritter v. Elizabeth Oil Cloth Co.* (1884) 112 U. S. 305, 28 L. ed. 733. The proper application of this rule to the facts in judgment depends somewhat on the nature of the mechanic's lien suit. Such suits in this state are regulated by positive law, which clearly indicates their nature. An action to enforce such a lien deals with certain described property, against which the lien is claimed, and, upon establishment of the claim, judgment goes first against the principal debtor, on the account. The amount ascertained to be due is then adjudged a lien on the specific property, and a special execution thereafter issues, directing a sale of the identical property to satisfy the demand. Whether such an action (so far as it concerns the realty) should be regarded as *in rem* or be placed in the class which some jurists have described as 'quasi *in rem*,' we do not stop to inquire. The true inquiry is whether the action deals with the property it seeks to affect in such a specific and definite manner as necessarily to withdraw the property from the exclusive control of other courts while the action is pending. We think it does, and that such is the plain effect of the Missouri statutes governing that action. Rev. Stat. 1889, §§ 6159-6167, 6705-6729. The jurisdiction of the state courts (having attached to the property a long time before the suit in the Federal court began) was not exhausted by the rendition of the judgment of lien. The ultimate process (in this instance, of special execution) needed to make the judgment fruitful was an essential part of the exercise of power comprehended in the term 'jurisdiction.' A grant of power is considered to include the use of all incidental powers necessary to make the principal grant effective. Broom, Legal Maxims, 8th Am. ed. pp. 479, 486; *State, McLorinan, v. Ryne* (1887) 49 N. J. L. 603. In a leading Federal case it was said that 'process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred.' *United States, Riggs, v. Johnson County Supers.* (1867) 73 U. S. 6 Wall. 187, 18 L. ed. 774. The subject of the mechanic's lien suit (namely, the opera-house property) was thus plainly within the control of the state courts, and neither the appointment of the receiver nor the order then made withdrew the property from that control. The establishment of the receivership did not transfer the title to the property, nor did it divest liens already fixed upon it. To hold that such was the effect of a proceeding to which the lien claimants were not parties would be to deprive them of their rights in the property 31 L. R. A.

without a hearing, which we certainly decline to do. As the learned Federal judge had no authority or jurisdiction to take the property out of the judicial control of the state courts in the manner attempted in said order, it follows (if his order is to be construed as having that effect) that it is void and of no force, as to the rights of the lien claimants in process of assertion in the state court. In *Gates v. Bucki* (1898) 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. Rep. 961, the Federal court of appeals of this circuit, by Judge Shiras, declared that, 'this property being thus in the custody of the state court in proceedings intended to affect the title and control the disposition of the same, the property was for the time being withdrawn from the jurisdiction of the Federal court, and when the foreclosure suit was filed in that court it could not and did not bind or reach the property, because the same was not then within the plane of Federal jurisdiction.' 12 U. S. App. 81, 4 C. C. A. 116, and 53 Fed. Rep. 961. The above ruling was made in a case wherein the jurisdiction of the Federal court was challenged by appropriate moves in that court. But if the principle announced in it is sound, as we believe it to be, it is not essential for the lien claimants to go into the Federal court to secure the recognition of that principle. It is one of those rules of 'general jurisprudence,' binding alike on Federal and state tribunals. It follows that the ruling of the trial court on the motion to set aside the sale, in so far as it is referable to the pendency of the receivership proceedings, was erroneous."

2. The next question is as to the correctness of the ruling of the court in setting aside the sheriff's sale. That the court had control of its own process and the power to set aside the sale if there was gross inadequacy of price, and the interests of the movers are injuriously affected by the sale if they were by mistake or misapprehension prevented from attending it or preventing it, we think, is well-settled law. It is equally well settled that inadequacy of price alone will not justify the setting aside of a judicial sale, and the court so declared; but when the inadequacy of price is very great, as in the case at bar, slight circumstances tending to show that interested parties, such as mortgagees, were misled, or by accident or mistake prevented from attending the sale or preventing it, will justify its being set aside. While the court declared, as a matter of law, "that inadequacy of consideration, however gross, is not sufficient ground of itself to set aside the sale," it did set it aside; and it may reasonably be inferred therefrom that, in its opinion, there were other facts in evidence which justified it in so doing. The execution under which the sale was made was a transcript execution, issued by the clerk of the circuit court of Greene county on the transcript of a judgment, rendered before a justice of the peace of said county, enforcing a mechanic's lien against the property in question in favor of Rogers & Baldwin Hardware Company against the Cleveland Building Company, A. B. Crawford, J. D. Porter, Seth Tuttle, Marion Davis, and W. H. Keyser, owners. The Jarvis-Conkling Mortgage Trust Company, mortgagees, Samuel M. Jarvis, trustee, W. W. Baldwin, mortgagee, and B. U. Massey, trustee, were also made

parties to that suit, but no judgment was rendered against them. The execution could not be found, but must be presumed to have been in accordance with the judgment. The judgment after describing the tract of land by metes and bounds, proceeds as follows: "Together with the four-story brick building known and designated as the 'Baldwin Opera House,' situated thereon, and that said land and building be charged with the payment of said debt. In the notice of sale by the sheriff no mention was made of the opera house, other than as the "buildings and improvements" on the land, although the property was generally known as the "Opera House Block." The sheriff testified that, at the time of the sale, he did not know that he was selling the opera house property. The property had been previously advertised for sale by the sheriff under nine executions issued on transcripts of mechanic's lien judgments in favor of different parties, amounting, in the aggregate, to about \$5,000. The judgment creditors in those cases, as well as in this, were represented by Capt. McAfee as their attorney, the purchaser of the property at the sale in question. Those judgments were all compromised or paid off by T. J. Flannelly, who represented the Jarvis-Conkling Trust Company. J. T. White, one of the attorneys for said company, testified that, about the time they were paid, Flannelly asked Capt. McAfee if he would not assign the judgments which he had paid off to him, or to his clients, and Capt. McAfee said he could not, for the reason that he had other suits pending, but that, if he would pay off the claims he had pending, "I will sell them to you, but it would not be fair to assign to you all those I have in judgment, and leave out those that are still pending." Witness further stated that his recollection was that Mr. Flannelly asked the captain if those were all the judgments that he had, and he answered that they were. This conversation, or the chief part of it, Capt. McAfee testified did not occur. White also stated that Mr. McCammon and himself were the attorneys for the mortgage trust company in Springfield, and represented it in all the litigation about this property, and the sheriff did not notify them that he had any execution in this matter at all; that it was his custom to do so in such cases; that the service was had by publication, and the judgment obtained without their knowledge. The property was worth from \$40,000 to \$50,000, and was sold by the sheriff for \$250. The purchaser represented a number of lien claimants, whose demands, not then in judgment, amounted to about \$11,000; and, by an arrangement between himself and them, they were to share the property in proportion to the amount of their respective claims.

While the notice of sale was a technical compliance with the law, it should have given a more particular description of the property, and in failing to do so was to some extent misleading; so much so, in fact, that the sheriff did not know what property he was selling. Herman, in his work on Executions (page 415), in speaking of sheriff's sales for inadequacy of price says: "A sale of \$12,000 worth of property for \$400 is strong ground for relief, especially where the advertisement contains an

imperfect description of the property. The fact that the advertisement was so framed as to mislead, so that no one, not acquainted with the premises, could have conjectured from the advertisement what the property was that was intended to be sold, in connection with the fact that there were no bidders at the sale but the purchaser, and the property was sold at a very inadequate price, makes a sale constructively fraudulent against a defendant and others having liens on the property, and constitutes a ground for equitable relief, although the advertisement may have been a technical compliance with the statute, so as to vest a valid title in the purchaser." *Hodgson v. Farrell*, 15 N. J. Eq. 88. The imperfect description of the property in the notice of sale should be taken into consideration, in connection with other facts in evidence, in passing upon the validity of the sale. The weight of the evidence clearly showed that Flannelly, as the agent and attorney of the mortgage company, was misled by the supposed statement of Capt. McAfee with respect to the payment by that company of all the lien judgments which he represented against the property; for it is fair to presume that he would not have paid all others, and left remaining unpaid the judgment under which the property was sold, amounting to so small a sum as \$87.60. His object seems to have been to pay all liens then in judgment, and it is unaccountable why he did not pay that, unless he was misled by what he understood the statements of Capt. McAfee to be with respect thereto. We do not undertake to say that Capt. McAfee was guilty of any intentional wrongdoing, fraud, or unfairness in buying the property, and only speak of matters connected with the sale from a legal standpoint. These facts, taken in connection with the evidence of White that the custom of the sheriff was to notify him with respect to intended sales of this property, and his failure to do so on this occasion, and the inadequate price that the property sold for, fully justified the court in setting the sale aside. *Seaman v. Riggins*, 2 N. J. Eq. 214, 34 Am. Dec. 200. The purchaser was attorney for plaintiff, and was not an innocent purchaser. *Harness v. Cratens*, 126 Mo. 233. Moreover, the sheriff, in selling the property, was the agent of both plaintiff and defendant, owing a like duty to each, and bound to protect the interest of all parties concerned. It was his duty to see that the property was not sacrificed, and to that end could have returned the execution, "No sale for want of bidders." *Conway v. Nolte*, 11 Mo. 74; *Shaw v. Potter*, 50 Mo. 281; *Holdeforth v. Shannon*, 113 Mo. 508; *Cole Co. v. Madden*, 91 Mo. 585; *State, Central Type Foundry, v. Moore*, 72 Mo. 285. His failure to do so can only been accounted for on the ground of his want of knowledge of the property that he was selling and of its value. His course cannot be justified or excused on the ground that the owner of the fee in the property is not here complaining, and the mortgagee is. That, however, does not legalize the sale, which in its result is the transfer of defendant's property to the purchaser for about one eighteenth of its value, a merely nominal sum. All the plaintiff company is entitled to is its debt, and that end is not defeated by opening the

bid but will certainly be attained if that be done. The plaintiff suffers no loss if the sale be set aside, while the mortgage company lose a large amount of money. The object of the sale is, not to transfer the property of the execution debtor to the execution creditor, "but to pay the debt. He cannot, therefore, be injured by any proceeding which has that for its object, and does not cause any unnecessary delays or expense." *Littell v. Zuntz*, 2 Ala. 256, 36 Am. Dec. 415. Justice can be but subserved by a resale of the property, for it cannot result in any injury to the purchaser of plaintiffs, the purchase money being refunded. The sale, if valid as against the movers, could not in any way be legalized by reason of any private arrangement between the purchaser and his clients as to how the property was to be shared by him with them, to which they were not a party.

The judgment is affirmed.

Brace, Ch. J., and Sherwood, Macfarlane, and Robinson, JJ., concur. Gantt, J., concurs in second and last paragraphs, but expresses no opinion as to the first. Barclay, J., dissents from last, but concurs in first, paragraph.

Barclay, J., dissenting:

Upon the leading proposition in the case a majority of the court in banc have adopted the unanimous opinion delivered in the first division. But they discard some of the minor rulings announced in that opinion, and conclude to affirm the circuit judgment. This change in the result does not seem to me entirely satisfactory.

1. My view still is that the cause should go back for a rehearing. The reasons for that view were given in the divisional opinion, and others will be added. The opinion of the first division was as follows (omitting the passage approved in the learned opinion of Judge Burgess):

"2. The defendants next insist that, as the trial court had control over its process, it might set aside the execution sale on equitable grounds satisfactory to that court. It is true, as pointed out in *Ray v. Stobbs* (1859), 28 Mo. 35, and recently repeated in *Bryant v. Russell* (1895), 127 Mo. 422, that a court, on motion has jurisdiction to regulate and control the use of its own writs, so as to see that no injustice is done by them. But the exercise of its judgment upon such motions is not beyond all review. The reasons assigned in such motions must be considered in determining the conclusiveness of action thereon by the trial court. The lien judgment in the case at bar was rendered by a justice of the peace. But, when the transcript thereof was filed in the circuit court, it came under the control of the latter court for purposes relating to its execution. Rev. Stat. 1889, § 6287. That control includes the power, on proper occasion, to set aside sales on execution to satisfy such judgments. The grounds of the motion in the pending cause were four. Two of them related to the proceedings in the Federal court. The comments already made dispose of them, so far as we are concerned. The first of the two remaining grounds was that the sale was for an

inadequate sum; that the defendants, bringing the motion, had no actual notice or knowledge of the judgment, execution, levy or sale until long after the sale; and that the sheriff had a custom (which he failed in this instance to observe) to notify interested parties or their attorneys of the demand of such an execution, and to thus give opportunity to pay the same. The circuit judge, upon an instruction, given at the close of the evidence on the motion, declared that mere inadequacy of consideration in the sale was not sufficient ground to set it aside. So it is probable that his order sustaining the motion was not based on that objection. The circuit court also excluded questions of defendants directed to the point as to the sheriff's custom to notify defendants in execution. As defendants are not in position to complain of that ruling, we need not go into it on plaintiff's appeal. Want of actual knowledge by, or notice to, defendants of the proceedings to enforce the lien would not alone form a just or substantial ground to vacate the process on a judgment for its enforcement, where the proceedings were valid against collateral attack, those defendants having been duly brought before the court by constructive service, as allowed by law.

"3. The remaining ground of the motion is that the 'sale was inequitable, unjust, and contrary to good conscience,' for the reason that defendants, long after the judgment was rendered, and 'before the issuance of said execution, were led to believe, and did believe, by statements made by said C. B. McAfee to the attorneys, that there were no other lien judgments at said time against said property on behalf of any clients of his, and that the sum of \$5,000, which was then paid to said C. B. McAfee, on settlement of a large number of lien judgments held by his clients, then and there settled all his lien claims and those of his clients, which at said time were reduced to judgment; that these defendants and their said attorneys were thrown off their guard by said statements of said C. B. McAfee, and by reason of the same did not investigate as to whether there were any such other judgments, and did not watch for said sale, and said property was sold without their knowledge for the grossly inadequate sum of \$250.' We have examined the evidence carefully on this point, and find that it does not establish the facts above alleged. We are unable to discover any proof of any statements by Mr. McAfee which should reasonably have been interpreted by adverse counsel as charged in the passage from their motion above quoted.

"4. Some minor objections to the execution sale are made, as, for instance, that there were certain supposed irregularities in the lien judgment or proceedings; but, on examination, we find none of those objections tenable or requiring special comment.

"5. On the case as it was submitted to the learned trial judge, we hold that he was in error in setting aside the sale. For that reason we shall reverse his order. As he sustained the motion, the moving defendants had no occasion to except to the ruling (against them and favorable to plaintiffs) excluding proof of a custom of the sheriff to notify parties interested before enforcing executions, and declaring by instruction that mere inadequacy of

price was not a sufficient ground to set aside the sale. In view of these rulings, to which these defendants had no need to except (because of the final ruling in their favor), we are unwilling to substitute a conclusive ruling to the contrary, on the record as it now stands. While the court's declaration (as to inadequacy of price) is correct as a general proposition, when applied to sheriff's sales which have become final, it is not more than a half truth as applied to the review of such a sale upon motion made before the sale has become a finality under the process on which it took place. It has been expressly held in this state that it may sometimes be the duty of an officer, in charge of process, to postpone such a sale, on his own motion, in case a gross and unnecessary sacrifice of property is threatened. *Conway v. Nolte* (1874) 11 Mo. 74; *State, Central Type Foundry, v. Moore* (1880) 72 Mo. 285. And in cases where the officer would be warranted in postponing the sale, the court itself, if the sale occurred, might set it aside, upon prompt and timely application to that end, if the property has been in fact sacrificed by a grossly inadequate sale, in circumstances which call for such relief against the abuse of the court's process. In the present case the property sold for \$250. It was certainly not worth more than \$40,000 or \$50,000. It was admitted that it cost about the latter sum, and there is proof that it was worth at least \$15,000. It bore an encumbrance to secure \$49,000. There are special facts, however, which indicate that the purchaser at the execution sale represented a large body of lien claimants whose demands reached the amount of about \$11,000, and the sale (under § 6727, Rev. Stat. 1889, as well as by their own mutual agreement) would inure to the benefit of all of them in proportion to their demands. So that, in effect, in view of the insolvency of the building company, the principal debtor, the price may be considered as substantially equivalent to the last-named sum, which we do not think sufficiently out of proportion to the value of the property to warrant a court in vacating the sale on the sole ground of inadequacy in the price. But here the evidence which the court excluded, as to the custom of the sheriff to notify defendants in execution, might have laid a basis for the court's remedial discretionary action, when coupled with great inadequacy in the proposed price. Where inadequacy of price (such as would not alone warrant interference with such a sale) is accompanied with any circumstance of surprise, mistake, or even excusable neglect, the court whose process is involved may, in the exercise of a sound discretion, relieve against a sacrifice of the property, where such course appears to be dictated by the demands of justice in the particular case. *Cole Co. v. Madden* (1887) 91 Mo. 585. This may be done on timely motion, without resort to an independent suit in equity.

"We hence reverse the decision upon the motion to set aside the judgment, and remand the cause, with directions to rehear that motion in conformity to the principles announced in this opinion. *Brace, Ch. J., and Macfarlane and Robinson, J. J., concur.*"

6. To the reasons given in the above-quoted

part of the divisional opinion, it may be well to add a few further observations, in view of some positions taken in the opinion of my learned associate, Judge Burgess. His opinion holds that the setting aside of the execution sale was a proper use of the discretionary power of the circuit judge. It is plain, from the record before this court, that the circuit judge did not intend to exercise his discretion upon the facts, because he was convinced (as his rulings show) that the pendency of the receivership prevented a valid sale. All the court here differ with him on that point, yet a majority favor affirming the order to set aside the execution sale, nevertheless. The proposition is undoubtedly true that a circuit ruling should always be sustained where it is right, though wrong reasons may have prompted it. But, where a reviewing authority undertakes to say that a decision in the trial court is correct on discretionary grounds, when that decision was evidently based on other and untenable grounds, the reviewing court should at least be very sure that ample foundation for a favorable exercise of the discretionary power (which was never exerted) exists in the facts, and it should also be very sure that the conclusion announced accords with the demands of the situation which confronted the trial judge in the particular case. The application of discretionary authority to set aside execution sales by the court out of which the process has issued is governed by equitable considerations, though the form of relief may be legal. On motions directed to that end, the court (though the form of action is not changed) applies rules of common fairness and justice according to the very right of the case, and on such terms as may be just. Here the parties moving to set aside the sale are not the primary debtors. They are persons claiming rights in the property under a mortgage, and they profess to have been surprised at the sale, and to have been willing to pay the claim without a sale. These facts are emphasized in the learned opinion of the court in banc. It appears that the moving defendants concede that the plaintiffs' mechanics' lien judgment "is a prior lien" (to use the language of their admission in the record), and that the lien judgment has become final as to all concerned. The gravamen of defendants' complaint now is that they were misled by Mr. McAfee when they were trying to pay off all claims reduced to judgments. Should any court, on such a showing, set aside an execution sale, in the exercise of discretion, without putting some sort of terms upon the parties moving for such relief? Ought not the latter, in such circumstances, to be required to do that equity which their admissions concede? Ought they not to pay, tender, or at least secure, the plaintiffs' judgment, which the moving parties have no ground to contest (and do not contest), before an order for resale is made? The trial judge merely set aside the sale, without more. Even the costs of the first sale were not required to be paid by the moving parties. Plaintiffs are thus put to the hazard of paying costs of the resale, and of the possibility of losing their present full security for payment. At all events, plaintiffs must lose considerable time, now, in obtaining payment of their demand,

though the latter is practically undisputed. It seems to me that a court, proceeding to deal with the situation described by this record, should at least require security for plaintiffs' judgment before setting aside the former sale, in the circumstances here shown, especially where the chief ground of the objection to the former sale is that these parties were trying beforehand to pay the plaintiffs' demand. But no terms were imposed of any sort, for the manifest reason that the learned trial judge thought the sale should be vacated as an interference with the Federal receivership. Had he reached or considered the general equities of the motion, he would, no doubt, have fully recognized the soundness of these suggestions as to the propriety of imposing reasonable terms on the moving defendants as a condition to setting aside the sale. The imposition of fair terms, in such circumstances, is approved as well by precedents as by the obvious demands of justice. *Savin v. Mount Vernon Bank* (1858) 2 R. I. 382; *Winterson v. Hitchings* (1895) 18 Misc. 201. At the hearing of this motion, Mr. McAfee, who purchased the land on behalf of the lien claimants, was a witness. In the course of his examination he said: "If these gentlemen will pay my clients to-day, I will deed them this property. . . . I had the sale made because I wanted to bring these men up to the mark in some way. . . . If these gentlemen will just pay off these claims, they will own the opera house." But these gentlemen were then contesting his purchase chiefly on the legal ground that the receivership was an obstacle to its consummation, and so they paid no heed to this polite invitation to pay off the mechanics' liens.

7. The pendency of the receivership and the well-known power of the Federal authority account in a great measure for the small price the property brought. But those factors in that result were not chargeable to the mechanics and materialmen, or their attorneys, who seem only to have sought payment for the labor and improvements upon the property. Whoever bought in such circumstances bought a certain lawsuit, with its probable terminus in the Supreme Court of the United States. What wonder, then, that no one bid at the sale but the lien claimants, or their at-

torney to protect their interest? The condition of the property and of its title had quite as much to do with the small price realized as any of the facts that have been mentioned as warranting interference of the court on discretionary grounds.

8. It has been intimated that the advertisement was misleading because the sheriff says he did not know he was selling the opera house. The description was used by him in his published notice of sale, and it so closely re-embled the one adopted in the learned district judge's order appointing the receiver that no one acquainted with the property could have been misled. The Federal receiver was manager of the advertising department of the paper in which appears the advertisement of sale. It is not likely, in such circumstances, that any fraud or secret sale was contemplated or perpetrated by the parties seeking to have the sale brought on.

9. The court, on a direct ruling, excluded evidence of the sheriff's custom to notify parties defendant in executions of his demand, before proceeding to a sale. Later on, one of the witnesses testified to such a custom. That fact was volunteered by the witness as part of an answer to this question: "Have you looked in the office of the attorneys for the judgment creditors, since that, for it [namely, the lost execution]?" Though the evidence of the custom thus came in, and was not stricken out, it is clear, from the court's definite ruling on the point at an earlier stage of the hearing, that the learned judge regarded the fact as irrelevant, and gave no weight to it. It does not seem necessary to discuss its value to support a conclusive judgment in this court on a question properly referable to the discretion of the trial judge.

All things considered, it seems to me that the order setting aside the sale, without any sort of terms imposed on the moving parties, should not be affirmed, but that the cause should be remanded to the end that the motion may be reheard on its merits on the circuit, and such conclusion be then reached as the facts disclosed may appear to warrant, in view of the ruling of the supreme court that the Federal receivership is, of itself, no impediment to the sale.

OREGON SUPREME COURT.

Nellie M. STEVENS, *Respt.*,

v.
J. L. CARTER, *Appt.*

(27 Or. 553.)

1. To defeat a mandamus proceeding

NOTE.—Mandamus to compel surrender of office.

- I. General doctrine governing.
- II. Necessity of a demand and refusal.
- III. Effect of such surrender.
- IV. Sufficiency of title to support.
- V. Special provisions relating to.
- VI. In the case of a private corporation.
- II. When writ refused.
 - a. Insufficiency of facts.
 - b. In case of a private party.
 - c. When there is another remedy.

L. R. A.

to compel the incumbent of an office whose term has expired to turn over the insignia of the office to an alleged successor, it must appear that he has a colorable title to the office and is in possession of it and discharging the duties thereof under a claim of right.

2. The incumbent of an office cannot.

VII.—Continued.

- d. In the absence of ouster.
- e. Prima facie title.
- f. Possession by an officer de facto.
- g. When the title is in issue.
- h. Question of election.
- i. Other relief sought.
- j. Relator's own act.

VIII. English cases.

As to mandamus to compel the acceptance of an office, see note to *People, German Ins. Co., v. Williams* (Ill.) 24 L. R. A. 492.

because of the ineligibility of his successor, hold over after his official term has expired and his successor has been elected and qualified, unless such ineligibility has been established in the manner prescribed by law.

3. **Mandamus will lie to compel the delivery of the insignia** of an office to one having a certificate of election thereto, and who has qualified thereunder, irrespective of his eligibility.
4. **The constitutionality of a statute** giving women the right to hold office will not be passed upon in a collateral proceeding.

(July 20, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Union County award-

ing a mandamus to compel defendants to deliver to plaintiff the insignia of the office of county superintendent of schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. D. Slater and R. Eakin, for appellant:

When the office is full *de facto*, the proper method of proceeding to oust the occupant is by quo warranto and not by mandamus.

State, Leeds, v. Atlantic City, 52 N. J. L. 332, 8 L. R. A. 698; *Williams v. Clayton*, 6 Utah, 86; *New York v. Conover*, 5 Abb. Pr. 171; *Blackwell, Tax Titles*, 117; *State, Leal, v. Jones*, 19 Ind. 356; 5 Cent. L. J. 27.

A *de facto* officer is one in possession of the office without title but by color of right.

5 Cent. L. J. 27; *State v. Fritz*, 27 La. Ann. 689; *Hamlin v. Kassafer*, 15 Or. 457.

This note is confined exclusively to the question of the remedy by way of mandamus to compel the surrender of an office, and of the books, papers, and other documents appertaining thereto, and does not include that class of cases wherein the surrender of such office and the delivery of the books and papers appertaining thereto have been enforced by proceedings in the nature of a quo warranto.

I. General doctrine governing.

It is the duty of every public officer, at the expiration of his official relation, to surrender to his successor the property of the office which the law commits to his custody, as in such property he has no individual right or interest, the title to it residing in the public, and of that he is merely custodian during his continuance in office, the duty is ministerial merely, no matter on what officer it devolves, and at common law its performance was enforceable by mandamus. *Thompson v. Holt*, 52 Ala. 491, 497 (1875).

When the power has been executed in due form it is the duty of the suspended officer to cease to exercise the duties of his office, and it is likewise his duty to turn over the books to the appointee commissioned to perform the duties of the office, and if it is not done voluntarily mandamus is not excluded or avoided by the mere fact that there is another remedy, the law being that there must be no special and adequate remedy; and mandamus is the only adequate remedy for preventing the confusion in government matters, particularly as the Senate, and not the court, is the body to pass upon the correctness of the action of the executive so long as he keeps within the range of power confided to him. *State, Atty. Gen., v. Johnson*, 30 Fla. 433, 497, 18 L. R. A. 410 (1892).

Where the defendant is not an officer *de facto*, it is his duty to surrender to the relator the property of the office at the commencement of the relator's term. *State, Jones, v. Oates*, 36 Wis. 634 (1893).

Mandamus is a writ to restore a party to an office from which he has been illegally ousted, or to put him in possession of one which is illegally obtained from him, and to cause its books, papers, etc., to be delivered into his possession. *Nelson v. Edwards*, 55 Tex. 399 (1881).

At common law mandamus was the proper remedy to compel the transfer or delivery of the books, records, papers, seals, and other paraphernalia of a public office to the officer entitled to their custody, and by virtue of the writ the surrender of public belongings pertaining to the office could be compelled. *Thompson v. Holt, supra*.

In *State v. Bruce*, 3 Brev. 264, 270, 6 Am. Dec. 576 (1812), it is stated to be an established maxim of law that such writ is the proper remedy where there is

a specific legal right, and no other specific legal right and operative remedy, upon reasons of justice and public policy, in order to preserve order and good government; and where any one has been unlawfully kept out, or dispossessed, of an office to which he is entitled, it lies to admit or to restore him.

Many circumstances may control the court in exercising its discretion, but where the relator shows a title, *prima facie* or otherwise, the mere fact that there is another person claiming the same office will not operate, in itself, to prevent an allowance of the writ. *State, O'Donnel, v. Duman*, 39 N. J. L. 677 (1877).

Mandamus will lie to command an ex officer, as a mayor or his deputy, to deliver up the books and papers and seal of office, and will not be defeated by a pretended exercise of the office *de facto*. *People, Brewster, v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 799 (1854).

An officer whose term has expired may be compelled by mandamus to surrender to his successor all records, books, and papers pertaining to his office, where such officer on demand refuses to deliver the same. *Fasnacht v. German Literary Assn.*, 99 Ind. 133 (1884); *People, Fuller, v. Hilliard*, 20 Ill. 413 (1862); *Warner v. Myers*, 4 Or. 72 (1870); *Driscoll v. Jones*, 1 S. D. 8 (1890); *Lindsey v. Luckett*, 20 Tex. 516 (1857).

It is the proper remedy to compel one, who has no color of title to an office, to surrender it to one who holds the *prima facie* title to it. *State, Moore, v. Archibald* (N. D.) 36 N. W. 234 (1896).

And in the absence of express statutory authority, it is the only practicable remedy to instate a claimant in office, and obtain the records and papers thereof. *State, Butler, v. Callahan*, 4 N. D. 481 (1895).

It is the proper remedy where one is lawfully entitled to the office. *Metsker v. Neally*, 41 Kan. 122 (1899).

Where the order directing mandamus to issue for the surrender of the books and papers belonging to an office is unqualified, it is a peremptory mandamus and is not the subject of an appeal because final in its character. *Harwood v. Marshall*, 9 Md. 83 (1856), *Affirmed* 10 Md. 451 (1857).

But it has been held that the writ should issue in the first instance in an alternative form, and that an order on petition directing a peremptory writ will be reversed upon appeal. *Ibid*.

It is well settled that mandamus will lie to compel the delivery of the books and papers belonging to the office upon refusal after demand therefor, where the relator holds an uncontested title to a public office, or his title has been adjudicated and finally established by a competent tribunal, and he is in possession of the office. *State, Cannon, v.*

Color of right may be by holding over after his term has expired.

If the office is full *de facto* mandamus will not remove the occupant, but quo warranto might be resorted to.

King v. Oxford, 6 Ad. & El. 349; Shortt, Mandamus, p. 122; *People, Dolan, v. Lane*, 55 N. Y. 217; *People, Faile, v. Ferris*, 76 N. Y. 326; *Duane v. McDonald*, 41 Conn. 517; Ang. & A. Corp. § 702; *French v. Cowan*, 79 Me. 426; High, Extr. Legal Rem. § 53; *People, Hodgkinson, v. Stevens*, 5 Hill. 625; *Meredith v. Sacramento County Supers.* 50 Cal. 434; *People v. Olds*, 3 Cal. 176, 58 Am. Dec. 898; *Hull v. Shasta County Super. Ct.* 63 Cal. 174; *Re Torney and Re Stiner*, 7 Misc. 260; *People, Wren, v. Goetting*, 133 N. Y. 569.

May, 106 Mo. 488, 509 (1891); *Territory, Eisenmann, v. Shearer*, 2 Dak. 332 (1881).

In *American Railway-Frog Co. v. Haven*, 101 Mass. 396, 403, 3 Am. Rep. 377 (1869), it was said to be well settled that mandamus would lie to compel a town clerk, or a clerk of a public corporation whose office had expired, to deliver over to his successor the common seal, books, papers, and records of the corporation which had belonged to his custody.

Where there is no other specific legal remedy, mandamus is the appropriate remedy in case of an ex officer, whether of a public or of a private corporation, county, church, or society, or the executor or widow of such officer, who refuses, upon demand made, to deliver to his successor in office the insignia, books, papers, etc., pertaining to such office. *State, Cooper County, v. Trent*, 58 Mo. 571 (1875).

And this is so for the reason that at the expiration of a term of office, it is the official duty of the officer to surrender the books of his office, and such duty does not become less an official one because neglected until the office has expired; and in such a case replevin is not a proper remedy. *Keokuk v. Merriam*, 44 Iowa, 432 (1876).

The writ also lies to compel an officer to pay to his successor money which is required by law to be applied to school purposes, where the prompt application of such money renders it necessary. *Frisbie v. Fogg*, 78 Ind. 269 (1881).

And where the object of the writ of mandamus is not only to restore to office one who has been illegally ousted, but also to cause the books, papers, and archives thereof to be delivered to his possession, the writ will operate as a more complete and effectual remedy than proceedings in the nature of quo warranto. *Banton v. Wilson*, 4 Tex. 400, 405 (1849).

By such writ the legal officer is put in the place of the intruder. *Prince v. Skillin*, 71 Me. 366, 36 Am. Rep. 825 (1890).

If one is entitled to the office of governor he may maintain it by mandamus. *Goff v. Wilson*, 32 W. Va. 393, 3 L. R. A. 58, 60 (1899).

Mandamus is the proper remedy to recover the books and papers appertaining to the office of town clerk wrongfully withheld by one claiming the title to such office as against one legally elected to fill such office, and such writ may be granted even on the application of the party so duly elected. *Walter v. Belding*, 24 Vt. 658 (1853).

In *Taylor v. Henry*, 2 Pick. 397, 402 (1824), the relator claimed the books and papers appertaining to the office of town clerk, to which office the record of the town's meeting showed that he was elected at an adjourned meeting, without showing from what meeting it was adjourned or the date thereof, and the court ordered the writ to issue.

The relator must show that a vacancy existed in the office, and that he was elected to fill it. *Doane* 81 L. R. A.

If defendant is in the office *de facto* in good faith, mandamus will not lie for the office, books, etc.

Spelling, Extraordinary Relief, §§ 1383, 1572; *People, Willson, v. Mt. Vernon*, 59 Hun, 204; *Laurence v. Hanley*, 84 Mich. 399.

Where there is an occupant of an office by color of right, the issue of a commission to the relator is not to be taken *prima facie* as an actual expulsion of the prior occupant.

People, Lockwood, v. Scrugham, 20 Barb. 302; *Harwood v. Marshall*, 10 Md. 451; *People, Coleman, v. Dikeman*, 7 How. Pr. 124; *Frey v. Michie*, 68 Mich. 323; *Delgado v. Chavez* (N. M.) 25 Pac. 948, 140 U. S. 586, 85 L. ed. 578.

Defendant is holding under color of right, because he was duly elected for the prior term.

v. Scannell, 7 Cal. 393, and 432 (1857); *Taylor v. Henry supra*.

It must be shown that the parties sought to be coerced were bound to act. *People, Phillips, v. Lieb*, 85 Ill. 484 (1877).

So, the petition must show upon its face that the relator has a clear right to the possession, and every material fact upon which the petitioner relies must be distinctly set forth. *Lavalle v. Soucy*, 96 Ill. 457 (1880).

In a case free from reasonable doubt in respect to the title to the office, it is the duty of the justice to proceed, and protect the party elected or appointed to office against the unlawful withholding by his predecessor of the books and papers of the office. *People, Williamsou, v. Allen*, 42 Barb. 208 (1864).

In New Jersey it has been held that members of a public body holding over until their successors are elected and qualified are not officers *de facto* in such a sense that a mandamus should not be allowed against them. *State, Love, v. Freeholders of Hudson County*, 36 N. J. L. 369 (1871); *State, Clarke, v. Trenton Bd. of Health*, 49 N. J. L. 349 (1887).

Where the appointment of the defendant to the office is clearly void, and the relator has a *prima facie* title to office, the mere fact that the former is an officer *de facto* will not of itself form an objection to proceedings against him to compel the delivery of the books and papers. *Re Baker*, 11 How. Pr. 418 (1855).

The remedy cannot be defeated nor can the officer be deprived of the possession of the books and papers of an office to which he has been regularly elected or appointed simply because another party claims to retain the same upon grounds which are frivolous or create no reasonable doubt in regard to such officer. *Re North v. Cary*, 4 Thomp. & C. 357 (1874).

If a claimant for office has given the bond, qualified, and received the commission of the office, he is entitled to mandamus to compel one holding from a previous term to surrender the custody of the books, files, office room, and other property of the office, but such remedy does not prejudice the question of the ultimate right to the office. *State, Law, v. Saxon*, 25 Fla. 792 (1899).

In *Re Baker & Vandewarker*, 44 Pa. 440 (1863), it was held that there was a regular and well-known remedy to compel public officers to do their whole duties, which remedy was by mandamus, and that therefore there was no need of inventing a new remedy which the court would not sanction.

In that case it was sought to compel a late justice of the peace to deliver over to his successor in office the docket upon a summary proceeding by way of petition and rule to show cause, which proceedings the court quashed and reversed.

In *Burr v. Norton*, 25 Conn. 103 (1856), the under-

and under the Constitution is still entitled to hold until his successor is elected and qualified.

Const. art. 15, § 1; *State, Everding, v. Simon*, 20 Or. 377; *Hamlin v. Kassafer*, 15 Or. 460.

And the person elected to succeed one formerly elected and holding the office must be duly qualified to hold the office before he can oust the former incumbent.

State, Everding, v. Simon, 20 Or. 378; *Taylor v. Sullivan*, 45 Minn. 309, 11 L. R. A. 272; *State, Snyder, v. Newman*, 91 Mo. 445.

Therefore, if the person claiming to be elected as his successor dies before entering the office, or declines to take the office, or is ineligible to hold the office under the Constitution, then the defendant has title to the office and has a right to fill it until the next election.

State, Everding, v. Simon, supra; *People v. Tilton*, 37 Cal. 614.

keeper of the work-house and jail, who had been dismissed from the office, refused to deliver up to the sheriff the possession of the jail and the papers and documents relating thereto and to the work-house, and the court granted a mandamus to compel him to do so.

When an officer has been regularly suspended by the government, under § 15 of the executive article of the Constitution of Florida, for any cause recognized by that section, and the successor to the suspended officer has been regularly commissioned, the latter is entitled to the official property of the office, and mandamus is the proper remedy to compel the suspended officer to deliver it, and the newly appointed officer is not a necessary party to the proceedings, but the attorney general is a proper and sufficient relator. *State, Atty. Gen., v. Johnson*, 30 Fla. 433, 497, 18 L. R. A. 410 (1892).

In the case of *People, Brewster, v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769 (1854), the court granted mandamus to compel the mayor, who was in possession of the corporate seal and insignia of the office, to deliver them over to the relator who was the person entitled to the possession thereof, the court stating that mandamus was the proper remedy in such a case, the relator being the mayor elect, the question as to the title to the office being questionable only upon proceedings in quo warranto.

Where the officer, a county superintendent of schools, resigned his office, and his successor was appointed, and such superintendent qualified and entered upon the discharge of the duties of his office, it was held that mandamus was the proper remedy to compel him to deliver over the records appertaining to the office, and in such case an allegation of the eligibility of the successor is not necessary, the defendant admitting his resignation. *McGee v. State, Artell*, 103 Ind. 444 (1885).

In such a case it is not necessary to decide whether it is requisite to the validity of the appointment that the votes of the majority of the school trustees should have been received, or whether the votes of a plurality constituted a valid appointment. *Ibid.*

In *Huffman v. Mills*, 39 Kan. 577 (1888), the defense was that no proper canvass of the election returns relating to the office of sheriff had been made, and that the relator had never properly qualified for office. The facts showed that the election returns were made to the county clerk, that the board of county commissioners canvassed the returns, and that the county clerk issued the certificate of election under which the relator qualified, by taking the oath of office and executing the bond and filing the same with the county clerk, the bond being approved by the commissioners. The court held the relator had the right to obtain his office and granted a mandamus as prayed.

31 L. R. A.

The rule that mandamus will compel the delivery of the books, etc., by the predecessor to the relator, has reference to instances where relator is exercising the office.

McGee v. State, Artell, 103 Ind. 444; *Spelling, Extraordinary Relief*, § 1510; *State, Cannon, v. May*, 106 Mo. 488.

The rule that mandamus is not the remedy to oust an incumbent in office is applicable only when the relator is clearly out and the incumbent is clearly in, the fullness of the office being the test.

State, Cannon, v. May, supra; *Kelly v. Edwards*, 69 Cal. 463.

Quo warranto, by our statute, is an adequate and specific remedy as it will exclude the defendant from the office and be enforced by "attachment of the body of the defendant."

Code, §§ 365, 368; *Kelly v. Edwards, supra*;

So, in *State, Sternberg, v. Legarde*, 21 La. Ann. 18 (1869), petitioner, who alleged himself to be the *de jure* and *de facto* sheriff of the parish, applied for mandamus to compel his predecessor in office to deliver to him the room, keys, papers, records, books, and documents and other things pertaining to the office of sheriff, and a peremptory writ of mandamus was issued from which the defendant appealed. The court held that the defendant had no right to appeal, as it did not appear from the records that the value of the articles exceeded \$500, the court being without jurisdiction *ratione materiae*, the matter of dispute not being the title to the office but to the documents relating thereto; the order was therefore affirmed and the appeal dismissed.

Where mandamus was applied for to compel the surrender of the office of state librarian, the court stated the law to be, that whenever there was a right to execute an office, perform a service, or exercise a franchise, more especially if it was in the matter of a public concern, or attended with profit, and a person was kept out of possession or dispossessed of such right, and had no other specific remedy, the court ought to assist by mandamus upon reasons of justice as the writ expressed, and that upon reasons of public policy, to observe peace, order, and good government, it ought to be used on all occasions where the law had established no specific remedy, and where in justice and good government there ought to be one. *Harwood v. Marshall*, 9 Md. 33 (1856).

In *Cecil County Comrs. v. Banks*, 30 Md. 321 (1894), the county treasurer, appointed under the Maryland act of 1894, chap. 25, made demand of office upon the county commissioners, and to have the books and papers belonging to the office delivered to him and also all records and books of the county commissioners' office, which books and papers were then in the possession and custody of the county commissioners. The answer, which admitted the demand for admission to office and for the delivery of the books and papers, but claimed that the office was then filled by one who claimed to retain it, and the books and papers belonging thereto, was demurred to, and the court sustained the demurrer. Upon appeal the order was affirmed, the court stating that as the party in possession was not a mere trespasser but the servant of the commissioners, the latter were bound to comply with the demand, and that therefore both the commissioners and such person were amenable to the writ; and further, that the fact that such a writ had been ordered to be issued against such third person in no way deprived the circuit court of authority to order the writ against the county commissioners.

Again, in *Conlin v. Aldrich*, 98 Mass. 557 (1868), mandamus was issued against the members of a school committee and another, requiring the for-

High, Extr. Legal Rem. § 349; *Lewis v. Whitte*, 77 Va. 415.

When the facts are admitted, and the whole case is before the court, the court will deny the writ when it appears that the plaintiff has no right.

State, Mason, v. Paterson, 35 N. J. L. 190; *Spelling*, Extraordinary Relief, § 1572; *Howard v. Gage*, 6 Mass. 462; *Elliott v. Oliver*, 22 Or. 44.

A certificate of election is not a prima facie title to the office, where it discloses on its face that it is void, or the petition shows it to be void.

Conklin v. Cunningham (N. M.) 88 Pac. 170.

If it appears from the writ in this case that

the plaintiff was ineligible, then the writ will not lie, and that question may be raised in this proceeding.

State, Snyder, v. Newman, 91 Mo. 445; *People, Sherwood, v. State Canvassers*, 129 N. Y. 360, 14 L. R. A. 646; *People, Gibson, v. Sheffield*, 47 Hun, 481; *People, Henry, v. Nostrand*, 46 N. Y. 375; *People, Steinert, v. Anthony*, 6 Hun, 142; *Burditt v. Barry*, Id. 657; *State, McNeill, v. Somers*, 96 N. C. 467; *Worthy v. Barrett*, 63 N. C. 199.

Mandamus will not put a person in possession of an office when it is disclosed by her petition that she would be a usurper, from which it would be the duty of the state to remove her.

People, Sherwood, v. State Canvassers, supra;

mer to permit the relator to act as a member, and such other person to refrain from acting as such, or to show cause to the contrary, and the court allowed the writ.

So, in *Sudbury v. Stearns*, 21 Pick. 148, 151 (1839), where the action was in trover to recover the books of record of the parish, the court stated that while it had no doubt that either trover or replevin would lie in such a case, the property of the records being in the parish, and the clerk of the parish being the officer designed by law to hold and keep them, the parish might take such records from a stranger having possession of them by proper action, and recover damages for such detention, yet mandamus would be a more appropriate and effectual remedy to compel the delivery of the records to the legal officer.

And in *Lawrence v. Hanley*, 84 Mich. 399 (1901), mandamus was granted to compel the respondent to return to the relator, as chairman of the board of county auditors, the books belonging to the said board. The court stated that when a person in office *de jure et de facto* was interfered with by one whose lack of title was plain and governed by adjudicated cases, it was not only proper, but best, to settle the question by mandamus.

In *State, State Savings, Bldg. & L. Assn., v. Davis*, 64 Mo. App. 447, 450 (1893), the retiring secretary resisted the proceedings, upon the ground that he was the lawful secretary of the association and therefore entitled to possession, and also upon the ground that before he could be compelled to surrender his account as secretary must be properly audited and settled, and upon the further ground that the election of the new board was illegal and void; but the court held that, the defendant's office having expired, it was his absolute legal duty, whether his accounts as secretary had been adjusted or not, to deliver up on demand all property which had come into his possession by virtue of his office, an adjustment of his accounts being a matter which could be dealt with as well after as before delivery.

So, in *State, Davis, v. Bacon*, 6 Neb. 286, 295 (1877), it was said that an action by mandamus could lie to compel an officer to deliver up property of the state held by him without right or authority of law.

Again, in *State, Dodson, v. Meeker*, 19 Neb. 444 (1896), where mandamus was sought to compel the respondent to surrender to the relator possession of the office to the clerk of the district court, from which office the respondent had, upon complaint filed with the board charging him with violations of the law, been removed, and the relator had on the same day been appointed to fill the vacancy and duly qualified by taking oath and giving the bond, upon a demand and refusal of possession, the court held mandamus was the proper remedy, the removal of the respondent being valid in law, a 31 L. R. A.

vacancy being created which the county board had authority to fill, the judgment of removal not being superseded by any proceedings in error.

And where, by virtue of an act of the state legislature, certain records and suits should have been transferred from one county to another, it was held that mandamus would lie to compel the county clerk to transfer such records. *State, Hooten, v. McKinney*, 6 Nev. 194 (1869).

In *Kimball v. Lamprey*, 19 N. H. 215 (1848), a mandamus was held to be the proper remedy to compel the delivery of books and papers pertaining to the office of selectmen, by the defendants who claimed to hold and exercise the office.

So, in *State, O'Donnel, v. Dusman*, 39 N. J. L. 67 (1877), mandamus was allowed to compel the delivery of books and papers belonging to the office of the township treasurer of a certain county, the relator claiming the office by virtue of his appointment by the committee who claimed to have been elected.

And in *State, Newark & N. Y. R. Co., v. Goll*, 32 N. J. L. 285 (1867), mandamus was allowed against the retiring secretary of the company to compel him to deliver over the books and papers relating to the office of secretary, which he had refused to surrender after demand made, although such books were purchased by him out of his own money, the court holding that such books were the property of the company and therefore his possession was that of the company, and that in such a case he had no lien.

Where a party has been in possession of the books and papers of the office, and has in one instance performed some duty appertaining to the office, he is an officer *de facto*, and the title of the respective claimants will not be looked into *de jure*. The abstract right of the applicant is unimportant where possession is clearly shown, and it will not be inquired into, further than to see that, if in possession, he has color of title, and being in office under color of right he should have had the proceedings to get the books and papers. And, on the other hand, having the best possible right to an office one should not have possession of the books and papers by the proceeding under the New York Revised Statute, while it was apparent that he was not in occupancy of the office, and not in a situation to exercise the functions of it. *Conover's Case*, 5 Abb. Pr. 74, 79 (1867).

In *State, Butler, v. Callahan*, 4 N. D. 481 (1896), it was said that where a *de facto* officer is exercising official functions under color of right, the writ of mandamus will not issue to dispossess him, but where an incumbent is holding over after the expiration of his term and until a successor is elected and qualified, and has no other claim to the office, he is not such a *de facto* officer as against a candidate who holds the proper certificate of election and has qualified for the office in manner and form

State, Clarke, v. Trenton Bd. of Health, 49 N. J. L. 349; *State, Snyder, v. Newman*, 91 Mo. 445.

If illegibility is shown by the answer upon the admitted facts, mandamus will not lie.

Spelling, Extraordinary Relief, § 1574; *People, Gibson, v. Sheffield*, 47 Hun, 481; *Gron-din v. Logan*, 88 Mich. 247; *Atchison v. Lucas*, 83 Ky. 451; *State, McNeill, v. Somers, supra*.

If the law is doubtful, mandamus is not the remedy. The relator's right must be free from all doubt.

State, Atty. Gen., v. Johnson, 80 Fla. 493, 18 L. R. A. 410; *Re Gardner*, 68 N. Y. 467; *People, Dolan, v. Lane*, 55 N. Y. 217; *People, Wren, v. Goetting*, 133 N. Y. 569; High, Extr. Legal Rem. § 77; *People, Brewster, v. Kilduff*,

15 Ill. 492, 60 Am. Dec. 769; *People, Cum-mings, v. Head*, 25 Ill. 325; *Peck v. Kent County Supers.* 47 Mich. 477.

If the act under which relator claims is unconstitutional, then she cannot state facts sufficient to entitle her to the books, etc., of the office.

Elliott v. Oliver, 22 Or. 44; *People, Sherwood, v. State Canvassers, supra*.

A female is not eligible to the office of county superintendent of public instruction.

Re Registry List, 5 Misc. 375; *People, Ahren, v. English*, 139 Ill. 622, 15 L. R. A. 131; *Plummer v. Yost*, 144 Ill. 68, 19 L. R. A. 110; *Re Inspectors of Election*, 25 N. Y. Supp. 1063; *People, Sherwood, v. State Canvassers, supra*.

directed by law, such incumbent being a mere intruder as against such relator.

In *State, Moore, v. Archibald* (N. D.) 66 N. W. 234 (1896), the superintendent of the state hospital for the insane, which, by law, was under the general management and control of the board of trustees, who had power to appoint and remove, having been removed by the board and his successor appointed, it was held that he might be compelled by mandamus to turn over such office to his successor, the sovereignty of the state being involved in a direct and important sense; the right of the board of trustees to control and manage such institution being involved.

Where the specific and only object sought, and the specific and only subject covered by the alternative writ, were the immediate and present possession of the seal and other property appertaining to the clerk's office, the court held the relator was entitled to proceed by mandamus, unless he had another plain, speedy, and adequate remedy in the ordinary course of law. *Cameron v. Parker* (Okla.) 38 Pac. 14 (1894).

In *Warner v. Myers*, 4 Or. 72 (1870), mandamus was granted to compel the defendant to deliver to the plaintiff the county jail and its appurtenances and property belonging to the county. The court held that under the provisions of the Oregon Code of Civil Procedure, § 583, the office of the writ was precisely the same as it was at common law, and might be issued to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from the office of trust or station.

In *Wadsworth v. Reel*, 15 Pa. Co. Ct. 440 (1894), a peremptory writ of mandamus was allowed against the defendant authorizing him to deliver up to his successor in office all the records, documents, and papers appertaining to the office of alderman then in his possession.

Where the defendant contended that the proceedings should be by quo warranto, the court stated that although in such proceedings the judgment would be one of ouster against the defendant and in favor of the plaintiff, yet it would not put the plaintiff in possession of the records of the office to which such judgment would establish his title, and that therefore he might still be obliged to resort to mandamus to obtain the possession, and for that reason mandamus was the proper remedy. *Driscoll v. Jones*, 1 S. D. 8 (1890).

In the above case the specific and only object sought by the plaintiff and covered by the alternative writ was the immediate and present possession of the seal and other property pertaining to the office of clerk of the district court, which office was abolished by the Constitution upon the admission of South Dakota as a state, the office of the clerk of the circuit court being created in its stead by the Constitution, the latter office being 31 L. R. A.

filled by the board of county commissioners under § 37, art. 5, of the state Constitution.

In *Cunningham v. O'Connor*, 12 Lea, 397 (1888), mandamus was issued to compel the delivery of certain books alleged to belong to the land office of a certain district, of which plaintiff contended that he was elected register for a term of four years, and had qualified by taking oath and giving bond; and further alleged that the defendant's term of office had expired, and that he was pretending to hold said office without authority of law.

Where the plaintiff petitioned the district court for mandamus requiring the defendant to deliver to him the office of clerk of the court, and also the books and papers appertaining to such office, and the facts showed the plaintiff's election to and qualification for such office and his performance of the duties until a certain date, when the defendant, by virtue of a pretended election, claimed to be the lawful incumbent, and the plaintiff, according to the advice of the chief justice, handed over the books and papers of the office to the defendant, but denied that he thereby transferred the right and immunities of such office and asserted that he had retained and reserved the same to himself until the term for which he had been elected elapsed,—the court held that mandamus was the proper remedy in such a case, the plaintiff having been illegally ousted from office. *Bradley v. McCrabb*, Dall. Dec. (Tex.) 504 (1843).

In *Stone v. Small*, 54 Vt. 498 (1882), mandamus was granted to compel the old trustees of an incorporated village to deliver over to their successors in office the books, papers, and property belonging to the office, to which office the petitioners had been duly elected according to the provisions of the act incorporating the village.

So, in *Lewis v. Whittle*, 77 Va. 415 (1883), the relators, appointed by the governor as a board of visitors of the medical college, claimed mandamus to command the defendant, who previously constituted such board, to deliver to the petitioners the possession thereof, and the petition set forth the appointment of the petitioners and claimed the rights of the college by reason of the appointment, all of which the defendant denied and claimed to be the lawful visitors. The court stated that such writ would lie where there was a right to execute an office, perform a service, or exercise a franchise, more especially if it was a matter of public concern, and a person dispossessed of such right had no other specific adequate remedy, the writ being granted on reasons of public policy to preserve the peace, good order, and good government, the doctrine of that court being that mandamus was the true specific remedy for a wrongful deprivation of an office.

And where one has been duly elected and qualified to the office of county judge he is entitled to the writ, as against his predecessor in office, for the

Messrs. T. H. Crawford and Baker & Baker, for respondent:

Mandamus is the proper remedy by an officer to compel delivery by his predecessor of the records, books, and papers of the office.

14 Am. & Eng. Enc. Law, p. 147, note 1, p. 207, note 8; *Warner v. Myers*, 4 Or. 72.

When a party seeks to recover the books, papers, and records of public office, to which he has been elected or appointed, from his predecessor in office, quo warranto is neither a speedy nor an adequate remedy. Mandamus is the only remedy affording speedy and adequate relief.

State, Atherton, v. Sherwood, 15 Minn. 221, 2 Am. Rep. 116; *Territory, Eisenmann, v. Shearer*, 2 Dak. 332; *Warner v. Myers, supra*;

14 Am. & Eng. Enc. Law, p. 102; *Cameron v. Parker* (Okla.) 38 Pac. 14.

The court will not go behind the certificate of election and try and determine issues as to the claimant's eligibility or title to the office.

State, Atherton, v. Sherwood, supra; *Cronin v. Lambert*, 10 Minn. 369; *People, Cummings, v. Head*, 25 Ill. 325; *Warner v. Myers, supra*; *State, Meckling, v. Jaynes*, 19 Neb. 161; High, Extr. Legal Rem. §§ 74, 75; *State, Simmons, v. John*, 81 Mo. 13; *State, Vail, v. Draper*, 48 Mo. 218; *State, Atty. Gen., v. Johnson*, 30 Fla. 433, 18 L. R. A. 410; *Thompson v. Holt*, 52 Ala. 491; *Huffman v. Mills*, 39 Kan. 577; *Delgado v. Chavez*, 140 U. S. 586, 85 L. ed. 578; *Conklin v. Cunningham* (N. M.) 38 Pac. 170; *Wenner v. Smith*, 4 Utah, 238; *Plowman v. Thorndike*,

recovery of such office and the books and papers appertaining thereto. *Fitzpatrick v. Kirby*, 81 Va. 437 (1886).

In *Bridges v. Shallcross*, 6 W. Va. 532 (1873), the mandamus issued against the defendant, commanding him to admit the petitioner to the office of superintendent of the penitentiary, and to surrender to him the possession and charge thereof, and to turn over to him all the property pertaining to the office.

Where one was elected the mayor of a town, and the opposing candidate took possession of the office, and the circuit court rendered judgment by ouster against such party, and he sued out a writ of error which operated as a supersedeas to such judgment, and the party elected alleged that the court had no jurisdiction of the writ of error, and applied for a mandamus commanding the circuit court to issue process for the execution of the judgment.—It was held that under the 13th section of the judiciary act of 1789, the supreme court judge had power to issue writs of mandamus to any courts appointed or persons holding office under the United States. *Re United States v. Addison*, 63 U. S. 22 How. 174, 16 L. ed. 304 (1859).

In the case of *People, Coleman, v. Dikeman*, 7 How. Pr. 124, 129 (1852), the court stated that the case of *People, Griffin, v. Steele*, 2 Barb. 398 (1848), extended the remedy by mandamus much further than that court had gone, against corporations and ministerial officers, but that the authorities quoted by the judge who decided that case did not warrant the extension of the rule in such cases beyond its ancient and well-settled limits.

II. Necessity of a demand and refusal.

In order that a writ of mandamus may issue, there must have been a refusal to do that which was the object of the writ to enforce, either in direct terms or by circumstances distinctly showing an intention in the party not to do the act required. *Colt v. Elliott*, 28 Ark. 294, 296 (1873).

Where it was contended on the part of the defendant that no demand had been made, the court stated that it was settled that when it could be conclusively implied from the conduct of the person against whom the writ was sought that there would be a refusal to comply, a literal demand was not required, neither was it essential in cases affecting public offices or duties, for the reason that omission or neglect under such circumstances became a refusal. *Conklin v. Cunningham* (N. M.) 38 Pac. 170 (1894).

In *McDiarmid v. Fitch*, 27 Ark. 106 (1871), mandamus was allowed to compel the register, whose duties had expired, to deliver the original books to the clerk of the county after demand made for same.

¹ *Territory, Eisenmann, v. Shearer*, 2 Dak. 332 L. R. A.

(1881), an alternative writ of mandamus was applied for to compel the defendant to take and deliver to the relator all the papers and property pertaining to the office of register of deeds and *ex officio* county clerk. The writ which was granted returnable at chambers outside of the subdivision of the judicial district was demurred to upon the ground that there was no jurisdiction to make it so returnable, and for the reason that it did not state facts sufficient to constitute a cause of action, and that it did not recite the want of adequate remedy at law; and for the further reason that the act of February 22, 1879, did not consolidate the two counties, nor abolish the defendant's office of register of deeds and *ex officio* county clerk of one of such counties. The court held that there was sufficient jurisdiction to warrant the issuance of the writ, the act of 1879 consolidating the two counties and abolishing such office in one county, and that therefore the relator was entitled to the writ, the parties sufficiently showing the want of adequate remedy at law although there was no formal allegation thereof, it being shown by abundant proof that the relator had demanded the delivery of the papers and property, and that there was a refusal on the defendant's part to comply with the demand.

There must be a demand and refusal before a mandamus will be absolutely issued. *Leonard v. House*, 15 Ga. 473 (1854).

In *Com. v. Athearn*, 3 Mass. 285, 286 (1807), it was stated that the proper remedy to be taken by a successor to an office was for such successor to take the oath of office, and to demand of the predecessor the records of the office, and if they were refused then to move for a mandamus to compel him to deliver over the records. In that case the court refused an information in the nature of a quo warranto against the town clerk who was elected for one year.

But in the case of *Re Cobee*, 8 How. Pr. 367 (1853), the defendant showed cause against the application made under N. Y. Rev. Stat. § 54, upon the ground that no notice had been given to him by any of the canal commissioners requiring him to surrender up the office, or the books and papers therein, to the relator or to any other person; that the only demand ever made was that of the relator himself which was not accompanied by any notice or request from the canal commissioners to deliver up the books. The court held that it was not necessary to prove notice served by the canal commissioners in proceedings under such statute.

Where a board of commissioners had been appointed by the comptroller it was held that by such appointment the former board no longer held office, and that their detention of the books and papers of the office was a personal detention of the same and not the detention of the board, and therefore a demand upon them as individuals was sufficient, and that such new board were enti-

52 Ala. 559; 14 Am. & Eng. Enc. Law, p. 143; *Cameron v. Parker*, *supra*.

Mandamus is the proper remedy where a party seeks to recover the books, papers, and records of a public office to which he has been elected or appointed.

Merrill, *Mandamus*, §§ 142-152; 14 Am. & Eng. Enc. Law, p. 147, note 1, p. 207, note 8; High, *Extr. Legal Rem.* §§ 73-76; *Warner v. Myers*, 4 Or. 72; *Driscoll v. Jones*, 1 S. D. 8; *Territory, Eisenmann, v. Shearer*, 2 Dak. 332; *Crowell v. Lambert*, 10 Minn. 369; *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116; *People, Brewster, v. Kilduff*, 15 Ill. 500, 60 Am. Dec. 769; *Nelson v. Edwards*, 55 Tex. 390; *Lindsey v. Luckett*, 20 Tex. 516; *Keenan v. Perry*, 24 Tex. 253; *Keokuk v. Merriam*, 44 Iowa, 432; *Banton v. Wilson*, 4 Tex.

400; *State, Clapp, v. Peterson*, 50 Minn. 239; *Walter v. Belding*, 24 Vt. 658; *State v. Dunn, Minor* (Ala.) 46, 12 Am. Dec. 28; *Brown v. Turner*, 70 N. C. 93; *Jackson, Van Courtlandt, v. Parkhurst*, 5 Johns. 128; *Miller v. Manice*, 6 Hill, 114; *Arnold v. Hudson River R. Co.* 49 Barb. 116; *Cameron v. Parker*, and *Conklin v. Cunningham*, *supra*.

Mandamus will not lie to try title to a public office, but it will lie to compel a predecessor in office to turn over to his successor the books, papers, and records belonging and appertaining to a public office, where the plaintiff shows in himself either an absolute or prima facie title thereto, and a certificate of election regular upon its face and qualifying as the law requires is sufficient prima facie title.

Ewing v. Turner, 2 Okla. 94; *Cameron v.*

tion to the possession thereof. *People, Williamson, v. Allen*, 42 Barb. 203 (1844).

Where mandamus lies to compel the delivery of the records, muniments, and official belongings of a public office to a successor holding a prima facie or absolute title emanating from the authority constituted by law to convey it, after demand, the title to the office is not in controversy, nor can it be put in issue. *Cameron v. Parker* (Okla.) 38 Pac. 14 (1894).

Where it was shown that the duty to take and deliver the books and papers pertaining to his office without demand was imposed upon the defendant by statute, it was held that the action fell within § 695 of the Dakota Code of Civil Procedure, which provides that mandamus may issue to compel the performance of an act specially enjoined by law as a duty resulting from an office. *Territory, Eisenmann, v. Shearer*, 2 Dak. 332 (1881).

See also *Thompson v. Holt*, 52 Ala. 491, 497 (1875), and *Ramsey, County Supers. v. Heenan*, 2 Minn. 330 (1858) *infra*, V.; *Fasnacht v. German Literary Assn.* 99 Ind. 133 (1884), and *State, Cannon, v. May*, 106 Mo. 488, 509 (1891), *supra*, I.

III. Effect of such surrender.

A writ of mandamus does not settle or determine the right to office; its effect is to fill the office by putting the relator in the possession of it when vacant, so that the right may be tried on quo warranto. *Com. v. Philadelphia County Comrs.* 6 Whart. 476, 482 (1841).

So, a judgment for the relator in mandamus proceedings does not determine the final rights of possession, but simply determines that the relator has a right to immediate possession under his prima facie title. *State, Jones, v. Oates*, 88 Wis. 634 (1893).

The surrender of the books and papers of the office amounts to a mere recognition of the relator's prima facie title under the canvass and election certificate, and will not affect any right of the defendant to contest the election of the relator in a proper proceeding. *Ibid*.

As the court cannot go behind the certificate of election, they can only determine whether or not the relator has received the office on election, given the bond, and taken the oath required by law, and if he has performed such acts he is prima facie the successor elected and qualified, and as such entitled to the possession of the articles demanded, until, in a proper proceeding for that purpose, his title to the office has been tried and found defective. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870).

And such prima facie title is conclusive until the right to the office is ultimately determined on a quo warranto or information in the nature thereof. *Plowman v. Thornton*, 52 Ala. 559 (1875).

31 L. R. A.

See also *Warner v. Myers*, 4 Or. 72 (1870), and *State, Law, v. Saxon*, 25 Fla. 732 (1889), *supra*, I.

IV. Sufficiency of title to support.

In order to entitle a party to maintain such a writ the petition must state facts which show, if true, that he has a clear right to the performance of the thing declared, and that it was plainly the duty of his predecessor in office to perform the duty required. *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317 (1859).

A person elected to an office will be deemed in full possession of it on his taking the requisite oath, provided no other condition is prescribed, but it is otherwise as against one already in actual possession under color of right, though he be not an officer *de jure*. *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843).

In a case where the respondents insisted that inasmuch as they were actually in possession of the office in question under a claim of right, exercising the functions annexed to it, the only mode of controverting their title was by a writ of quo warranto, the court stated that the fact that the offices were *de facto* filled and occupied by rival claimants was by no means decisive, nor perhaps material upon the point, and that the court had so decided in the case of conflicting claims to the office of county commissioners, and also in the case of members of the school committee. *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 403, 3 Am. Rep. 377 (1869), the court following its prior decisions in *Re Strong*, 20 Pick. 434 (1833), and *Conlin v. Aldrich*, 98 Mass. 557 (1868).

Where an office is vacated, and one with claim and color of title assumes such office and enters upon the discharge of the duties thereof, he will be held an officer *de facto* entitled to possession, and the mere fact of his forcible removal from the premises where the business of the office is transacted will not affect his right to the office. *Re Conover v. Devlin*, 24 Barb. 587, 609 (1857).

In the above case the court further stated that it doubted whether a party not in possession of an office, and therefore not in a condition to exercise the functions, should in any case have the possession of the books and papers of it awarded to him in a summary manner, even though his title to the office was perfect, and inclined to the opinion that, on the other hand, a party in an office with color of title and performing the duties of the office should have been.

The above statement of the law was dissented from in the subsequent hearings of the above case in 5 Abb. Pr. 315, and 6 Abb. Pr. 236, 237, the court, on the former hearing, holding that the court had no jurisdiction to commit the defendants because the relator showed upon the face of his papers that his

Parker, and Conklin v. Cunningham, supra; People, Cummings, v. Head, 25 Ill. 325; State, Jackson, v. Howard County Ct. 41 Mo. 247; Wenner v. Smith, 4 Utah, 238; Plowman v. Thornton, 52 Ala. 559; Merrill, Mandamus, §§ 142, 152; High, Extr. Legal Rem. §§ 73-76; Driscoll v. Jones, 1 S. D. 8; State, Atherton, v. Sherwood, 15 Minn. 221, 3 Am. Rep. 116; State, Atty. Gen., v. Johnson, 30 Fla. 433, 18 L. R. A. 410; State, Newark & N. Y. R. Co., v. Goll, 32 N. J. L. 285; State v. Layton, 28 N. J. L. 244; People, Smith, v. Pease, 27 N. Y. 45; State, Jones, v. Oates, 86 Wis. 634.

Mr. Charles F. Hyde also for respondent.

Moore, J., delivered the opinion of the court:

This is a mandamus proceeding to compel

appointment was unauthorized, and conferred upon him no authority to take or hold the office, and because he sought, on the face of the complaint, to take such books and papers from one who claimed to hold the office by a better title than himself, and on the last hearing of the case, which was upon an application for certiorari, the court inclined to the same opinion.

These two opinions were further approved of by the court in the case of *People, Williamson, v. Allen*, 42 Barb. 203, 209 (1864), the court holding that the justice, before whom the proceedings were made, to obtain the delivery of the books and papers appertaining to an office, must examine the question of the title of the respective claimants to the office so far as to enable him to determine properly the question to be submitted, but that, if the right of the applicant was not free from any reasonable doubt, the summary relief provided for by the statute (1 N. Y. Rev. Stat. chap. 125) must be denied; and further, that if the title of the applicant was free from reasonable doubt he was absolutely entitled to the assistance which the statute contemplated.

In *People, Sedgwick, v. Shear* (Cal.) 15 Pac. 92 (1887), the defendant, who had been removed from his office as prison superintendent by the board of supervisors who appointed a successor, had refused to surrender the office, upon the ground that his removal was illegal no cause for his removal from office being originally assigned, and upon the ground that such removal was not made as provided for by the California act of March 31, 1876, which declared that such superintendent should only be removed for just and sufficient legal cause after a fair and impartial investigation of his case by said supervisors. A cause for removal being subsequently assigned, the court held that the defendant was properly removed from office, and sustained the order of the court below upon the authority of the cases of *Smith v. Brown*, 60 Cal. 672 (1881), and *People v. Hill*, 7 Cal. 97 (1857).

So, it has been held that it is incumbent upon the relator to show that he has a clear right to the office in question as the first requisite to entitle him to a mandamus. *People, Coleman, v. Dikeman*, 7 How. Pr. 124 (1852).

And it must also be shown that the party sought to be coerced was bound to act. *People, Phillips, v. Lieb*, 85 Ill. 484 (1877).

The claimant must show a prima facie title. *Doane v. Scannell*, 7 Cal. 393, and 432 (1857).

As a general rule in an action in mandamus where a relator shows a prima facie title to a public office he is entitled to the aid of mandamus to obtain possession of the books, records, insignia, paraphernalia, and official belongings of such office, and in granting the writ the court will not go behind such showing and try the title thereto. *Ewing v. Turner*, 81 L. R. A.

the surrender of the books and papers belonging to the office of county superintendent of common schools of Union county. The facts are that at the election in June, 1894, the plaintiff received a plurality of all the votes cast, obtained a certificate of election to the office, and, having qualified as required by law, demanded the said books and papers of the defendant, and, upon his refusal to comply therewith, sued out an alternative writ of mandamus, requiring him to deliver them to her, or show cause why he had not done so. A demurrer to the writ having been overruled, the defendant, for a return thereto, after denying the material allegations contained therein, alleged that the plaintiff was a woman, and by reason thereof was ineligible to hold the office, that in June, 1892, he was elected superintend-

2 Okla. 94 (1894); *Cameron v. Parker* (Okla.) 38 Pac. 14 (1894).

And this is so for the reason that a prima facie title to a public office confers a right to exercise its functions, and a right to the possession of the insignia and property thereof, and upon such prima facie title the court will compel the delivery of the insignia and property, in order that the functions and duties of the office may be exercised. *Thompson v. Holt*, 52 Ala. 491, 497 (1875); *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870); *State, Moore, v. Archibald* (N. D.) 66 N. W. 234 (1894); *State, O'Donnell, v. Dusanan*, 30 N. J. L. 677 (1871).

If the relator had the right to be admitted to the office on a prima facie title, and hold it pending a contest, the right may be enforced by mandamus. *State, Jones, v. Oates*, 86 Wis. 634 (1893).

Justice and public interest will best be promoted by giving effect to the prima facie title to an office, whenever the facts proving it are not disputed, and the proceeding in which the question of title arises is one in which an inquiry into matters behind those facts are not allowable, a prima facie title being a good and sufficient title until overcome. *Re Baker*, 11 How. Pr. 418 (1855).

The decision of a board of canvassers upon the result of an election, no matter how erroneous in its conclusions from the facts, is sufficient to give color of right to one taking possession of an office under it. *People, Hodgkinson, v. Stevens*, 5 Bull. 616 (1843).

After a person has been declared elected by a competent tribunal, it may seem to be necessary upon mandamus to determine, as a preliminary or collateral question, whether it has been so declared, and his right to sue may depend upon it; therefore in such a case, admitting proof of the fact is not such a trial of the right to the office as would compel proceedings in the nature of a quo warranto. *Warner v. Myers*, 3 Or. 218, 221 (1870).

But the validity of the election and the right to take and hold office cannot be inquired into in a collateral action or proceeding. *Satterlee v. San Francisco*, 23 Cal. 314, 320 (1863).

Neither in the case of an officer appointed by an executive and confirmed by the board can an officer to whom the application is made go behind the appointment and confirmation to investigate fraud and corruption, even if they would vitiate the appointment or the evidence was sufficient to justify the charge. *People, Kilbourn, v. Allen*, 51 How. Pr. 97 (1857).

Pending a contest as to the election the relator's right to possession is perfect as against every one except a *de facto* officer holding under color of authority. *State, Jones, v. Oates*, 86 Wis. 634 (1893).

When the relator shows a certificate of election to an office regular upon its face, or any lawful evidence of title later and superior to any other

ent, and qualified as such; and that he was holding over under color and claim of right, and was entitled to the insignia of the office. A demurrer to the return having been sustained, the court awarded a peremptory mandamus, from which judgment the defendant appeals, and contends that, he being in possession of the office under color and claim of right, mandamus will not lie to oust him therefrom, and that the plaintiff is ineligible to hold the office, while the plaintiff insists that having obtained the certificate of election, and qualified as required by law, she has a prima facie right to the books and papers, which mandamus will compel the defendant to deliver to her, and that the question of her eligibility cannot be tried in this proceeding.

To entitle the defendant to invoke the rule

claimant, and that he has qualified as required by law, he may be deemed to have a prima facie title to the office sufficient to support mandamus. *Ewing v. Turner*, 2 Okla. 94 (1894).

The certificate of a board of canvassers of election returns is competent evidence of the election of the relator. *Warner v. Myers*, *supra*.

And if he holds the certificate of election it is sufficient. *State, O'Donnell, v. Dumas*, 39 N. J. L. 677 (1877).

No matter whether the certificate of election be rightfully or wrongfully given, it confers upon the person holding it the prima facie right of holding for the term, which right is subject to be defeated only by the voluntary surrender of the office, or by a judicial determination of the right. *People, Benoit, v. Miller*, 16 Mich. 56, 59 (1867).

If the office is an elective one, and the result has been declared in favor of the applicant, the officer cannot go back of the election as declared, to investigate the legality of the votes cast nor the bribery of voters. *People, Kilbourn, v. Allen*, *supra*.

And in such a case the form of notice of election or the ballots thereat will not be inquired into. *State, Franci, v. Dodson*, 21 Neb. 218, 222 (1887).

For the purposes of the proceeding by way of mandamus the certificate of election is conclusive evidence of the right of the relator to the possession of the office. *Ibid*.

A person producing a certificate of election from the proper election officers, with proof that he has taken the constitutional oath of office and filed the same and given the necessary undertaking, where one was required by law, is entitled to the delivery to him of the books and papers pertaining to such office. *Re Foley*, 8 Misc. 196 (1894).

The party holding the commission or certificate of election regular on its face, evidencing an absolute and prima facie title to the office, is entitled to the possession of the books, records, and official belongings thereto, notwithstanding the actual title may be in controversy at the time in the same or another tribunal. *Cameron v. Parker* (Okla.) 38 Pac. 14 (1894).

And this is so even though it may be true that the courts will sometimes inquire incidentally into the title to the office in determining who is entitled to the official belongings thereof, yet the court will not do so unless the relator at the same time proves, in himself, at least, a prima facie title thereto. *Ewing v. Turner*, 2 Okla. 94 (1894).

An election gives the right to the office, and the decision of the tribunals fixed by law to try the contest simply declares the title upon the evidence, but does not create or confer it, and having the title by virtue of election the qualification of the party so elected entitles him to exercise the duties of the office. *Goff v. Wilson*, 32 W. Va. 393, 3 L. R. A. 58, 60 (1899).

31 L. R. A.

of law for which he contends, it must appear that he has a colorable title to the office, and was in possession of it, and discharging the duties thereof, under a claim of right. The return shows that in June, 1892, he was elected to the office in question, and, under the statute, was entitled to hold it for a term of two years, or until his successor was chosen and had qualified. Hill's Code, § 2386. An examination of the writ discloses that in June, 1894, the plaintiff was chosen as his successor, and qualified as required by law (Id. § 2587); hence the defendant's term of office had expired, unless he had a private interest in the ensuing term, by reason of the plaintiff's alleged ineligibility. The right of an officer to hold over after the expiration of his term exists only in cases where there is no legally

A certificate of election regular in form and signed by the proper authority constitutes prima facie evidence of title to the office which can only be set aside by such proceedings for contesting the election as the law provides. *La Pointe Supers. v. O'Malley*, 46 Wis. 85, 57 (1879); *State, Atty. Gen., v. Vall*, 53 Mo. 97 (1873).

In an elective office the law requires that the evidence or credentials of the persons declared duly elected shall be a certificate of election, or in an appointive one a commission from the governor, these being the highest evidence of title the law requires, and therefore, a private individual cannot assert the invalidity of the law authorizing it, the want of authority for its issuance or the illegal exercise of the power conferring it otherwise, being questions for the court to determine. *Cameron v. Parker*, *supra*.

If the refusal to deliver the possession of the office for a day or a week or for two weeks will constitute a predecessor an officer *de facto* so as to compel the party declared elected to proceed by way of quo warranto to oust him before any action could be taken to compel him to deliver the books, papers, and moneys belonging to such office, then the whole effect and force of a certificate of election would be avoided unless the person elected should commence proceedings immediately to recover such books, papers, or money. *La Pointe Supers. v. O'Malley*, *supra*.

In proceedings by way of mandamus the court cannot go behind the canvass evidenced by the certificate of election to office, and inquire as to the notice of election or the form of the ballots cast thereat, but will only inquire as to whether the office is one which could be lawfully filled at said election, and whether the relator, by virtue of the canvass thereof, has received a certificate of election thereat, and was duly qualified for such office by taking the prescribed oath and giving the bond required by law, and if such requirements have been filled mandamus will issue to compel the surrender of the office and the delivery of the books and papers relating thereto. *State, Franci, v. Dodson*, 21 Neb. 218, 222 (1887).

So, the appointment and commission by the governor are sufficient to give the applicant a prima facie title to the office. *Wenner v. Smith*, 4 Utah, 238 (1886).

A title founded on a commission from the governor issuing on a certificate of election or a certificate disclosing a vacancy in the office, made by the officer having authority to certify it, until vacated by a judicial determination in a proper proceeding, shows a prima facie title to the office free from all reasonable doubt, and this is so whether the certificate be true or false. *Plowman v. Thornton*, 52 Ala. 559 (1875).

In *State, Atherton, v. Sherwood*, 15 Minn. 221, 2:

elected and qualified successor, for when the rights of the successor vest, those of the incumbent terminate. *State, Elliott, v. Bemenderfer*, 96 Ind. 374. If the election of the plaintiff was not legally authorized, the defendant would continue to hold the office, by force of the express provisions of the statute. *State, Ewerding, v. Simon*, 20 Or. 365; *State, Loring, v. Benedict*, 15 Minn. 198 (Gil. 152); *People v. Tilton*, 37 Cal. 614. The defendant, being in office by virtue of a prior election, was not a mere usurper. *Hamlin v. Kassaffer*, 15 Or. 457. And the statute which provides that he should hold the office until his successor is elected and qualified gives him a colorable title; and, if it should be found, in a proper proceeding, that the plaintiff is ineligible, he would have a private interest in the term which would

entitle him to hold over. *Taylor v. Sullivan*, 45 Minn. 309, 11 L. R. A. 272. When a certificate of election has been issued to another, who has qualified thereunder, it is the duty of an incumbent of a public office, at the expiration of his term, to surrender the office to his successor; and should he then desire to contest the eligibility, election, or qualification of the person so holding the certificate, he may do so by proceeding in the manner prescribed by law for determining contested claims to office. *State, Atty. Gen. v. Johnson*, 30 Fla. 433, 18 L. R. A. 410. It would seem to follow that when the official term of an incumbent has expired, and his successor has been elected and qualified, his term is either suspended or terminated; and while he may have a colorable title and private interest in the ensuing term,

Am. Rep. 116 (1870), the court stated that it was immaterial in proceedings by way of mandamus to compel the delivery of the books and papers appertaining to an office, whether or not the relator was eligible or was duly elected to the office, for the reason that to try every issue would be to try the title.

The truth of the matters contained in the certificate of election cannot be entertained in a proceeding which is merely collateral and not directly to determine the title to office. Where, however, the certificate discloses facts which by legal construction show that no vacancy existed in the office, this destroys the certificate, and will not support a commission based upon it, no *prima facie* right to the office being shown. *Plowman v. Thornton, supra*.

The court is only to determine whether or not the relator has received the certificate of election and given the bond and taken the oath required by law, and if he has done so he has a *prima facie* title and is the successor elected and qualified, and, as such, entitled to the possession of the office and documents relating thereto until, in a proper proceeding for that purpose, his title to the office shall be tried and found defective. *State, Atherton, v. Sherwood, supra*.

In order that a relator may obtain mandamus to compel the delivery of the books and papers relating to his office, he must show that he has a clear right to require the respondent to deliver possession to him, and if the validity of the election is contested upon appeal he has no such right to possession pending such appeal. *Allen v. Robinson*, 17 Minn. 113 (1871).

Where the evidence of the title of the claimant to the office was the commission signed by the governor under seal of the state, countersigned by the secretary, it was held that such commission, whether granted on a certificate of election or a certificate of vacancy, was the highest and best evidence of one who was the officer, until a quo warranto, or a proceeding in the nature thereof, annulled it by a judicial determination, as such commission imparted to the courts judicial notice, and in a proceeding by mandamus, or under the statute to compel the transfer of the property of the office, is a clear *prima facie* title to the office on which the courts will proceed without indulging in inquiries behind it, when such commission was founded on a certificate of election or a certificate disclosing a vacancy made by a proper authority; and on such *prima facie* title the court must rest and award the keeping of the property of the office without adjudicating whether the relator has or has not the actual title. *Thompson v. Holt*, 52 Ala. 491, 497 (1875).

Where the petitioner alleged that he was duly elected and qualified for sheriff and *ex officio* tax

collector, and that the defendant was immediately and prior to a given date the under sheriff and deputy tax collector, which allegations were admitted, the court held that from them as facts the inference was fairly deducible that the petitioner was the complete incumbent. *Hull v. Shasta County Super. Ct.* 68 Cal. 174 (1893).

Where the petition, under §1015, 1016, of the California Political Code, alleged that the petitioner was duly elected and qualified as sheriff and tax collector of the county, and as such was entitled to the books and papers in the defendant's possession, it was held that under the sections of the statute he was entitled to recover the same on petition and to have the same enforced by an order for a warrant commanding the constable of the county to search for and deliver the same to him. Notice of the petition being given. *Ibid*.

A relator holding the certificate of election to the office of the clerk of a district court, having given bond and taken the oath as required by law is entitled upon mandamus to the possession of the seal, records, and papers of office as against a person holding such office until his successor is elected and qualified; and in such a case the court will not inquire into the certificate of election or consider the question as to whether or not the relator was entitled to the office. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870).

In proceedings by way of mandamus to compel the surrender of an office and the books and papers relating thereto, the relator's cause of action consists solely in his having been canvassed and declared elected, awarded a certificate of election, taken the oath and given the bond required by law, and the respondent having refused or failed to deliver up to him the books, papers, and furniture of the office on demand; and in such a case it is quite unnecessary for him to allege any other facts in his relation, nor will the denial and disapproval of any other facts by the respondent defeat the action. So held in *State, Meckling, v. Jaynes*, 19 Neb. 161, 164 (1896), where the relator claimed under an election as justice of the peace.

And the fact that the defendant alleged that he received a greater number of votes at the election will not affect such proceedings. *State, Jones, v. Oates*, 86 Wis. 634 (1893); *People, Salisbury, v. Holcomb*, 5 Misc. 459 (1893), to the same effect.

In *Luce v. Dukes County Bd. of Examiners*, 153 Mass. 108 (1891), the court intimated that one elected as county commissioner might enforce his right to such office by means of the writ of mandamus, and so prevent a stranger from acting as such officer.

Where the defendant contended that mandamus would not lie to admit one to an office which was full, but that the claimant must resort to the proceedings in the nature of a quo warranto, the court

in case the rights of his successor cannot vest, he cannot hold over under a claim of right until such right has been established in the manner prescribed by law.

The following provisions of the state Constitution are deemed applicable, in determining the eligibility of the plaintiff to hold the office of county superintendent of common schools: Art. 6, § 6. "There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner, and surveyor, who shall severally hold their offices for a term of two years." Art. 6, § 7. "Such other county, township, precinct and city officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law." Id. § 8. "No person shall be elected or appointed to a county office who

shall not be an elector of the county." Art. 2, § 2. "In all elections not otherwise provided for by this Constitution every white male citizen of the United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, and shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law." It will be observed that article 6, § 6, in designating the officers to be elected in each county, does not enumerate that of county superin-

stated that the reason for the rule was, that a mandamus to admit to office ran to others than the incumbent and they were required to oust him, and thus his rights were sought to be passed upon in the proceeding to which he was not a party, but that the rule was different where the respondent's title to hold till his successor was elected and qualified was not in question, the relator's title in the latter case being prima facie shown by his certificate of election and qualification thereunder. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870).

Where the party claiming the delivery of the books and papers appeared from uncontested facts entitled to hold an elective office by the majority of the votes cast at the election, received his certificate of election, and took the oath of office required by law,—it was held that such facts were sufficient to entitle him to the books and papers appertaining to such office and for the granting of an order under the statute referred to. *Re Foley*, 8 Misc. 196 (1894).

Where the tribunal appointed by law to canvass the votes found that the relator received the largest number, declared him duly elected, and gave him a certificate of election, whereupon he took the oath of office, and made demand upon the defendant for the books and papers, and was refused possession upon the ground that the relator's election was illegal and that the defendant had received the legal votes and was entitled,—the court held that the decision of the canvassers afforded prima facie evidence of the relator's title, and granted a mandamus. *People, Cummings, v. Head*, 25 Ill. 325 (1861).

Where the election of a party to an office is shown by the canvass of the votes cast at the election, and is so declared by the canvassing officers, and the party duly qualifies for such office, he is entitled to hold the same against all who claim title thereto until such time as the election is set aside by the decision of a court of competent jurisdiction in a direct proceeding for such purpose, and all assuming the duties of such office, including the predecessor of the party elected whose term of office has expired, will be treated as usurpers of such office, and proceedings may be had against them to compel the delivery of the books and papers appertaining to the office, and also to recover the moneys and other property in their hands which their successor in office is entitled to, even though such predecessor in office was a candidate to such election and alleged error in the votes. *La Pointe Supers. v. O'Malley*, 46 Wis. 35, 57 (1879).

Where it appeared by the statements of the relation, and by the express or implied admissions in the return, that the relator was declared elected to the office of the circuit court of the county by 31 L. R. A.

the county board of canvassers; that he received the proper certificate of election and qualified for the office; and also that the defendant, the former incumbent, retained possession of the same after the expiration of his term without any certificate, commission of authority, or right, but under a claim that he in fact received a greater number of votes for the office,—the court held the relator entitled to the possession of the office and granted mandamus, although the defendant claimed the right to attack the title to such office, the court stating that such title could be successfully contested upon quo warranto. *State, Jones, v. Oates*, 86 Wis. 634 (1890).

In *Crowell v. Lambert*, 10 Minn. 369 (1865), the petitioner qualified as judge of probate and demanded the office of his predecessor, which was refused, and no issue being properly raised on the facts appearing from the petition, the court held the relator entitled to the writ, stating that the question was not, Who would be entitled to the office on an examination into the merits of the election? but Who was then entitled to the possession of the books and papers appertaining to the office? and further, that the person holding the certificate of election was prima facie the officer and therefore prima facie entitled to the insignia and records of the office, and that in such cases the writ of mandamus was a peculiarly particular, adequate, and speedy remedy.

Where the writ was objected to because it did not allege that there was any clerk of the district court to be chosen at a general election, or that the relator received a majority of the votes cast, or that he was eligible, and upon the ground that no title to relief was shown (Minn. Rev. Stat. chap. 80, title 1, § 4, requiring the writ to state concisely the facts showing the obligations of the defendant to perform the act), but the relator claimed to have the necessary certificate and to have taken the oath and given the bond, and demanded possession, the court held that although loosely drawn the rights sufficiently showed that the relator held the certificate of office, and that he was duly qualified, and that the respondent was his predecessor in office, whose term had expired, and was in possession of the articles demanded, and refused upon request to deliver them, and that the case was clearly brought within the scope of the decision in *Crowell v. Lambert, supra*, and therefore granted the writ and denied the defendant's motion to quash the same. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870).

So, in *Fitzhugh v. Custer*, 2 Tex. 391, 51 Am. Dec. 728 (1849), where the defendant received a certificate of election as county sheriff, which election was contested and the record showed that on one day the court consisted of the chief justice and two

tendent of common schools, but that office was created by an act of the territorial legislative assembly (Or. Gen. Laws 1855, p. 458), and was in force at the time the Constitution went into effect, and continued in force by virtue of its express provisions (art. 8, § 8). The term, "such other county officers as may be necessary," as used in art. 6, § 7, doubtless includes, among others, the county superintendent of common schools. The plaintiff's demurrer to the defendant's return to the alternative writ confesses that she is a woman, but since she was elected in pursuance of a statute which provides that "women over the age of twenty-one years, who are citizens of the United States and of this state, shall be eligible to all educational offices within the state (Sess. Laws 1893, p. 62), we cannot declare her ineligible without holding a statute unconsti-

tutional, and therefore void,—a conclusion a court will rarely ever reach in a collateral proceeding.

That the title to an office cannot be tried in a mandamus proceeding is a rule of law so well settled that it needs no citation of authorities to support it. It is also well settled that in such proceeding against the incumbent of a public office, to compel him to deliver the books and papers thereof to one who claims to have been elected as his successor, the certificate of election issued to the claimant, and proof of his qualification thereunder, constitute *prima facie* evidence of title to the office, and a peremptory writ will be directed to compel the delivery of the insignia of the office, irrespective of the eligibility of the person to whom the certificate has been issued. In *Crowell v. Lambert*, 10 Minn. 389 (Gil. 295),

commissioners, and it was ruled that the chief justice and one of the commissioners were disqualified, and that on the next day no quorum appeared, and that by agreement the controversy was submitted to arbitration, under which title was declared and the election set aside and a new one ordered, and the award was entered as a judgment after the election was ordered, at which election the plaintiff received a majority of the votes, was declared duly elected, and received the certificate, whereupon defendant applied for mandamus to compel him to deliver to him the office, claiming it by virtue of his certificate as a result of the first election,—the court below ordered the writ to be issued, and the court affirmed the decision, holding that the proceedings in the first election were a nullity.

Again, where the relator obtained the certificate of election to the office of district clerk, took the oath of office, filed his bond, and demanded of the former clerk, whose office had expired and who was then in possession, the property appertaining thereto, and the defendant resisted the claim upon the ground that the relator was not legally entitled or eligible to office by reason of his being a non-resident of the state, the court held that such title to office could not be called in question in the proceeding, the relator having a *prima facie* title, and granted the mandamus. *State, Atherton, v. Sherwood, supra*.

In *State, Cannon, v. May*, 106 Mo. 488, 509 (1891), the writ was issued upon a *prima facie* showing, and jurisdiction was thus obtained, and the court stated that while such a proceeding was not the proper remedy to determine the title to an office yet in such a case they would decide the case upon its merits having obtained jurisdiction, rather than place its decision upon the question of practice alone.

An appointment to an office of the executive is complete upon the delivery of the commission so as to entitle the relator to the possession of the office, for the refusal of which he may maintain mandamus, and in such a case the appointment of the governor will give a *prima facie* title to office, and such commission when issued may be taken as at least *prima facie* evidence that the person holding it was lawfully entitled to the office. *Conklin v. Cunningham* (N. M.) 38 Pac. 170 (1894).

In *Conklin v. Cunningham, supra*, the relator sought to compel the defendant to turn over to him the books, papers, property, and prisoners appertaining to the office of sheriff and *ex officio* collector of the county, alleging the defendant's removal by the governor of the territory, and the relator's appointment, the service of the order of removal, the relator's due qualification for the office, and the defendant's refusal to deliver to him the prop-

erty in question. The defendant alleged that he was elected and qualified as sheriff on a given date for two years from a later date, and denied the removal from office, and the right of the governor to remove him and appoint the relator, and also the fact that the relator was sheriff. The court held that the fact that the governor acted within the limits of his authority was a conclusive presumption in that proceeding; that he was authorized by the statute to remove for causes specified in the section under which he acted, and to appoint to the vacancy, and issue his commission, were not less indisputable legal conclusions in that action; and that the fact that the defendant ceased to be sheriff by the one executive order, and the relator became, *prima facie*, such officer, by the other, was the law's operation, so pronounced that it could not be controverted, except in an action contesting the legal title to the office.

In the above case it was further stated that in the exercise of the powers confided to the discretion of the executive, and in the performance of the duties imposed upon him, he was independent of the judiciary; and presumptively his acts were within the limitations of his authority, and must be recognized by the judicial tribunals; and therefore, *prima facie*, the order of the removal of the defendant was a legal exercise of executive authority; and the appointment of the relator constituted a commission that was evidence, *prima facie*, that he was lawfully entitled to the office of sheriff, and imposed upon the contestant the burden of showing a better title by an action in the nature of a quo warranto. The court therefore affirmed the judgment of the lower court granting the peremptory writ of mandamus.

Where the petition stated that a statement of the result and the canvass at a town meeting for the office of supervisor was entered in the minutes by the clerk, and such minutes showed that the relator was elected and took the oath of office, which was certified by the town clerk and filed, whereupon he entered upon the duties of the office, it was held that the relator showed a *prima facie* title to the office, and that the irregularities of the election could not be shown by the defendant as against such minutes in a summary proceeding under the New York Revised Statutes to compel the delivery of the books and papers appertaining to the office. *Re Baker*, 11 How. Pr. 418 (1855).

Where one filling the office of town clerk had declared his intention of removing from the county, removed from the town, and the justices had appointed his successor, who had duly qualified and taken possession of some of the books and papers relating to the office, and sought the delivery up of the remainder,—the court held that such successor was to be taken as legally elected to office, and

Berry, J., in rendering the decision of the court in a mandamus proceeding, said: "On the whole it may be said that the question here is not Who will be entitled to the office on an examination into the merits of the election? but Who is now entitled to the possession of the books and papers appertaining to the office? The person holding the certificate is, under the circumstances of the case, prima facie the officer, and therefore prima facie entitled to the insignia and records of the office. In such cases the writ of mandamus is a peculiarly proper, adequate, and speedy remedy, and perhaps the only one by which to enforce the delivery of the books, etc." So, too, in *State, Atherton, v. Sherwood*, 15 Minn. 221 (Gil. 172), 2 Am. Rep. 116, the court, in discussing the eligibility of one who held a certificate of election, and sought by mandamus to procure

a delivery of the books belonging to an office, says: "It would seem, then, to be immaterial in this proceeding whether or not the relator was eligible, or was duly elected to the office, for to try either issue would be to try the title." In *Warner v. Myers*, 4 Or. 72, it was held that the person holding the certificate of election was entitled to a peremptory writ of mandamus to compel the incumbent of the office to deliver the property appertaining thereto. In *People, Cummings, v. Head*, 25 Ill. 325, Caton, Ch. J., in speaking of the certificate of election which had been issued by a canvassing board, said: "The decision of the canvassers afforded prima facie evidence that the relator was legally elected, and entitled him to the office till that canvass should be set aside by a proceeding to be instituted by the defeated candidate in the courts of justice, and in the forms

therefore entitled to an order, even though the predecessor had sworn that he was still a resident and intended to return, the proceedings of the justices being entered into bona fide under the belief that the office was vacant, the defendant not being an officer *de facto*, the applicant having possession and having commenced to discharge the duties of the office, prima facie evidence of title being sufficient. *Re Bagley*, 27 How. Pr. 151 (1863).

In *People, Salisbury, v. Holcomb*, 5 Misc. 450 (1893), the relator and respondent were candidates for the office of town clerk, the latter being the then incumbent of the office, and the result which showed that each party received the same number of votes was entered on the minutes of the proceedings kept by the respondent and subscribed by him, and by the officers presiding, and subsequently a majority of the town board made a written appointment of the relator as town clerk, as prescribed by statute, which appointment was filed and the oath of office taken by the relator, and all the forms of the statute requisite to a valid appointment were complied with, and the defendant alleged error in the counting, and contended that he had the majority. The court held the relator entitled to the benefit of the statutes to compel a delivery of the papers, as he had a prima facie title, while the defendant simply claimed a right to the office, the court stating that a prima facie title was sufficient to entitle the relator to the records of the office until the defendant in an action of quo warranto established his right to the office by proof that he received a majority of the votes.

V. Special provisions relating to.

In some of the states the statutes provide a statutory remedy which in a few is in the nature of a summary proceeding, and such proceedings will be found to be contained in the provisions of the Alabama, California, and New York Codes. Yet it has been held that such provisions have not in any way abrogated the doctrine of the common law relating to the issuing of such writs, and that such summary proceedings can only be had in cases where the title to the office is not in question, the proceedings by way of quo warranto being still the remedy in such cases.

Under the provisions of the Alabama Code in all cases in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all the books, papers, property, and money belonging or appertaining to such office must be delivered over upon demand to the qualified successor, a violation of the duty being a misdemeanor, and on a refusal, after demand, complaint may be made to the probate judge of the county, or to the judge of the circuit court by such

successor in office, and if the judge is satisfied by the oath of the complainant that such property is withheld, he must make an order requiring the person withholding to show cause why he should not deliver it up, and the person so charged may, upon making affidavit that he has made such delivery, discharge himself. But if he does not make such affidavit the judge must proceed to inquire into the circumstances, and if it appears that such property is withheld, he must make an order committing the accused to jail until he makes the delivery, or is otherwise discharged by due course of law, and a search warrant must then issue, commanding a search of a designated place for the property, which when found must be brought before the judge. The above provisions are contained in the Revised Code of Alabama, §§ 193-197. *Thompson v. Holt*, 52 Ala. 491, 497, 498 (1875).

Where the relator had been duly commissioned by the governor and had qualified as judge of probate he was held entitled to the custody of the books and papers, money and property, of the office, and the refusal by the respondent to deliver them over on demand subjected him to an order of commitment. *Ibid.*

Yet the proceedings under art. 6, pt. 1, title 5, chap. 1, Ala. Rev. Code, to compel the delivery of the books and papers, etc., appertaining to an office, cannot be supported, unless the relator exhibits a prima facie title to the office free from all reasonable doubt. *Ibid.*; *Plowman v. Thornton*, 52 Ala. 559 (1875).

So, if the object is to test the title to the office, and such title is the real question in issue, and the relator does not show a clear prima facie title, the rule of the common law that a party must proceed by way of quo warranto instead of mandamus applies to such summary proceedings under the above statute. *Thompson v. Holt, supra.*

The purposes of the Alabama Code were to provide a more summary and adequate remedy than that which mandamus would afford, and the remedy thus provided is cumulative, not exclusive, and is of like nature with mandamus. *Ibid.*

And the above statutory proceedings will lie whenever a mandamus could be obtained at common law. *Ibid.*

Where the petition was filed by one who had been declared entitled to the office after the contest to the term of office expired, at the period when the petition could be brought to hearing and the party withholding had been elected for the succeeding term, relief was denied. *Beebe v. Robinson*, 64 Ala. 171 (1879).

A party claiming the remedy provided by art. 6, chap. 1, title 5, pt. 1, of the Alabama Code, being § 206 of the Code of 1876, must show that he is the qualified successor to the office. *Ibid.*

of law." To allow an incumbent to hold over and retain possession of an office after the close of his term, when a certificate of election has been issued to another, who has duly qualified, because, perchance, the incumbent may think his successor is ineligible, or has not been duly elected, would thwart the popular will, as expressed by the majority at the election, and tend to make the incumbent the judge of his own rights, as well as of the eligibility, election, and qualification of his successor. *State, Jones, v. Oates*, 86 Wis. 634. The electors having expressed their preference at the polls, it is better that the person chosen by their votes, having obtained the certificate of election, and qualified, should be inducted into office, and the burden of proving the ineligibility and want of election and qualification cast on the prior incumbent, than that his successor should be deprived of his office until he could

show himself eligible thereto. It is true that in *State, Snyder, v. Newman*, 91 Mo. 445, to which our attention has been called, the court denied a peremptory writ of mandamus to compel the incumbent to deliver the books and papers of an office to one shown by the record to be ineligible; but, in view of the statute authorizing the plaintiff's election, we decline to pass upon the plaintiff's eligibility until the question is before us in a direct proceeding. Having received the certificate of her election, in pursuance of a statute authorizing it, and having qualified, the plaintiff made a prima facie case, and showed a prima facie right to the possession of the books and papers which she is entitled to use until the question of her right to do so can be tried in a proper proceeding.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

He must show a legal title and a subsisting right to the custody at the time. *Ibid.*

Under the provisions of the California Code of Civil Procedure, § 805, judgment may be rendered upon the right of a party claiming to be entitled to the office. *Kelly v. Edwards*, 60 Cal. 460 (1896).

The remedy afforded by Ill. Rev. Stat. chap. 20, § 32, has been held to be of such a doubtful nature as to entitle the party to proceed by way of mandamus. *People, Cummings, v. Head*, 25 Ill. 325 (1861).

The Louisiana Code of Practice, art. 833, permits a mandamus to issue through a public officer to compel him to deliver to his successor the papers and other effects belonging to his office. *State, Jumel, v. Johnson*, 29 La. Ann. 399 (1877).

So, the statutes of Maine of 1890, chap. 198, accomplish by one and the same process the objects contemplated by both the proceedings by way of quo warranto and by mandamus, and oust the unlawful incumbent and give the lawful claimant the right to the office which he is entitled to, and afford a speedy and effectual remedy in lieu of the proceedings of the common law. *Prince v. Skillin*, 71 Me. 306, 36 Am. Rep. 325 (1880).

In *Ramsey County Supers. v. Heenan*, 2 Minn. 380 (1858), a peremptory writ of mandamus was applied for to compel the register of deeds in the county to deliver to the board of supervisors certain books and papers relating to the county taxes, the application being made under § 9 of the Minnesota act of August 13, 1858 (*Laws of 1858*, p. 206), and the court held that a proper demand having been made by the board for the books and papers, the writ of mandamus should issue.

The Minnesota statutes (Rev. Stat. chap. 79, § 3), have not changed the law with respect to the issue of a mandamus to compel the surrender of an office and the books and papers appertaining thereto, where the officer has a prima facie title to the office, and to the denial of such writ to try and finally determine the title to the office, except in cases where the law has provided no other means of so doing, the statutes containing nothing from which an intention to enlarge or change the issue to be tried can be inferred, and this, even though the writ of quo warranto, which was the adequate and speedy remedy to try title, should have been held to have been abolished, other and adequate provisions being made for the full and speedy trial and determination of questions as to title to office. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 118 (1870).

Under the statutes of Nevada, the remedy by way of mandamus is not confined to cases where a person is deprived of the enjoyment of his office, but the writ will be issued "to compel the admis-

sion of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person," the remedy by the writ being more extensive than at common law, embracing within its provisions cases wherein the relator claims to have delivered over to him the books and papers belonging to the office of superintendent of a mining company, and to admit him to the enjoyment of the rights thereof. *State, Curtis, v. McCullough*, 3 Nev. 202 (1867).

Mandamus is inappropriate, and should not be issued, where there is a real and substantial dispute as to the title to an office; and where the right of the applicant is clear and unquestionable, and the possession of the books and papers is all that is necessary to enable him to perform the duties of the office. Resort should be had to a direct proceeding to obtain such books under the New York statute (1 Rev. Stat. chap. 124, §§ 50, 51), and where the title of the applicant to an office is beyond substantial dispute so that the objection to it is wholly frivolous, and the possession of the books and papers would not give control of the office, a writ of mandamus would be proper and should be awarded. *People, Brady, v. Stephens*, 2 Abb. Pr. N. S. 348, 353 (1866). To the same effect, *People, Coleman, v. Dikeman*, 7 How. Pr. 124 (1852).

The object of N. Y. Stat. 124, §§ 50, 51, is to compel the delivery of the books and papers by a summary proceeding, to which any person, duly appointed to an office, is absolutely entitled without any qualification or reservation, the only questions for the judge being whether the predecessor was legally removed, and whether the claimant has been legally appointed; but such proceeding does not supersede the more regular and formal redress by action by the party against whom the application is made, the remedies being concurrent, the one summary and preliminary and partial in its operation, the other final and complete, comprehending all the profits and benefits of the office. *Re Bartlett*, 9 How. Pr. 414 (1854).

When a party has been elected or appointed to an office, and his predecessor in such office refuses to deliver up the books and papers belonging to such office, an application may be made, under the New York Revised Statutes, to a justice of the supreme court, who is authorized, in case the party complained against refuses without satisfactory reason to deliver to such successor such books and papers, to direct such delivery and to commit such party to the jail of the county, there to remain until he complies with such order or is discharged according to law. *Re North v. Cary*, 4 Thomp. & C. 357 (1874).

The statute was intended for the actual incum-

FLORIDA SUPREME COURT.

STATE of Florida, *ex rel.*, W. B. LAMAR,
Attorney General,

v.

James E. JOHNSON.

(35 Fla. 2.)

*1. In an alternative writ of mandamus, upon the part of the state, to compel the surrender by a prior incumbent of a public office of the office room and the records, books, and papers of the same, it is not absolutely necessary to allege in specific words that the term of office of such prior incumbent has expired. While the writ would

Headnotes by LIDDON, J.

bent, the actual successor to such office, rather than the person entitled to succeed to it, and therefore was not intended for the party entitled merely because he was so entitled, the only proper remedy for such person entitled, but not in possession, to assert his title, being by way of quo warranto, in which action he could judicially establish his title and possession, and then avail himself of the proceedings under the statute to obtain possession. *Re Conover v. Devlin*, 24 Barb. 587, 609 (1867).

The object of the proceeding under the New York Revised Statutes was to put the books and papers into the possession of the actual incumbent for actual use for the time being, and not to decide who, in the abstract, was entitled to them, because he was entitled to the office to which they pertained; and that the title to such books and papers must ultimately depend upon the title to the office; and therefore the right to present possession should depend on the fact of present possession of the office to which such documents were appurtenant. *Ibid.*

The authority conferred by the New York Revised Statutes to compel the delivery over of the books and papers appertaining to the office should only be exercised in a clear case or in one free from reasonable doubt, as the aim of the revisers of such statute was to give the remedy "only" when the case was so clear that the conduct of the party in refusing to deliver could be called wilful or obstinate. *Bridgeman v. Hall*, 16 Abb. N. C. 272 (1885); *People, Williamson, v. Allen*, 42 Barb. 203 (1864).

When the case is free from reasonable doubt, the application under the New York Revised Statutes for the delivery of the books and papers appertaining to an office should be granted. *People, Kilbourn v. Allen*, 51 How. Pr. 97, 100 (1875).

And a judge has no right to enforce such delivery unless the applicant shows a title, clear and free from reasonable doubt. *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843).

In order to entitle a party elected to office to the benefit of the proceedings given by 1 N. Y. Rev. Stat. 125, §51, to compel the delivery of the papers appertaining to the office as against his predecessor whose term of office has expired, it is only necessary for the party claiming to be entitled to the office to show that he has been duly elected, and that he has duly qualified himself for the office, and questions relating to the validity of such election cannot be entered into in any such proceedings. *Re Bradley*, 141 N. Y. 527 (1894).

In proceedings under the New York Revised Statutes the defendant may show that the facts adduced by the relator showing his election and title to the office are not truly stated, and so create a doubt as to the title to the office, although he cannot by merely alleging irregularities in the election avoid the proceedings. *Re Baker*, 11 How. Pr. 418 (1855).
31 L. R. A.

be more exact and definite if the specific words were used, their use is not essential, and words fully equivalent, from which the expiration of the term follows as a necessary consequence, are sufficient.

2. Allegations contained in such an alternative writ of mandamus as is mentioned in preceding headnote, to the effect that at a general election held in accordance with the provisions of law in this state, in the county of Duval, one J. F. G. was a candidate for the office of tax collector of said county, was voted for at said election for said office; that the returns of said election were duly canvassed by the proper canvassing board of said county, and that he was shown by such canvass to have received the

The true rule under the New York statute is that one having a prima facie title evidenced by an election or appointment valid on its face must prevail over one claiming the right to the office. *People, Salisbury, v. Holcomb*, 5 Misc. 459 (1893).

In the above case the court stated that *Re Davis*, 19 How. Pr. 323 (1860), which would seem to hold otherwise, was a practical nullification of the statute which was designed to afford a summary remedy to one having a clear prima facie title, and that the judge in that case overlooked *Re Baker*, 11 How. Pr. 418 (1855), which latter case was approved of in *People, Williamson, v. Allen*, 42 Barb. 203 (1864).

An application under the New York Revised Statutes for books and papers is designed to be a summary proceeding, and the officer to whom it is made has no power to declare the action of the appointing and confirming power void for official corruption, especially when there is not clear proof of the fact. *People, Kilbourn, v. Allen*, 51 How. Pr. 97 (1875).

Under the proceedings given by the New York Revised Statutes it is the province and duty of the judge to examine the facts and claims of the respective parties so far as to ascertain whether the person claiming the office and the delivery of the books and papers shows a clear right to such office and to the possession of such books and papers, and whether or not the party refusing such delivery establishes a reasonable doubt in regard to the right of the applicant to the possession of such book and papers. *Re North v. Cary*, 4 Thomp. & C. 357 (1874).

In such a proceeding the judge must look into the title to the office so far as necessary to ascertain whether the applicant's right is free from reasonable doubt, and such examination of the title is not the trial of the title to office, for the reason that the question is not involved, and the title remains wholly unaffected by his decision. *People, Williamson, v. Allen*, *supra*.

The application for the delivery of books and papers under the New York Revised Statutes will not be denied for the reason that it involves the validity of the appointment, as resort may be had to action to try the title. *Re Bagley*, 27 How. Pr. 151 (1863).

But the summary remedy given by the New York Revised Statutes does not lie where the party in possession of the office, and the books and papers appertaining thereto, holds under a bona fide belief that he is entitled to the office, but only in cases where there is a wilful and obstinate refusal of delivery. *Bridgman v. Hall*, 16 Abb. N. C. 272 (1885).

So, the proceedings given by such statutes were not adapted, nor were they intended, to try the title to an office when there were adverse claim-

highest number of votes cast for any person for such office, and was declared elected to the same; that the supervisor of registration of such county gave him a certificate of his election, certifying that according to said returns and canvass he was at said election elected tax collector of said county for the term prescribed by law, beginning on the 1st Tuesday after the 1st Monday in January, A. D. 1895 (which precedes the date of said writ); that he had duly given his bond and qualified for said office in all respects; and that the governor of the state, under his hand and the great seal of the state, did commission him to be such tax collector, according to the Constitution and laws of this state, for the term of two years from the 1st Tuesday after the 1st Monday in January, A. D. 1895, and until his successor is

qualified; that the incumbent of said office prior to the term for which said J. F. G. was commissioned as aforesaid was J. E. J., the defendant,—make a sufficient prima facie showing that the term of said J. E. J. as tax collector has expired.

3. The allegations of the alternative writ of mandamus set out in the preceding headnote are sufficient prima facie allegations of an election in fact of J. F. G. as tax collector of Duval county.

4. Section 2 of article 6 of the Constitution of this state gives the legislature power to provide for the returns of elections, and with it, as a necessary incident to that power, the authority to appoint and designate some officer, or board of officers, to aggregate the returns and ascertain and declare the result of such elections.

ants, and in such a case quo warranto is the proper remedy. *Re North v. Cary, supra.*

In *People, Dolan, v. Lane*, 55 N. Y. 217 (1873), it was said to be doubtful whether the title to an office ought ever to be tried collaterally on proceedings by mandamus instituted on behalf of a party out of possession of the office.

Where one claiming to be clerk of the common council of a city applied for a mandamus to compel his predecessor in office to deliver up the books and papers, the court held that the application should be denied inasmuch as the relator, if he was in truth clerk, had another specific legal remedy under 1 Rev. Stat. 124. *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843). From this decision, however, Chief Justice Nelson dissented.

In *People, Hodgkinson, v. Stevens, supra*, it was urged on the part of the defendant that the New York statutes (1 Rev. Stat. 124, §§ 50-55), had superseded the remedy by way of mandamus, but Chief Justice Nelson was of the contrary opinion, and held that nothing in the provisions of the statute indicated that such was the intention of the legislature, the statute being obviously designed to furnish a prompt and summary remedy for cases of emergency, in addition to the one already existing by way of mandamus, the remedy by way of mandamus being one of a proceeding according to the principles of the common law where questions of fact might be determined by a jury, and those of law by the court subject to review on error, while in the proceeding under the statute the remedy was by an informal application to a judge at chambers who was to proceed summarily and whose determination upon the matter was final.

In a note to the above case of *People, Hodgkinson, v. Stevens*, 5 Hill, 616, 630 (1843), Chief Justice Kent observed that the legislature never intended that the judge could exercise his powers to enforce the delivery of books and papers against an officer *de facto* when the title of the applicant for the office was questionable, and that the title of the applicant must be prima facie and free from reasonable doubt.

In *Re Whiting*, 2 Barb. 513 (1848), the court stated that although the proceeding under such statutes was not a substitute for a quo warranto because it did not establish the title to the office, yet it was kindred, and in addition to the remedy by way of mandamus, which has always been an appropriate mode of settling the possession.

In the above case a health officer of the poor, who resigned his office, communicated the fact to the board of health, and required them to fill the vacancy under the statute authorizing them so to, in case of temporary inability or otherwise, which provided that "the person so appointed should hold office only until such inability was removed, or the sense of the governor, or of the governor or Senate, should be declared." The board appointed a successor, who qualified and entered
31 L. R. A.

upon the duties of the office, but at that time the third party had been nominated by the governor for the office, and later such nomination was confirmed by the Senate, and such third party took the oath of office and attempted to enter upon its duties, but was obstructed by the appointee of the board, who claimed to be lawfully appointed and refused to surrender the books and papers. The court held that in such a case proceedings under the statutes were a proper remedy, the applicant's title being clear, and the defendant was not in possession under color of lawful right to hold.

In *Re Conover v. Devlin*, 24 Barb. 587, 600 (1857), the court stated that in proceedings under the New York Revised Statutes to obtain possession of the books and papers appertaining to an office, the question of title to the office should not be allowed to be tried in it at all, and that the abstract right of an applicant was unimportant where the possession was clearly shown; and further, that it should not be inquired into at all further than to see that if in possession he had color of title, that being in the office under color of right he should have such proceeding to get the books and papers, and, on the other hand, that having the best possible right to an office, one should not have the possession of the books and papers by proceedings under such statute while it was apparent that he was not in occupancy of the office and not in a situation to exercise the functions of it, the court thus going further than the rule established in the prior cases of *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843), and in the opinion of Judge Kent in the same case, p. 631, and that of Justice Edmonds in *Re Whiting*, 2 Barb. 513 (1848).

Where a statute gave the canal commissioners power to remove superintendents of repairs and collectors of tolls, when they judged such removal proper, the court held, the board alone having the right to decide upon the propriety of such removal, and its action being final and conclusive, the case was one in which the relator's title to the office was clear and free from reasonable doubt, and was therefore a proper case for enforcing the delivery of the documents in a question under the provisions of the New York statute. *Re Cobee*, 8 How. Pr. 367 (1853).

In the above case of *Re Cobee* the relator had qualified himself by taking oath and filing the official bond required by law, and the court held that such proceedings would lie, the statutes referring to and including collectors of tolls on canals as well as other officers.

Yet it has been held that the remedy given by the New York Revised Statutes, even though it involves the question of the legality of the removal of one out of the office and the appointment of the other, does not prevent either party from resorting to a more formal method of redress by action. *Re Bartlett*, 9 How. Pr. 414 (1854).

Where an office is already filled by a person who has been admitted and sworn and is in by color of

5. Where the result of an election held under the provisions of law has been ascertained and declared by the proper canvassing board, their official announcement is of binding force and efficacy as to the fact of an actual election, until reversed or set aside by a court of competent jurisdiction.

6. Upon an application for mandamus the court will not go behind the certificate of election and try the actual title to the office.

7. It is not necessary, in a mandamus on behalf of the state, to allege the eligibility of the person stated therein to have been elected to the office, for the reason that to try such an issue would be to determine the title to the office upon proceedings in mandamus, which the court will never do.

8. A prima facie title to public office confers a right to exercise its functions, and a right to the possession of the insignia and property thereof, and on such title the courts will compel a delivery of such insignia and property for the time being, without adjudicating the actual title.

9. The commission of the governor of this state is the highest and best evidence of who is the officer, until on a quo warranto or proceedings in the nature of a quo warranto it is annulled by a judicial determination.

10. Where one person has the certificate of election and the commission to hold an office he is *prima facie* the officer *de jure*, and a mandamus to put him into possession

right, a mandamus is never issued to compel a surrender. The proper remedy in such a case was formerly by quo warranto but now by the substituted action. *People, Lockwood, v. Scrugham*, 20 Barb. 302 (1855).

In *Re Baker*, 11 How. Pr. 418 (1855), the point in issue was, that the defendant was in, and held, the office of supervisor, by color of right, and was supervisor *de facto*; that the question of right to the office upon the respective claims of the relator and the defendant could only be tried by a direct proceeding in the nature of a quo warranto; and that upon the defendant's answer the county judge had no jurisdiction of the proceedings had before him under 1 N. Y. Rev. Stat. 358, § 5. The court held that, the relator's title to the office being clear, such proceedings to compel the delivery of the books and papers to the relator could be had under the provision of such statute as against officers *de facto*, but that if the title to such office was not clear quo warranto was the proper remedy.

Where the right to the books and papers has been determined by proceedings instituted under 1 Rev. Stat. 125, § 61, after a further hearing of the case the decision in such proceedings is *res judicata* and conclusive between the parties, and cannot be called in question in a collateral suit. *Conover v. New York*, 25 Barb. 518 (1857).

In *Devlin v. Platt*, 20 How. Pr. 167 (1861), the facts disclosed circumstances which showed that the defendant had been legally removed from the office of chamberlain, and the relator had been duly appointed his successor, and an order was therefore made in favor of the relator for the delivery over to him of the books and papers appertaining to the office under the New York Revised Statutes.

In that case the defendant had been removed from office by proceedings under the New York laws of 1857, p. 874, by the president of the board of city aldermen with the consent of the aldermen, and the relator appointed in his place.

And in such a case the applicant was held entitled to a warrant to commit the defendant to jail until he complied with the order or was otherwise discharged by law. *Devlin v. Platt*, 11 Abb. Pr. 398, 406 (1861).

So, in *People, Conliss, v. North*, 72 N. Y. 124 (1878), the facts showed that the defendant had been appointed chamberlain of the city for two years, and that at the expiration of such term he held over, no successor being appointed, but later, after the annual election at a meeting of the common council at which the late board of aldermen was recognized as members, and before any announcement was made that new aldermen had been elected who claimed recognition as such, or had taken the oath of office, and without objection, a resolution reappointing the defendant as chamberlain was passed, upon which he took the oath of office and filed the bond which was approved; but subse-

quently the council as a board of canvassers received the inspector's statements, and declared a certificate and election of new officers, and at a subsequent meeting the relator's appointment as chamberlain was passed, and it was held that he was entitled under the provisions of the statute to the office and the books and papers appertaining thereto.

Where the defendant made affidavit before a notary public, and not before the officer granting the order, stating that he had truly delivered to the plaintiff each and every book and paper in his possession or under his control as supervisor within his knowledge, and that he had not then, nor had he at any time since then, any such book as that described in the papers, the court below refused to dismiss the proceedings but made the order to take proof, and the court held that the order was properly made, the section of the Revised Statutes under which the proceedings were taken plainly requiring the affidavit to be made before the officer, namely a justice of the peace, the affidavit being evasive in other respects as it did not deny the delivery of the particular book in question, nor identify the books which were delivered. *McGrory v. Henderson*, 43 Hun, 438 (1887).

In *Re North v. Cary*, 4 Thomp. & C. 357 (1874), the plaintiff's application for the delivery of the books and papers was denied upon the ground that the applicant had omitted to present the bond for approval of the mayor, as until such approval of the sureties he was not entitled to the possession of the books and papers of the office, the laws of the city providing that the bond of the chamberlain, to which office the applicant claimed to have been elected, "shall be approved by the mayor and common council."

S. C. Code, § 434, subdvs. 2-4, provide that if any person shall refuse or neglect to deliver over to his successor any books or papers as required in the preceding section on demand, such successor may make complaint thereof to any judge of the circuit court or justice of the supreme court where the person so refusing shall reside, and if such officer be satisfied by the oath of the complainant, and such other testimony as shall be offered, that any such books or papers are withheld, he shall grant an order directing the person so refusing to show cause before him within some short reasonable time why he should not be compelled to deliver the same, and at the time appointed upon proof of service of the order, if the person charged with withholding such documents shall make affidavit before such officer that he has truly delivered such books and papers to his successor, all further proceedings shall cease, but if the person so complained against shall not make such oath, and it appears that such books are withheld, the officer before whom such proceedings shall be had shall by warrant commit the person so withholding to jail until the same be delivered.

of the property of the same cannot be defeated by a claim that the election was illegal, and that the incumbent is entitled to hold as an officer *de facto* until a proper election and qualification of his successor.

(February 27, 1895.)

APPPLICATION for a writ of mandamus to compel defendant to turn over the office of Tax Collector for Duval County, including the records, etc., to John F. Geiger, who was alleged to be the duly qualified incumbent. On motion to quash the writ and demurrer to the return. *Motion denied. Demurrer sustained, and writ awarded.*

The facts are stated in the opinion.

Messrs. A. W. Cockrell & Son, for defendant in support of motion to quash:

The writ must contain averments of all such facts as are necessary to show that it is the defendant's duty to execute the command of the writ.

14 Am. & Eng. Enc. Law, p. 212; *Puckett v. State*, 33 Fla. 387; *State, Fowler, v. Finlay*, 30 Fla. 332; *Enterprise v. State, Atty. Gen.*, 29 Fla. 128.

Tax collectors are constitutional officers, whose tenure of office is prescribed by the Constitution.

Const. art. 8, § 6; art. 16, § 14.

The Constitution interprets for itself what constitutes a "vote" in the making up of an

In *Ex parte Whipper*, 32 S. C. 5 (1890), the proceedings were had under a writ of habeas corpus to discharge the applicant from confinement under an order made against him under the above section of the Code for the delivery of books and papers to his successor in office. It was not denied that the proceedings were in conformity with the above provisions of the Code, but it was contended that they were not applicable until after formal judgment in an action to test the title to office. The court held that, although the provisions of the Code abolished the writ of quo warranto and substituted a civil action in its place, yet it was not expressly declared that they were only applicable after demand in such action, yet the above provisions of the Code as to getting possession of the official records were to be construed in connection with the acts creating machinery for declaring elections in the general statutes which, in authorizing the election to be declared and commission to be issued, conferred a prima facie title to the office which was sufficient to authorize an application for possession of the records appertaining to the office, and that therefore the petitioner should have surrendered the books and papers of the office and resorted to his civil action in the nature of a quo warranto to test the title to the office.

The proceedings under §§ 977, 983, Wis. Rev. Stat. to compel the delivery of books and papers, do not afford adequate remedy in a case where the relator claims the delivery of the seal of office and the moneys appertaining thereto, and therefore such proceedings would be inadequate and mandamus would be the proper remedy. *State, Jones, v. Oates*, 86 Wis. 634 (1893).

See further, *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 306 (1853); *infra*, VII., c.; *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116 (1870), *supra*, IV.; *Warner v. Myers*, 4 Or. 72 (1870), *supra*, I.

VI. In the case of a private corporation.

A writ of mandamus lies to a former town clerk or clerk of a county to deliver to his successors the common seal, books, papers, and records of the corporation, which belong to his customers, and it lies to any person who happens to have the books of a corporation in his possession and refuses to deliver them up. *Proprietors of St. Luke's Church v. Slack*, 7 Cush. 226, 239 (1851).

In that case the writ was issued to compel the treasurer or clerk of the religious society to deliver over the books and papers belonging to the office on the petition of the society, and the court stated that such writ was an appropriate remedy in such a case, the preservation of the rights in securing the peace and quiet and order of the parish, a religious society, being a matter of great public interest and importance.

In the case of *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377 (1869), the court granted mandamus upon the petition of a private

manufacturing corporation to compel the surrender of books and papers held by persons actually, but unlawfully, exercising the functions of the office under a claim of right, such persons having taken possession of them under a choice of a minority of the stockholders by the use of illegal votes, the court stating that the use of the writ was by no means confined to cases of a public nature, or to public corporations.

The petition in the case in question was that of the corporation, and not a process of a private stockholder against a corporation, to protect itself in the enjoyment of its charter rights, and to secure to itself the benefit of a due and proper observance of the laws in relation to its organization.

It has been held that mandamus is the proper remedy to compel the admission of a person to a private right or office from the enjoyment of which he has been excluded, where there is no other person claiming it under color of right. *State, Curtis, v. McCullough*, 3 Nev. 202 (1867).

So, it is said to be well established that mandamus will lie upon the petition of a private corporation to compel the surrender of its records, books, and papers which are unlawfully withheld by one of its former officers, especially when it is made to appear that the property has been concealed and cannot be reached by ordinary legal process. *State, State Savings, Bldg. & L. Asso., v. Davis*, 54 Mo. App. 447, 450 (1898).

In the case of *State, Cooper County, v. Trent*, 53 Mo. 571 (1875), the court stated that the statement made in *Proprietors of St. Luke's Church v. Slack*, *supra*, to the effect that a writ would lie to "any person" who happens to have the books of a corporation in his possession, and refuses to deliver them up, was entirely *dehors* the record, and was a mere dictum without support.

In *Tobey v. Hakes*, 54 Conn. 275 (1886), the application was for a mandamus to compel the secretary of a private corporation to allow the plaintiff to transfer the stock and the books of the company to a purchaser. The court held that the suit being against a private corporation and its only object the enforcement of a mere private right, it was not the proceeding to enforce the performance of a public duty, and that therefore mandamus was not the proper remedy.

In *Bridgman v. Hall*, 16 Abb. N. C. 272 (1865), relator claimed title to, and possession of, the office of chamberlain, and the surrender by the defendant of the books and papers appertaining thereto, and the question was whether the provisions of art. 5, title 6, chap. 5, pt. 1, N. Y. Rev. Stat. applied to the office of chamberlain or treasurer of a municipal corporation created by special charter where each of the parties claimed to be entitled to the office. The court held that the statutes did not apply to such an officer but only to public officers of the state.

See also *State, Curtis, v. McCullough*, 3 Nev. 202

"election by the qualified voters in each county"; and also defines, for itself, what proportion of such "votes" shall constitute "an election of officers."

Const. art. 6, § 6, art. 16, § 6.

It has not been alleged traversably and issuably that Johnson's term had in fact expired; nor is it alleged that Geiger in fact received a plurality of the votes by ballot of the qualified voters of Duval County, Florida.

State v. Black River Phosphate Co. 27 Fla. 326.

Johnson's right, *prima facie* as well as absolute, to his continuance in office as tax collector for the period elapsing after the expiration of the two years for which he was chosen

by the qualified electors of Duval county, and the election and qualification of his successor, is just as much under the protection of the Constitution as was his incumbency for the two years for which he was so chosen.

People, Baird, v. Tilton, 87 Cal. 614.

It cannot be claimed that, under the allegations of the writ, the title of the incumbent or his right to the continuance therein, is clearly void, or clearly colorable.

State, Hero, v. Pitot, 21 La. Ann. 388; *State, Carson, v. Harrison*, 118 Ind. 434.

The expiration of Johnson's tenure is an essential fact required to make up a cause of action.

High, *Extr. Legal Rem.* §§ 49, 50, 77.

(1867), *supra*, V.; *Bates v. Overseers of the Poor*, 14 Gray, 163 (1859); and *Husey v. Hamilton*, 5 Kan. 462 (1870), *infra*, VII., b.

VII. When writ refused.

The rule upon the subject of mandamus to compel the surrender of an office and the books and papers relating thereto as laid down in High on Extraordinary Legal Remedies, § 77, is as follows: If it be apparent to the court that instead of a proceeding whose object is only to get possession of the books and insignia of the office, the writ is invoked in reality to test the title to the office, and that the question of title is the real point in issue, it will refuse to lend its aid by mandamus. In all such cases the parties will be left to a determination of the disputed question of title by proceedings upon information in the nature of a quo warranto, since this is the first remedy by which judgment of ouster can be had against an actual incumbent, and the person rightfully entitled can be put into rightful possession of the office. The court will not, upon an application for a mandamus to procure possession of official records, inquire into the right of a *de facto* incumbent of the office, and if it is apparent that the relator's right cannot be determined without such an investigation into respondent's title, mandamus will not lie. The above rule was applied by the court in *State, Addison, v. Williams*, 25 Minn. 340, 343 (1879), where mandamus was denied.

a. Insufficiency of facts.

The writ must show facts sufficient to authorize the granting of it or it will not be sustained. *McLeod v. Scott*, 21 Or. 94 (1891); *Elliott v. Oliver*, 22 Or. 44 (1892).

In *Elliott v. Oliver, supra*, mandamus was brought by the plaintiff as recorder of conveyances against defendant as county clerk, to recover possession of certain records which he claimed title to by virtue of his office. The writ was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action, and the court below sustained the demurrer for the reason that the act of the legislature of 1889, creating the office of recorder of conveyances, was unconstitutional and void, and upon appeal the court held that in order to sustain such writ it must show facts sufficient to authorize the granting of it, and that the writ could not be aided by reference to the petition, following the decision in *McLeod v. Scott, supra*, and affirming the decision of the court below.

So, the relator must prove that the defendant's office is at an end or the writ will be denied. *State, Addison, v. Williams*, 25 Minn. 340 (1879).

Again, it has been held that under the New York statute the relator's title must be clear, and free from reasonable doubt. *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843); *Re Davis*, 19 How. Pr. 323 (1860).

31 L. R. A.

In *Howard v. Gage*, 6 Mass. 462 (1810), it was stated that the remedy by way of mandamus was inadequate when the officer was annually elected, from the nature of the proceedings on writs of mandamus in that court, which was according to the course of the common law; none of the English statutes regulating such proceedings having been adopted in that state.

b. In case of a private party.

Where a private person acts in an unofficial capacity, mandamus is not the proper remedy to compel him to deliver over documents which have come to his hands. So held in *State, Cooper County, v. Trent*, 58 Mo. 571 (1875), where the party against whom the writ was sought to be enforced had been employed by the county court to make a survey of the public roads of the county, and to plat them in a suitable book, and who, after receiving the contracting price for his services, regained possession of the same and refused to deliver them.

In *Bates v. Overseers of Poor*, 14 Gray, 163 (1859), where a committee chosen by the town for the purpose of auditing the accounts of the overseers of the poor for the year who were authorized by a vote of the town to demand and receive from the overseers of the poor the books of account belonging to the town which were held by the latter in their official capacity, petitioned the court for mandamus to compel the delivery of the books the court refused the writ, holding that the books were not those of the petitioners, the vote of the town not having made them such; the petitioners not being public officers entitled by virtue of their office to the custody of the same, or charged with any public official duty respecting them.

In *Husey v. Hamilton*, 5 Kan. 462 (1870), it was shown that at the general election of county probate judge the defendant received the majority of votes and was duly declared elected, a certificate of election being issued, upon which he gave his bond, took the oath, and entered upon his official duties. The plaintiff, his immediate predecessor, turned over to him the county seal and part of the other property of the office, but subsequently entered the office and removed part of the same in a clandestine manner, under pretext that the defendant's bond was illegal. The court below granted a peremptory writ of mandamus placing the defendant in possession, but upon appeal the same was refused, the court holding that as the defendant was not charged as holding a public office or as being in a position from which the law required a special duty, proceedings by way of mandamus were not an appropriate remedy, the defendant being considered as a private individual, being nowhere represented as in any other capacity, and for the further reason that there was a plain and adequate remedy at law, the affidavit also being defective as not representing that the defendant held or pre-

The right of the person to be surrendered to cannot be determined without an investigation and determination that respondent's right has expired.

State, Addison, v. Williams, 25 Minn. 340.

Had the Constitution fixed Johnson's prior term at two years, the action of the returning board, and the commission issued thereon, might have invested Geiger with a prima facie or colorable right to be put into the office by mandamus.

Crowell v. Lambert, 10 Minn. 369; *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116.

A tax collector holds subject to the law of

the land, as to its termination, modification, and as to suspension or removal therefrom.

State, Atty. Gen., v. Johnson, 30 Fla. 487, 18 L. R. A. 410.

The writ of mandamus is not effective to create a title in the person to whom the writ directs the incumbent to surrender; it only consummates such title as he may already have.

King v. Clarke, 2 East, 75; *King v. Bishop of Oxford*, 7 East, 345; *State, Carson, v. Harrison, supra*; 2 Spelling, Extraordinary Relief, § 1572; *Soucy v. People, McCracken*, 113 Ill. 109.

To require Johnson to surrender the office in which he was continued by force of the Con-

tended to hold any office, trust, or station from which any duty resulted.

In the above case the court referred to and distinguished the cases of *People, Brewster, v. Kilduff*, 15 Ill. 500, 60 Am. Dec. 769 (1854), and *People, Cummings, v. Head*, 25 Ill. 325 (1861), on the ground that they differed from the case then under consideration upon the very point on which that case was decided, the pleadings in the former of the two cases admitting that the defendant was in the exercise of an official position, from which, if he was wrongfully in such position, resulted the special duty of delivering to his successor the seal, books, and papers of the office, the plaintiff occupying a station from which a special duty sprang, which the court enforced by the writ. The same conditions as to the parties were found to exist in the second case above referred to, while in the case then under consideration neither the affidavit nor answer represented the plaintiff as acting or pretending to act in any such capacity as created any special duty or from which such special duty resulted. *Hussey v. Hamilton*, 5 Kan. 462 (1870).

In *Carr v. McCampbell*, 61 Ind. 97 (1878), action was brought against the successors of certain trustees appointed under 2 Va. Rev. Stat. 1876, to compel the surrender of books and papers connected with their office, and also the proceeds of the sales of certain lots laid out as a town. It was held that the action could not be maintained by a private citizen, but must be brought by the board of trustees of the town, after a demand and refusal, under the provisions of the act.

See also *Queen v. Hopkins*, 1 Q. B. 161 (1841), VIII., *infra*.

c. When there is another remedy.

Mandamus may be granted to admit as well as to restore to office, where it is one that concerns the public or the administration of justice, but generally it will not be done where there is clearly another remedy, and particularly when such remedy is of a much more efficient character. *Com. v. Philadelphia County Comrs.* 6 Whart. 476, 482 (1841).

It will not be granted where the applicant has another adequate specific legal remedy. *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 403, 3 Am. Rep. 377 (1869).

But the remedy in order to be a bar to the issuing of the writ must not only be adequate, but also specific, and damages recoverable for the violation of the right are not such specific remedy. *Ibid*.

In *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398 (1853), an alternative mandamus to compel the delivery of the books and papers belonging to the office of clerk of the superior court, to the relator, was demurred to on the ground that the relator's remedy was by information in the nature of a quo warranto, and the general answer also denied the fact of the election. The court refused the application, holding that the California statute furnished not only a specific but an adequate and speedy remedy, and 31 L. R. A.

therefore mandamus was not the proper or appropriate form of relief, such a writ only issuing to prevent the failure of justice.

In refusing the relator's application in the above case, the court pointed out that the defendant was then actually in possession of the office, was duly sworn and admitted, and exercised the duties as officer *de facto*, and was therefore prima facie entitled to it, and for that reason, while he was in the exercise of such office under color of right, his title to the office could not be tried by that writ, and that the California statute gave an adequate remedy at law by the practice act, against any person usurping, intruding into, or unlawfully holding or exercising any public office, civil or military, or any franchise within the state.

See also *Cameron v. Parker* (Okla.) 38 Pac. 14 (1894), and *State, Atty. Gen., v. Johnson*, 30 Fla. 483, 497, 18 L. R. A. 410 (1892), *supra*, I.

d. In the absence of ouster.

And it has been held that proceedings under the New York Revised Statutes will be denied in the absence of a judgment of ouster regularly entered against the person executing the duties of the office. *Re Welch v. Cook*, 7 How. Pr. 173, 14 Barb. 395 (1852).

In the above case of *Re Welch v. Cook*, an application was made under §§ 50-53, 1 N. Y. Rev. Stat. 124, to compel the delivery of books and papers appertaining to the office of state treasurer, and the court denied the application upon the ground that a regular judgment of ouster in the relator's favor was not shown to have been obtained, the court stating that no proceedings to obtain the books and papers appertaining to an office could be instituted until a judgment of ouster had been regularly entered against the person executing the duties of the office. In that case the judgment upon which the relator relied showed great irregularities.

e. Prima facie title.

In the absence of a prima facie title to the office, the writ will not issue. *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398 (1853); *Lavalle v. Soucy*, 36 Ill. 467 (1869); *Hussey v. Hamilton*, 5 Kan. 462 (1870); *State, Addison, v. Williams*, 25 Minn. 340 (1879); *Case v. Campbell*, 16 Abb. N. C. 239 (1883); *Ewing v. Turner*, 2 Okla. 94 (1894).

Where the petition alleged that the defendant, at the time of the election of the petitioner, had possession and control of all the books and papers belonging to the office, but there was no direct allegation that there were any books, papers, or money belonging to the office, and it did not appear from any statute that the supervisors were entitled to the custody of the books, papers, and money belonging to the commons of the village, and there was no statute requiring a supervisor to deliver to his successor such documents, it was held that it devolved upon the relator to show that there were

stitution until his successor is chosen by a plurality of the votes by ballot, merely because of the acts of the canvassing board, and the supervisor of registration, and the issuance of a commission based thereon, irrespective of the election in fact of his successor by a plurality of the votes by ballot of the qualified electors of the county, is to abridge Johnson's term by withholding from him the right of continuing therein secured to him by the Constitution.

State v. Lusk, 18 Mo. 333; *State, Smith, v. Anderson*, 26 Fla. 240; *State, Lamar, v. Dillon*, 32 Fla. 579, 23 L. R. A. 124; *Cooley*, Const. Lim. 6th ed. p. 762.

such books in existence, and in the custody of the defendant, and that he, as such relator, was entitled by law to the same, and the court therefore denied the relief. *Lavalle v. Soucy*, *supra*.

The relator is not entitled to the aid of mandamus to obtain possession of funds in the hands of the territorial treasurer, when it appears that such relator has been removed by the governor and a subsequent commission has been lawfully issued for the same office to another, for the reason that, in seeking to avoid the later commission, the relator necessarily puts in issue the title to the office, which cannot be tried by mandamus; and in the face of the later commission, the relator being unable to show a prima facie title to such office, the writ must be denied. *Ewing v. Turner*, *supra*.

Where the office has not become vacant and has been illegally filled, the right to office by virtue of such election must fail, and therefore proceeding by way of mandamus to compel the surrender of such office and the delivery of the books and papers appertaining thereto will be denied. *Lindsey v. Luckett*, 20 Tex. 516 (1857).

In *Re Carpenter & Snow*, 7 Barb. 30 (1849), the petitioners, upon an application at chambers under 1 N. Y. Rev. Stat. 124, § 50, alleged that they, as freeholders of the county, were appointed by the governor, with the consent of the Senate, commissioners of loans of the county in the place of the late commissioners, whose term of office had expired; and further, that the permission signed by the governor was forwarded to and received by the clerk of the county, and that the petitioners within the time specified after the receipt of notice performed all acts necessary to entitle them to office, and entered upon their duties. The defendants did not deny that their official term had expired before the petitioners were nominated, but they insisted that under the state Constitution the governor and Senate had no right to make the appointment, and that they were entitled to hold office under 1 N. Y. Rev. Stat. 117, § 9, until a successor should be duly qualified, by the legislature determining the manner in which officers should be elected or appointed; and they further insisted that the petitioner had not taken the necessary steps to qualify for office. The court denied the motion upon the ground that the office of commissioner of loans was a county one within art. 10, § 2, of the Constitution, and that the mode of appointment was not provided for in the Constitution except by the section which declared that such county officers should be elected by the electors of the counties or appointed by the board of supervisors or other county authorities as directed by the legislature, and further that the power of appointment by the governor and Senate which existed with respect to county officers under the late Constitution was by implication removed, and that therefore the petitioners had no prima facie title to the office.

31 L. R. A.

Mr. Fred. T. Myers, for relator, *contra*: Mandamus lies to compel the transfer or delivery of the books, seals, muniments, records, papers, and other paraphernalia pertaining to a public office, to the person properly entitled to their custody, and the writ may even be extended to the case of public buildings pertaining to an office, and may require the surrender of such buildings to the person legally entitled thereto.

High, Extr. Legal Rem. § 73; *People, Brewster, v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769; *People, Cummings, v. Head*, 25 Ill. 325; *Crowell v. Lambert*, 10 Minn. 369; *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116; *War-*

1. Possession by an officer de facto.

The writ will be denied where the office is already filled by one who has been appointed and sworn, and is in by color of right, and is in possession as an officer *de facto*. *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 396 (1853); *Booner v. State*, Pitta, 7 Ga. 473 (1849); *State, Johnson, v. Thompson*, 36 Mo. 70, 72 (1865); *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355 (1843); *State, Cannon, v. May*, 106 Mo. 488 (1891); *State, Vall, v. Draper*, 48 Mo. 213 (1871); *People, Platt, v. Stout*, 19 How. Pr. 171 (1860); *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843); *Re Davis*, 19 How. Pr. 323 (1860); *People v. New York*, 3 Johns. Cas. 79 (1802); *Com. v. Philadelphia County Comrs.* 6 Whart. 476, 482 (1841); *Lindsey v. Luckett*, 20 Tex. 516 (1857); *State, Butler, v. Callahan*, 4 N. D. 481 (1895).

Mandamus is not the appropriate remedy to try the title to an office as against one actually in possession under color of law. So held in *French v. Cowan*, 79 Me. 426 (1887), where the petitioner attempted to oust an actual incumbent and to place himself in an office, the title to which was in controversy, the court stating that quo warranto was the proper remedy.

So, where the respondent holds the certificate of election no writ will be allowed by one claiming a better title. *State, O'Donnel, v. Dusman*, 39 N. J. L. 677 (1877).

In *People v. New York*, 3 Johns. Cas. 79 (1802), mandamus was applied for, *inter alia*, against certain parties commanding them to desist from executing their offices, and the court denied the writ holding that where the office was already filled by a person who had been appointed and sworn and was in by color of right, mandamus was never issued to admit another person, for the reason that the corporation being a third person might admit or not at pleasure, and the right of the party in office might be injured without his having an opportunity to make a defense, and therefore the remedy in the first instance was by quo warranto.

In the absence of proof of a prima facie right in the person claiming the possession of the office and the books and papers appertaining thereto, his predecessor in office holding over is a *de facto* officer and cannot be compelled by such proceedings to deliver over the books and papers. Justice Orton in dissenting opinion in *La Pointe Supers. v. O'Malley*, 46 Wis. 35, 57 (1879).

In *State v. Dunn*, Minor (Ala.) 46, 12 Am. Dec. 25 (1821), a person claiming office as county court judge prayed for the issue of a writ of mandamus to compel the party then holding the commission and exercising the duties of such judge to admit the petitioner to office. It was held that the writ would not lie, there being a recorder *de facto*, the applicant having another remedy by quo warranto.

g. When the title is in issue.

The writ will not be granted where it puts in issue

ner v. Meyers, 4 Or. 72; *Spelling*, Extraordinary Relief, § 1508; *Huffman v. Mills*, 89 Kan. 577; *McGee v. State*, *Axtell*, 103 Ind. 444; *State*, *Jones*, *v. Oates*, 86 Wis. 634; *State*, *Law*, *v. Saxon*, 25 Fla. 792.

Having received a certificate of election and qualified in the manner provided by law, relator is prima facie entitled to their possession, and may enforce his rights by aid of the writ.

High, Extr. Legal Rem. § 75; *People*, *Brewster*, *v. Kilduff*, 15 Ill. 492, 60 Am. Dec. 769.

The court will not go behind the certificate of election and try the relator's actual title.

High, Extr. Legal Rem. § 75; *State*, *Ather-ton*, *v. Sherwood*, and *McGee v. State*, *Axtell*, *supra*.

Whenever the term of an office has expired, the incumbent may be compelled by mandamus to turn over to his successor all records and

books pertaining to his office to which the public are entitled to access.

High, Extr. Legal Rem. § 74; *People*, *Cummings*, *v. Head*, and *Warner v. Myers*, *supra*.

The writ for this purpose may be granted in aid of the person declared duly elected to the office and holding the certificate of election.

High, Extr. Legal Rem. § 74; *People*, *Cummings*, *v. Head*, and *Crowell v. Lambert*, *supra*.

The term of the person having expired, he is regarded as in possession without any colorable right or title of any nature, and is therefore a mere intruder, for whose expulsion a prompt and efficient remedy is necessary.

High, Extr. Legal Rem. § 76; *State v. Layton*, 28 N. J. L. 244; *Spelling*, Extraordinary Relief, § 1509; *State*, *Jones*, *v. Oates*, 86 Wis. 634.

Mr. William B. Lamar, Attorney General, also for relator.

the title to the office. *Hull v. Shasta County Super.* Ct. 63 Cal. 174 (1883); *Duane v. McDonald*, 41 Conn. 517, 521 (1874); *People*, *Cummings*, *v. Head*, 25 Ill. 325 (1861); *People*, *Phillips*, *v. Lieb*, 85 Ill. 484 (1877); *State*, *Jumel*, *v. Johnson*, 29 La. Ann. 399 (1877); *State*, *Hero*, *v. Pitot*, 21 La. Ann. 336 (1869); *French v. Cowan*, 79 Me. 428 (1887); *State*, *Addison*, *v. Williams*, 25 Minn. 340 (1879); *St. Louis County Ct. v. Sparks*, 10 Mo. 117, 45 Am. Dec. 855 (1843); *State*, *Cannon*, *v. May*, 106 Mo. 488 (1891); *State*, *Tracy*, *v. Taaffe*, 25 Mo. App. 567 (1887); *State*, *O'Donnel*, *v. Dusman*, 89 N. J. L. 677 (1877); *People*, *Hodgkinson*, *v. Stevens*, 5 Hill, 616 (1843); *Re Davis*, 19 How. Pr. 323 (1860); *People v. New York*, 8 Johns. Cas. 79 (1802); *People*, *Coleman*, *v. Dikeman*, 7 How. Pr. 124 (1852); *People*, *Bradley*, *v. Stephens*, 2 Abb. Pr. N. S. 348, 353 (1866); *Brown v. Turner*, 70 N. C. 98 (1874); *Ewing v. Turner*, 2 Okla. 94 (1894); *Warner v. Myers*, 3 Or. 218, 221 (1870).

The court will not as a general rule turn out one officer and admit another upon proceedings by way of mandamus. *People*, *Akin*, *v. Matteson*, 17 Ill. 167 (1855).

No matter whether such title be directly or indirectly in question in such proceeding. *State*, *Cannon*, *v. May*, *supra*.

And this is so as, while the writ does not conclude, yet it forestalls, the opinion of the court upon the subsequent proceeding by quo warranto, which in itself is strong ground for the refusal of the writ. *State*, *O'Donnel*, *v. Dusman*, *supra*.

For the reason that the title of an officer *de facto* cannot be assailed collaterally, there must be a direct proceeding against him. *People*, *Hodgkinson*, *v. Stevens*, *supra*.

But the rule that mandamus will not be awarded when its object is to test the title to an office claimed by two or more parties, amounts to a rule of discretion. *State*, *O'Donnel*, *v. Dusman*, *supra*.

In proceedings by way of mandamus it may be necessary to determine as a question of fact whether or not a particular person is in actual possession of the office, or, in other words, whether he is exercising its functions; but such a matter is entirely different from determining whether such person is entitled to the office, and so it may be necessary to determine whether or not a particular person is an officer *de facto*, and the trying of that question is not the trial of the right to office in any sense that makes it necessary to resort to quo warranto. *Warner v. Meyers*, *supra*.

Where the issuing of the writ of mandamus would have the effect of admitting a second person to an office already filled by another, both claiming to be duly elected, resort must be had to other proceedings to contest the disputed title. *Duane v. McDonald*, *supra*.

31 L. R. A.

Where the books and papers appertaining to the office of assessor had been delivered by the county clerk to the party appointed to fill such office, it was held that such county clerk could not be compelled by mandamus to deliver the papers over to another party who claimed the same office by election, the only question upon mandamus being the fact of the appointment of the party to fill the office, and not the legality or illegality of the holding. *People*, *Phillips*, *v. Lieb*, *supra*.

In *State*, *Jumel*, *v. Johnson*, *supra*, the auditor of public accounts of the state alleging that the defendant refused to deliver to him the keys and papers, etc., belonging to that office, obtained an alternative mandamus to compel their delivery. Before filing answer the defendant presented a petition for removal of the cause from the district court to the circuit court and tendered a bond, and further specifically denied that the relator was the legal and rightful auditor, and prayed that the writ of mandamus be refused and the suit dismissed. The court held that such defense presented distinctly the issue of the rightful title to an office which could not be tried by mandamus.

In *State*, *Hero*, *v. Pitot*, 21 La. Ann. 336 (1869), the relator based his claim on the ground that the defendant had ceased to be an officer, and that it was the former's duty under the Louisiana act of March 28, 1867, to vacate the custody of the records of the office. The court held that as it could not determine the rights of the relator without deciding upon the rights of the defendant to the office of notary public, proceedings by way of mandamus were not the appropriate remedy.

In *State*, *Addison*, *v. Williams*, 25 Minn. 340 (1879), the facts showed that the respondent, elected county treasurer at a general election, qualified and entered upon the duties of the office, and continued to discharge them, and remained in possession of the records and other property appertaining thereto; that at a general election, while so county treasurer, he was duly elected a member of the House of Representatives, accepted such membership and entered upon its duties; that the relators, the county commissioners, declared a vacancy in the office of county treasurer by reason of the election to the office of representatives, appointed the relator to fill it and delivered a certificate of such appointment to the relator, who accepted and qualified as provided by statute, notified the respondent's deputy of such appointment, and demanded possession of the records and property, possession whereof was withheld, the respondent contending that the controversy related to the title to the office, and that therefore quo warranto was the proper remedy. The court held that such was the case, unless the respondent's election, ac-

Liddon, J., delivered the opinion of the court:

The state of Florida, by the attorney general, filed in this court a petition for a mandamus against the defendant. Said petition alleged, in substance, that at the general election under the laws of said state held in and for the county of Duval on the 2d day of October, A. D. 1894, John F. Geiger was a candidate for the office of tax collector of said county, and was voted for at said election for said office; that the returns of said election were afterwards, to wit on the 4th day of October, A. D. 1894, canvassed by the county judge, the supervisor of registration, and the chairman of the board of county commissioners of said county, sitting as a county canvassing board of elections, in pursuance of law; and the said John F. Geiger was by said canvass shown to have received

the highest number of votes cast for any person for said office of tax collector, and was declared elected to said office; that the supervisor of registration for said county, afterwards, to wit on the 6th day of October, A. D. 1894, did make, sign, and deliver to the said John F. Geiger a certificate of election, certifying that on the 4th day of October, 1894, W. H. Baker, county judge of Duval county, Florida, E. J. E. McLaurin, supervisor of registration of said county, and Charles Marvin, chairman of the board of county commissioners of said county, did publicly canvass the returns of the election districts of said county, filed with the said county judge and said supervisor of registration, as required by law, showing the votes cast for tax collector of said county at an election held therefor, on the 2d day of October, 1894, and did declare the result thereof, and

ceptance, and entry upon the duties of representative operated to deprive him of the office of treasurer, and that the question of the relator's right to office depended altogether upon whether the respondent had any title to the same, and that relator could not move without first proving the respondent's title at an end.

In *State, Tracy, v. Taaffe*, 25 Mo. App. 567 (1887), an appeal was taken from a judgment awarding a writ of peremptory mandamus against the defendant commanding him to deliver all the books, papers, etc., appertaining to the office of justice of the peace, in his possession, to the relator the register of the city of St. Louis, and the court held that the Missouri statute, which provided for the delivery of the papers, had no application to the case as the justice in that case claimed title by re-election.

Where the relator's title is dependent upon the cessation of the term of office of a person actually exercising the duties of the office, and claiming that his office has not become vacant, the court will not award mandamus. *State, O'Donnel, v. Dushman*, 39 N. J. L. 877 (1877), citing *State, Hero, v. Pitot*, 21 La. Ann. 336 (1869).

In the case of *State, O'Donnel, v. Dushman, supra*, the writ was refused upon the ground that the evidence proved that there were less than a certain number of legal votes in the township, which fact raised a great question as to the relator's title to office.

Where the title of the applicant was not free from reasonable doubt for the reason that his title was opposed by a clerk *de facto* holding and exercising office on a claim and color of title, the application was denied. *People, Hodgkinson, v. Stevens*, 5 Hill, 616 (1843).

And the same judge refused the application upon the further ground that the judges of the supreme court had differed in their views in regard to the matter, and the ultimate establishment involved the examination of questions which were not free from legal doubt. *Ibid.*

In the case of *People, Coleman, v. Dikeman*, 7 How. Pr. 124 (1852), the facts showed that village trustees were, by an act of the legislature, authorized to appoint a cells keeper of the prison, and that by a later act the electors of the village were authorized to elect such a keeper, who was to hold office for one year and until a successor should be elected and duly qualified; that the defendant was duly elected under such last-mentioned act at a village election, and continued to discharge his duties, but later the village was, by act of the legislature, incorporated as a city, and under such act the term of all officers elected or appointed under the village charter was to expire upon a certain date; that the act incorporating the village repealed the village act and all acts and parts of acts inconsis-

tent with the charter, that the city succeeded under the act to all the rights and liabilities of the corporation of the trustees of the village, which gave the common council certain powers, but made no express provision as to the election or appointment of cells keeper, but later the common council of the city balloted for the office of cells keeper, and on such ballot the relator was elected, and the defendant refused to surrender the office, whereupon the relator obtained an order to show cause why an alternative writ of mandamus should not issue. The court denied the motion holding that there was a real and substantial dispute as to the title to the office.

Where the applicant was appointed supervisor by the justices of the town to fill a vacancy occasioned by the party previously elected omitting to take the oath of office within a certain number of days, and to compel him to deliver the books and papers of the office held and claimed by the former supervisor who held possession, the court denied the relief upon the ground that the New York statute was only applicable where the title to the office was clear and a party against whom the proceeding was taken was in possession under the color of a legal right to hold office. *Re Davis*, 19 How. Pr. 323 (1860).

In *Re Davis, supra*, application was made, under the New York Revised Statutes, to compel the delivery to the applicant of books and papers belonging to the office of town supervisors, and the question was, Who was in actual possession of the office, retaining the muniments and exercising the functions appertaining thereto? and the court stated that the statute was never intended to apply to a case where there was a real question of title to the office, and no possession to any practical purpose had been obtained, and that in such a case proceedings in the nature of quo warranto to try title to the office was the proper remedy.

A party in possession of an office with claim or color of title should have the custody of the books and papers, and a party out of possession and not in a condition to exercise its functions, and who makes no attempt to perform its duties, should not have the incidents and appurtenances to the office until there has been a trial of the title in the mode provided by law, and his right has been well established, the New York statute only being applicable where the title is clear and where the party against whom such proceeding is taken is not in possession under color of a legal right to hold the office. *Re Davis, supra*.

In *People, Bradley, v. Stephens*, 2 Abb. Pr. N. S. 348 (1866), the court refused the writ upon the ground that the title to the office depended upon an act which was a constitutional one, the relator claiming office as president of a board of aqueduct

according to said returns and canvass John F. Geiger received the highest number of votes cast for any person for said office of tax collector; and that according to said election returns and canvass, and the result declared as aforesaid, the said John F. Geiger was at said election elected tax collector of said county for the term prescribed by law, and beginning the 1st Tuesday after the 1st Monday in January, A. D. 1895; that said Geiger had duly filed his bond as such tax collector, which had been duly approved by the proper authorities, and that a commission under the great seal of the state, in due form of law, had been issued by the governor to said Geiger for the term of two years from the 1st Tuesday after the 1st Monday in January, 1895, and until his successor is qualified; that the incumbent of said office, prior to the commencement of the term for

which the said Geiger was commissioned as aforesaid, was one James E. Johnson, who upon the demand of the said Geiger refused, and still refuses, to surrender to him the possession of the office in the court-house of said county of Duval set apart for the use of the tax collector; and refused, and still refuses, to deliver to the said Geiger the assessment rolls, books, records, papers, and files of the said office of tax collector, although demand has been made on him for their delivery; that the action of said Johnson, as stated, is delaying and hindering the collection of the state's revenues in said county, and is likely to produce embarrassment and confusion in the collection of the same; and that there was no other remedy to compel the delivery of said assessment rolls, etc., except by the extraordinary writ of mandamus. The petition prayed

commissioners under the New York act of May, 1866, 2 N. Y. Laws 1866, p. 2056.

In *Brown v. Turner*, 70 N. C. 98 (1874), mandamus was applied for by the plaintiff as public printer against the defendant directing him to deliver the public laws to the plaintiff and restraining him from delivering them to the other defendant. The defendant demurred to the complaint upon the ground of defect of parties, and also upon the ground that the governor had no right to appoint a public printer, and that mandamus was not the proper remedy, the demurrer being overruled in the court below. Upon appeal the judgment was reversed and the demurrer allowed, there being a question of right or title to the office, which question could alone be tried by quo warranto.

In *Welshans v. Shirk*, 98 Pa. 17 (1881), the petition for mandamus urged that the respondent was elected treasurer and receiver of taxes for one year from a given date, subject to the right of suspension or removal as provided by law, but subsequently by joint resolution of the city council he was suspended from office, and two days following the suspension was, by another resolution, continued until further action, and on the same day the petitioner was appointed to the same office, qualified therefor and demanded of the respondent the books and papers, and certain moneys belonging to the city, which the respondent refused to deliver. The petition was demurred to upon the ground that the respondent was wrongfully removed and that the petitioner was not legally appointed, and the court denied the writ, no just cause for his suspension being shown.

In *State, Addison, v. Williams*, 25 Minn. 340 (1879), the court distinguished the case from that of *Crowell v. Lambert*, 10 Minn. 369 (1865), and *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 118 (1870), upon the ground that in the latter class of cases the question was, Who was *prima facie* entitled to the possession of the records and other property of a given office? the certificate of the auditor, which was conclusive until it was affirmatively overthrown, being properly held *prima facie* evidence that the person named in it had been elected, and was therefore, if he had duly qualified, entitled to the possession of the records and other property of the office; and that in that class of cases the title to the office was not finally adjudicated, but the question of *prima facie* right was particularly regarded as settled by the auditor's certificate, while in the case at bar the question of title must be examined and determined against the incumbent *de facto* of the office before the relator's certificate of appointment could possess any value whatever, the case being one in which the title to the office was directly and unavoidably in controversy although the action was not one for the determina-

11 L. R. A.

tion of the title but for the recovery of possession of the records, etc.

b. Question of election.

So, where the question of election is inquired into the writ will be denied, the court having no power to entertain that question in such proceedings. *Case v. Campbell*, 16 Abb. N. C. 269 (1823); *Duane v. McDonald*, 41 Conn. 517, 521 (1874).

In *Grand Rapids Guard v. Bulkley*, 97 Mich. 610 (1893), the relator was an unincorporated organization formed for social purposes governed by a Constitution and by-laws. The Constitution provided for the election of a board of directors to hold office for a year from a given date or until their successors were elected, and it was the duty of the board to elect, among other officers, a treasurer, whom the board of directors assumed to elect to succeed the respondent, but notice of the election was not given to all the members of the board. Upon refusal of the respondent to turn over the books, papers, and money to the party claiming under the election, mandamus was issued. The court held that such proceedings would not lie, as the relator was not duly elected, no full notice of the meeting having been given, and for the further reason that the term of office of the directors had not commenced at the time of the election.

In a case where the parties were rival candidates for the office of register of deeds, and the relator was declared duly elected by the canvassing board, whereupon a certificate was issued to him as provided by statute, but such election was subsequently contested by the defendant and was declared void, which judgment was appealed from by the relator, it was held that the respondent, until the final determination of the appeal, was entitled to the possession of the books and papers as against the prior incumbent, and, further, that the petitioner, although the former incumbent had handed over the office to him, was not entitled to the writ although he was forced to give way to the respondent by reason of force irregularly issued against him. *Allen v. Robinson*, 17 Minn. 113 (1871).

In *State, Curtis, v. McCullough*, 3 Nev. 202 (1871), the relator claimed to have delivered to him the books and papers belonging to the office of superintendent of a mining company, and to be admitted to the enjoyment of the office, but the supplemental answer of the defendant showed that the defendant, after filing his first answer, had been legally and duly appointed to the possession claimed by the relator, and the writ was therefore refused.

In *Bergen v. Powell*, 80 Hun. 438 (1893), an appeal was made from an order of the special term denying a motion by way of mandamus to compel the delivery of books and papers appertaining to the

for a writ of mandamus commanding the defendant forthwith to surrender to the said Geiger the office in the court-house of Duval county, set apart for the use of the tax collector, and to deliver to said Geiger the assessment rolls, books, records, papers, and files belonging or appertaining to said office, which are now in his possession. Attached to the petition was a copy of the certificate of the supervisor of registration of Duval county, and of the commission of Geiger as tax collector, referred to in the same. Upon this petition an alternative writ of mandamus, conforming to the petition and in the usual form, issued.

Upon the return of the alternative writ the defendant moved the court to quash the same upon the following grounds, to wit: 1. It does not appear, from the allegations of said writ, with legal or other sufficiency or certainty that

this movent's incumbency, therein set up, of the said office, has expired. 2. That the allegations of said writ sufficiently show that this movent is the incumbent of said office, exercising the function thereof, under and by virtue of his election, qualification, and entry thereon, for a term not yet expired. 3. The allegations of said writ do not set up, issuable or traversably, the facts upon which, as matter of law, may be predicated the expiration of the incumbency of this movent, or the tenure by which this movent holds said office. 4. The said writ does not show that J. F. Geiger, to whom, by the command of said writ, this movent is required to surrender said office, was in fact elected tax collector of Duval county at the election therein alleged to have been held, by a plurality of the votes by ballot of the qualified electors of Duval county; nor

office of treasurer of the board of police commissioners. The facts showed that under N. Y. Laws 1878, chap. 306, which created a certain police district and vested the powers and duties connected with the police government in a board of commissioners appointed by the supervisors of the town, the defendant with two others were appointed police commissioners. Subsequently the supervisor and the justice of the peace of the town removed the defendant and another from the office without notice, except one served on the president of the excise commission of the town to meet and act with them, which was served outside of the town, and after such removal the supervisor alone appointed the plaintiff and another to succeed to the office, which the defendant refused to vacate and deliver up the papers. The court affirmed the opinion of the court below denying mandamus, holding that the officers required by the act to appoint had not power, after making such appointment, to remove any officer from office; and further, that article 10, § 3, of the Constitution had no application to the case.

In *Case v. Campbell*, 16 Abb. N. C. 299 (1883), the county judge made an order for the delivery over of the books and papers appertaining to the office of town supervisor, and an appeal was taken from the order, and a stay of proceedings granted and a motion made to vacate such stay. The facts showed that both the relator and defendant were candidates for the office of town supervisor, and that at the canvass of the votes two ballots closely folded together were not opened or counted; subsequently the ballots were opened and found to be for the relator, but the board did not decide whether the two ballots in question should be counted or not; that at the trial the judge proceeded by inquiry into the election to ascertain and determine its result. The court held that such finding was beyond the power of the judge upon the summary application, and that in the absence of prima facie evidence of the relator's election there was no power vested in the judge to ascertain and declare the result, the only remedy being by action to determine the result.

Where neither the speaker of the House of Delegates nor the joint assembly of both Houses of the Legislature convened under § 3, art. 7, W. Va. Const. for the purpose of opening and publishing the returns of the election to the office of governor, did in fact open and publish the returns in respect to said office, or declare any person elected to that office, it was held that the court could not by mandamus adjudge the person who appeared from the return certificate to the speaker of the House to have received the largest number of votes for that office to be the governor, and compel the person who was the governor during the preceding term to deliver the office and the insignia to him. *Goff v. Wilson*, 32 W. Va. 333, 3 L. R. A. 58 (1889).

In *Banton v. Wilson*, 4 Tex. 400, 405 (1849), the plaintiff applied for mandamus to compel the delivery of the office of clerk of the district court together with the records appertaining thereto, and the facts showed the death of the clerk of the circuit court, and the appointment of the plaintiff by the district judge, until a regular election to fill the office was issued and published, at which election the defendant received the highest number of votes, was commissioned, and entered upon the discharge of the duties, but plaintiff claimed the office by virtue of his previous appointment and brought suit for restoration. The court refused the writ upon the ground that the defendant had been duly elected and was entitled to hold.

1. Other relief sought.

The remedy by way of mandamus has also been denied where the relator has sought protection in equity.

In *Hardcastle v. Maryland & D. R. Co.*, 32 Md. 32 (1870), the case came before the court upon appeal from an order of the circuit court directing a mandamus commanding the delivery to the president of the company, or to its authorized agent, of certain subscription books or lists and original copies of letters relating to the business of the company. The writ charged that such papers came into the possession of the appellant when he was president, and were held by him in his official capacity, and should have been surrendered on the termination of his office as president, and the election and qualification of his successor, but the court denied the relief, upon the ground that the claimant had elected to proceed in equity where full and complete relief could be afforded, and held that the court below erred in ordering the writ.

See also *King v. Wheeler*, Cas. t. Hardw. 99 (1735), *infra*, VIII.

3. Relator's own act.

So the writ has been refused where the relator's own action was the cause of the dispute.

In *Pariseau v. Escanaba Bd. of Edu.*, 96 Mich. 302 (1893), the relator claimed to be duly elected and to have qualified and acted as a member of the board of education until prevented by action of the board which seated another person in his place. The facts showed that the relator had tendered his resignation as a member of the board and had knowledge of the nomination of his successor, and also of the election to be held to fill the vacancy, but he claimed to have withdrawn the same. The court refused the writ upon the ground that the relator's own action brought about the state of affairs, and for the reason that there was nothing that showed that the board had not acted bona fide, and also upon the ground that the party whom he sought to oust was not made a party to the proceedings, and stated that in such a case

that he was in fact declared or certificated as elected by any tribunal or person invested by law with authority to determine that he was so elected. 5. Said writ does not show that the said Geiger was in fact eligible to said office. 6. Said writ does not set up any facts upon which, because of the refusal of this movent to surrender said office, or the books and papers appertaining thereto, embarrassment, hindrance, or delay in collecting the state and county taxes in said county may be predicated.

The said defendant also at the same time, mandamus was not a proper proceeding to oust him.

VIII. English cases.

In *Town Clerk of Nottingham's Case*, Sid. 31, mandamus was granted to compel the delivery of the records relating to the office, which was one of public justices.

In *King v. Owen*, 5 Mod. 314, mandamus was allowed to a mayor to deliver the ensigns of his office to his successor, even though the words "or signify to us cause to the contrary, etc." were omitted from the writ.

In *Rex v. Wildman*, 2 Strange, 879, mandamus was granted requiring the defendant to deliver to the company of blacksmiths all books and papers which he had in custody by virtue of being clerk to the company from which office he had been removed, but the court held that the mandamus must be made out according to the rule.

But in an Anonymous Case reported in 1 Barnard. K. B. 402 (1730), mandamus was moved against the late clerk of the blacksmith's company in London to deliver over to the present officer all public books of the company, and the court stated that in the case of menial officers of a corporation such writ would be denied, but in that case it was granted the company being public.

In *King v. Holford*, 2 Barnard. K. B. 350 (1733), mandamus issued to compel the defendant to deliver over to the register of the bishop the books belonging to his office, but the rule was discharged, there being a consent to try the case by information in the nature of a quo warranto, and to deliver up the books and papers if the court found the relator entitled to the office.

In *Rex v. Clapham*, 1 Wils. 306 (1751), mandamus was granted to oblige the old overseer of the poor to deliver over the books of the poor's rates to the new overseer, for the reason that they were public books and ought to be delivered over by one overseer to another in order that all the parishioners might have access to them, and for the reason that the overseer and churchwarden for the time being ought to have the custody thereof.

In *Rex v. Owen*, Comb. 399, a rule was made for the defendant, who was served with mandamus and an alias, to return the writ which required him to deliver the mace and insignia of office appertaining to the office of mayor.

Where there is a legal right to the office which gives no right or title to the books for the reason that the defendant has an equitable right to them which bars the legal title, the case shows no right in the relator to the books and papers, and therefore mandamus will be denied. *King v. Wheeler*, Cas. t. Hardw. 99 (1735).

Where the right to exercise the office is that of a private office which is already the subject of a suit in equity between the parties, the court will not interfere by mandamus to compel the delivery of the books and papers. *Ibid.*

In *King v. Buller*, 8 East, 389 (1807), the late mayor and deputy mayor of a borough were called upon by a rule to show cause why mandamus should not issue commanding them to deliver to the present mayor the mace, common seal, books, and records 31 L. R. A.

but without waiving his motion to quash, made a return to the alternative writ. The substance of that portion of this return which it is thought necessary to set out here was as follows: That he has not surrendered to said John F. Geiger the office in the court-house of Duval county, Florida, set apart for the use of the tax collector, and he has not delivered to the said John F. Geiger the assessment rolls, books, records, papers, and files belonging or appertaining to the said office of tax collector of Duval county, which were in his possession, or any of them,

of the office pertaining to mayor of the borough, but, it appearing that the presiding officer, who, by the Constitution of the borough, owned an integral part of an elective assembly, departed from it after the meeting had been regularly formed and the election entered upon, but before it was completed; the election made after his departure being void, the court refused the writ.

In *King v. Round*, 4 Ad. & El. 139 (1835), the mandamus stated that the defendant was surveyor of the highways for an expired term, and that divers books of accounts relating to the highways were in his possession and ought to be delivered to the churchwardens, and that he had been requested, but had refused, to deliver them. The defendant returned that he had not on the day of the test of the writ, nor since, nor now, nor when he was required on behalf of the churchwardens, any books in his possession, not stating whether he had delivered those in his possession between the times of the request or test of the writ, nor what he had done with them. The court held his return was good but denied him costs.

In *Queen v. Hopkins*, 1 Q. B. 161 (1841), a mandamus issued commanding a party who was alleged to have the custody of certain books and papers and proceedings relating to a court of requests under a local act (47 Geo. III., § 2, chap. 1), or to the office of the clerk thereof, to deliver them up to a party who claimed to hold them as having been elected clerk of the court. It was held that the mandamus was bad as not showing that the detainer was other than a private individual, even though the defendant in his return alleged that he and not the prosecutor was duly elected clerk, and that as such clerk, he was entitled to hold the books, raising on the face of the returns a question upon the construction of the local act, and of the statute 5 & 6 Wm. IV., chap. 76, the court stating that if on the face of a mandamus there was no ground for the writ the defect could not be supplied by matter appearing in the return.

In *Ex parte Holloway*, 30 Eng. L. & Eq. 240 (1855), mandamus was moved for on behalf of one of the churchwardens to show cause why mandamus should not issue commanding the defendant to restore to the proper custody the register books of the parish. The facts showed that a certain hospital, which was partly a charitable institution and partly an ecclesiastical benefice, was united with the parish, the church of which was pulled down, and subsequently persons were inducted to the mastership of the hospital with the rectory of the parish, but since a later date the rectory had become vacant and there was no regular officiating minister. Afterwards the appointment was made under the decree of the court of chancery to the office of receiver of hospital charities, the appointee took possession of the joint registers, which were formerly kept in the church connected with the hospital but were then out of the parish. Upon an application by the churchwardens of the parish for mandamus to compel the delivery of the register books to the churchwardens, it was held that the writ would not lie, as the possession of the books was wrongful from the first. E. W.

and for cause why he has not done so shows as follows: 1. That the respondent is the duly qualified, elected, commissioned, and acting tax collector of Duval county, Florida, elected to said office at the general election held under the laws of Florida in and for Duval county in October, 1892, duly qualified, commissioned, and inducted into office for the term of two years from the 1st Tuesday after the 1st Monday in January, 1893, and until his successor is duly qualified, and he now holds the said office in the court-house, books and papers, together with the right and title to the office of tax collector of Duval county. 2. That the said pretended election claimed to have been had and held on the 2d day of October, 1894, was not in fact an election of said Geiger by a plurality of the votes of the qualified electors of Duval county.

The remainder of the return set out at considerable length and detail the reasons upon which the defendant predicated the allegation that the election held on the 2d day of October, 1894, was not in fact an election of said Geiger. These consisted in various charges of fraud and conspiracy on the part of the county commissioners and election officers to prevent a fair, honest, and legal election, and to falsely, fraudulently, and illegally procure the counting in of said John F. Geiger to the said office of tax collector, and that such conspiracy prevented the election of a tax collector by a plurality of the votes by ballot by the qualified electors of Duval county. Various other allegations in regard to the fraudulent conduct of the election are also made. In view of our conclusion that the validity of the election, or the title of the defendant, cannot be determined in this proceeding, it is not necessary to further state the allegations of the return.

The relator demurred to this return upon the grounds (1) that it was not responsive to the writ; (2) that the facts therein set up are irrelevant and immaterial in this proceeding; and (3) that it attempts to bring into issue and to try in this cause the title to the office of tax collector of Duval county, which is not permissible in a proceeding of this character. The cause came on for hearing upon both of the pending matters; the motion to quash the alternative writ, and the demurrer to the defendant's return, being submitted together.

The first three grounds of the motion to quash the alternative writ may be considered together. The gist of all of them is, that it does not sufficiently appear from the writ that the term of office of the defendant has expired. It is true that the writ does not allege in specific words that the term of the defendant has expired, but we think it does sufficiently state facts fully equivalent to an allegation of the expiration of the term of the defendant. It would have perhaps been more exact and definite to use the specific words, but their use is not absolutely essential, and words fully equivalent and from which the expiration of the term follows as a necessary consequence are sufficient.

Examining the writ we learn that a general election under the laws of this state was held in the county of Duval on the 2d day of October, A. D. 1894, and that John F. Geiger was a candidate for the office of tax collector of

said county and was voted for at said election for said office; that the returns of said election were duly canvassed by the proper canvassing board of said county, and he was shown by such canvass to have received the highest number of votes cast for any person for said office, and was declared elected to the same; that the supervisor of registration gave him a certificate of his election, certifying that according to said returns and canvass the said Geiger was, at said election, elected tax collector of said county for the term prescribed by law, and beginning on the 1st Tuesday after the 1st Monday in January, A. D. 1895; that said Geiger had duly given his bond and qualified for said office in all other respects, and that the governor of the state under his hand and the great seal of the state did commission him to be such tax collector, according to the Constitution and laws of this state, for the term of two years from the 1st Tuesday after the 1st Monday in January, A. D. 1895, and until his successor is qualified; to have, hold, and exercise said office, etc.; that the incumbent of said office prior to the term for which said Geiger was commissioned as aforesaid was James E. Johnson, the defendant. We think these allegations in connection with the provisions of our Constitution and statutes, as to the election and length of term of tax collectors, make a sufficient prima facie showing for the purposes of this case that the term of the defendant has expired, it being borne in mind, as will be further stated in this opinion, that this is not an action in which the ultimate and actual and legal title to the office can be determined. The objection, however, is made that the election of Geiger is not alleged in the alternative writ as an actual fact, or that he actually received a majority of the qualified votes cast at the said election for said office, but that his title to the office is based wholly upon the fact of his being a candidate, the determination of the county canvassing board, the certificate of the supervisor of registration, and the governor's commission. The point contended for is that the provision of the Constitution of 1895 (art. 16, § 14) providing that county officers "shall continue in office after the expiration of their official terms until their successors are duly qualified," construed together with section 6 of article 9 of the same Constitution, providing that "the legislature shall provide for the election by the qualified electors in each county" of county officers, gives to such officers so elected whose official terms have expired a further tenure of office until their successors are elected as a matter of fact by the qualified electors of the county and have duly qualified. It is claimed by the defendant that the writ substituted an allegation of the declaration of the results of an election as ascertained by a canvassing board and certification and commission, for the necessary allegation of an actual election. Thus it is contended that it does not appear that the term of office of the defendant has expired because by the imperative mandate of the Constitution he continues to hold until an election in fact of his successor. We presume there can be no doubt that the Constitution where it speaks of an election means an election in fact. Section 2 of article 6 of the same Constitution gives

the legislature power to provide for the returns of elections, and with it, as a necessary incident to said power, the authority to appoint and designate some officer or board of officers to aggregate the returns, ascertain and declare the result, of such elections. The outcome of an election must not be left to uncertainty, to individual opinion, to hearsay, or to rumor, but must be settled by those appointed by the law for that purpose. When the result of an election held under the provisions of law has been ascertained and declared by the proper canvassing board, their official announcement is of binding force and efficacy as to the fact of an actual election, until reversed or set aside by a court of competent jurisdiction. *Warner v. Myers*, 4 Or. 72; *State, Atty. Gen. v. Johnson*, 80 Fla. 438, text 495, 18 L. R. A. 410. So in this proceeding, whatever may be said of other proceedings where the actual and ultimate title to the office is involved, the allegations of the alternative writ hereinbefore stated are sufficient prima facie allegations of an election in fact. A similar question was presented in the case of *State, Meckling, v. Jaynes*, 19 Neb. 161, which was an application for a mandamus to turn over the books and papers of a public office. There, upon a contention that the relator was not duly elected, the court said: "The relator's cause of action consists solely in his having been canvassed in, declared elected, awarded a certificate of election, taken the oath, and given the bond required by law, and the respondent having refused or failed to deliver up to him the books, papers, and furniture of the office on demand. It was quite unnecessary for him to have alleged any other facts than these in his relation, nor would the denial and disproving of any other facts by the respondent defeat the action. It is stated as the law, in a standard work on this branch of the law, as follows: 'Upon the application for mandamus the court will not go behind the certificate of election and try the relator's actual title. It is therefore wholly immaterial whether the relator was eligible to the office in question, or whether he was duly elected thereto, since to try such issues would be to determine the title upon proceedings in mandamus, which the courts will never do' (High, *Extr. Legal Rem.* pp. 74, 75); and this is the law of the courts generally."

What has been said in reference to the first three grounds and the authorities cited applies to the 4th and 5th grounds, the 4th ground being that the writ contained no allegation of Geiger's actual election; and the 5th being that the writ contained no allegation that Geiger was in fact eligible to said office. That the eligibility of the relator will not be determined in a proceeding by mandamus, see *State, Ather-ton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116, cited with approval in *State, Atty. Gen., v. Johnson*, *supra*. See also *State, Bisbee, v. Board of State Canvassers*, 17 Fla. 29, text 32.

The 6th ground was, that the writ does not set up any facts upon which, because of the refusal of the defendant to surrender said office, or the books and papers pertaining thereto, embarrassment, hindrance, or delay in collecting the state and county taxes in said county may be predicated. Conceding, but not de-

ciding, that it is necessary that the alternative writ should make such a showing, we think it is sufficiently made in the writ. The writ contains special allegations to that effect. Even if there were no special allegations, we do not see how embarrassment, hindrance, and delay could fail to result from the general effect of the allegations of the writ—that the offices, books, and papers of the tax collector's office are in the hands of one man, who refuses to surrender them, while another clearly appears prima facie entitled to them. Both persons claiming to be the rightful tax collector, the taxpayer will be doubtful as to whom he should pay his taxes, and would probably hesitate until coerced by proceedings to sell his property before he would pay to either.

We next consider the return. Two principal points of contention are argued in connection with the return, (1) that the defendant is in office claiming to hold over until his successor is elected as a matter of fact and duly qualified, *i. e.*, is an officer *de facto*; and (2) that the said pretended election claimed to have been had and held on the 2d day of October, 1894, was not in fact an election of said Geiger by a plurality of the votes of the qualified electors of Duval county. Reversing the order in which the respective contentions are presented, we will consider the last one first. It has already been said in this state, borrowing the language of a decision from a sister state, that "a prima facie title to a public office confers a right to exercise its functions, and a right to the possession of the insignia and property thereof. On this prima facie title the court will compel a delivery of the insignia and property, that the functions and duties of the office may be exercised. . . . The commission of the governor, whether granted on the certificate of election, or a certificate of vacancy, is the highest and best evidence of who is the officer, until on a quo warranto, or a proceeding in the nature of quo warranto, it is annulled by a judicial determination. It is this commission which imparts to the courts judicial notice and which informs the community who are clothed with official authority and bound to official duty. In a proceeding, whether by mandamus or under the statute, to compel the transfer of property attached to a public office, this commission is a clear prima facie title to the office, on which the courts will proceed without indulging any inquiries behind it, when it is founded on a certificate of election or a certificate disclosing vacancy made by proper authority. Inquiries behind it would generate a controversy as to title to the office, which, as we have already said, cannot be entertained either on an application for a mandamus or in the statutory proceeding. The court must rest on the prima facie title, and award the keeping of the property of the office to this title, for the time being, without adjudicating whether the relator has or has not the actual title." *State, Atty. Gen., v. Johnson*, 80 Fla. 438, text 492-494, 18 L. R. A. 410; *State, Law, v. Saxon*, 25 Fla. 792.

In view of the great public importance of this case, we have reviewed the decisions of many other states of this union upon the same subject. While there may have been some

difficulty in the application of the rule, the principles announced in the extract from *State, Atty. Gen., v. Johnson, supra*, almost universally prevail.

We will now recur to the first contention made under the defendant's return, that the writ does not lie against him because of his claim that his successor has not been actually elected and duly qualified, he is entitled to hold over until such election and qualification, and that his right to continue in office can only be inquired into by quo warranto, or proceedings in the nature of a quo warranto. We think this point was practically involved in the case of *State, Atty. Gen., v. Johnson, supra*. In that case the 6th ground of the motion to quash the alternative writ of mandamus was as follows: "That the relief prayed in and by said writ of mandamus can be legally had only upon quo warranto, or upon an information in the nature of quo warranto, whereby the claim of E. W. Gillen, created by the commission therein set up, to be tax collector of Duval county, Florida, can be determined as against the *de facto* incumbent 'clothed with the ostensible attributes and semblance of office.'" Other similar grounds were included in the same motion. The decision of the court that it could not inquire behind the governor's commission (where it appeared that he acted within his constitutional authority), which was a *prima facie* title to the office in favor of the person holding it, seems a practical disposition of the defense that a mandamus to surrender the property of the office cannot issue against one claiming to be a *de facto* officer in possession. Yet as the precise point was not expressly determined by the court, we have very carefully examined the question in the light of authority derived from a great number of decisions. There can be no doubt that some text-books state a doctrine that seems to give some support to the contention of the defendant. Thus, in a recent work (2 Spelling. Extraordinary Relief, § 1572) we find the following: ". . . The cases in which the writ of mandamus lies, in admitting or restoring to office, are where the return to the writ will involve merely a question of law, so that, admitting the facts to be true, a peremptory mandamus ought to be awarded. The true principle underlying the jurisdiction in mandamus in these cases is that the proceeding can confer no title not already existing, though it may effect the consummation of the relator's title if he have any; but it creates no new title. . . . In all cases where the validity of an election or appointment is the main point in dispute, mandamus will not be granted until the controversy has been tried at law and an adjudication had in favor of relator. In other words the writ will not lie to try the title, but will only issue after a judgment of ouster shall have been rendered against the incumbent." To same effect is Merrill, Mandamus, § 143; also *State, Jones, v. Oates*, 86 Wis. 634. We have carefully examined the cases cited in the text to support the proposition laid down. None of them were cases like the present, but in all of them the writ was invoked by the party out of possession, but who claimed to be elected, while the incumbent had the commission and all the muniments of title to the office. It is only neces-

sary to give a few illustrations from the many cases cited in such text-books upon the subject, because there is a great similarity in all of them. In the case of *State, Mead, v. Dunn, Minor* (Ala.) 46, 12 Am. Dec. 25, we quote only the headnote, which shows sufficiently the facts in the case. The headnote reads as follows: "Mandamus will not lie, on behalf of one claiming the office of judge of a county court, directing another who holds the commission and is in the exercise of its duties." In the later case of *Thompson v. Holt*, 52 Ala. 491, it is emphatically settled that mandamus will lie when the conditions are reversed, and the relator holds the state's commission, instead of the incumbent. In the case of *Bonner v. State, Pitts*, 7 Ga. 478, the incumbent held the commission, while the relator claimed to be elected, but had no commission. The court says (text, 479), citing a number of cases: "Was the proceeding by mandamus the proper remedy to vacate the commission of Bonner, who was elected by the new justices, and commissioned by the governor? From the record in this case, it appears that the respondent, Bonner, was the acting clerk of the court of ordinary of the county of Jones, under a commission from the governor of this state. He was in possession of the books and papers appertaining to the office, and exercising the duties thereof under a *prima facie* title; he was the officer, *de facto*, and one of the objects of the mandamus was to inquire into the validity of the respondent's title to the office, and to vacate the same. In our judgment, the relator had another specific, and much more appropriate, remedy,—to try the validity of the respondent's title to the office which he was exercising, by an information in the nature of a quo warranto." The court then quotes extracts showing that the same principle has been held in the following cases: *King v. Colchester*, 2 T. R. 259; *State v. Delieasseline*, 1 McCord, L. 43; *State, Mead, v. Dunn, supra*; *People v. New York*, 3 Johns. Cas. 79.

By protracting the length of this opinion many more similar cases could be added. On the other hand, the law is well settled that where the relator has the certificate of election and the commission, he is *prima facie* the officer *de jure*, and entitled to the property of the office, and that a mandamus to put him into possession of the same cannot be defeated by any claim of the incumbent that the election was illegal and that relator's title is not valid, and that he, the incumbent, is entitled to hold as an officer *de facto* until a proper election and qualification of his successor. Merrill, Mandamus, §§ 154 *et seq.* In the present proceeding we cannot determine the ultimate title to the office, but only the present apparent right. *Prima facie* the successor of the defendant has been duly elected and has qualified, and as such is entitled to the possession of the office and its books and records until, in a proper proceeding for that purpose, his title has been found defective or invalid. *State, Atherton, v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116; *Crowell v. Lambert*, 10 Minn. 389; *Stone v. Small*, 54 Vt. 498; *Huffman v. Mills*, 39 Kan. 577; *People, Cummings, v. Head*, 25 Ill. 325.

We see no foundation in reason for the claim of the defendant that the writ does not lie

against him because he is an officer *de facto*. We do not think he can take an advantage of a tenure of office which is prima facie wrongful, and stand upon the bare fact of such tenure when he is called upon to surrender the property of the office to the officer *de jure*.

The motion to quash the alternative writ is denied. The demurrer to the return is sustained, judgment rendered for the relator upon demurrer, and a peremptory writ of mandamus is awarded, returnable on Tuesday, the 5th day of March, A. D. 1895.

ALABAMA SUPREME COURT.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appt.*,

v.

Hannah C. JOHNSON, Admrx., etc., of A. W. Johnson, Deceased.

(.....Ala.....)

1. **The intoxication and misbehavior of a passenger which will authorize his expulsion** from a train will not justify his expulsion without exercising due care for his safety having reference to time, place, and surroundings.
2. **The ejection from a train at night of a passenger known to be drunk** and irresponsible, at a place from which he can escape only by following the roughly ballasted railroad track, and crossing cattle guards on one side and a bridge over a creek on the other, renders the railroad company liable when he is killed by another train soon after.
3. **The extent of the intoxication of a passenger**, the conductor's knowledge of his condition, and the safety of the place at which he was ejected, are questions for the jury.

(January 8, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Cullman County in favor of plaintiff in an action brought to recover damages for alleged negligent killing by defendant of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas G. Jones for appellant.
Messrs. Cofer & Brown and L. C. Dickey for appellee.

Haralson, J., delivered the opinion of the court:

This is the third appeal in this case. On the former,—(92 Ala. 204, and 16 So. 75) and especially in the latter,—the law as applicable to the facts of the case was fully settled. In that decision, the following propositions were announced: (1) That mere drunkenness which does not take away consciousness and the power to consider and understand the danger to which one is exposed, nor deprives him of physical capacity to take care of himself and to avoid danger, does not relieve him from the responsibility of exercising due care to escape the danger, and if killed in consequence of such neglect of duty on his part, there can be no recovery on account of the injury. (2) That a con-

ductor on a railroad, under proper circumstances, such, as it may be admitted, existed in this case, has the right to eject a passenger from a car, but it requires that in exercising this right, it shall not be done at a time and place, and under such conditions and circumstances, as would unnecessarily expose the person ejected to great peril of life or bodily harm, whether the attendant danger arose from natural infirmity of the person or was self-imposed. (3) That if a conductor so ejecting a party from his car did not know or was not informed of the infirmity of the person and the peril attending his ejection, there would be no liability arising from the exercise of the right. (4) That if a passenger on a train is intoxicated to a degree to render him unconscious of danger,—unable to take in his position, surroundings, and perils, and his duty to avoid them,—or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner and at a proper place. *Tanner v. Louisville & N. R. Co.* 60 Ala. 621; *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Johnson v. Chicago, R. I. & P. R. Co.* 58 Iowa, 348; *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282; 3 Wood, *Railway Law*, §§ 363, 364; *Shearm. & Redf. Neg.* § 493; 2 Am. & Eng. Enc. Law, p. 748.

The counsel for appellant in a lengthy and elaborate review of the main question at issue,—the drunkenness of deceased and the consequences following,—invites a reconsideration of some of our conclusions as announced on the last appeal. His contention is that, to make the defendant liable, deceased must have been drunk to a degree to render him unconscious of attending perils, at the time and place he was ejected; that the conductor must have known of his condition; that, as a matter of law, under the evidence, the court below should have held that deceased's intoxication was self-imposed, was not to a degree to render him unconscious; that whatever its degree may have been, the conductor was ignorant of his true

NOTE.—As to exposure of drunken passenger to danger by ejection from car, see *note to Roseman v. Carolina C. R. Co.* (N. C.) 19 L. R. A. 327.

condition and acted, in ejecting him, in the discharge of a right and duty; that there was nothing in the time, place, and circumstances of the ejection to show wanton or reckless negligence on his part, and that deceased was guilty of culpable negligence, which contributed proximately to his own death, for which defendant was not liable. But we remain satisfied with the principles of law as before declared, and find no reason for departing from them. It is opposed to authority and reason and the common instincts of humanity to allow, because a passenger is intoxicated, whether to a greater or less degree, and misbehaves in a manner authorizing the conductor to expel him from the train, that such expulsion may be made without the exercise of due care for the safety of the passenger, having reference to time, place, and surroundings. If expelled without the exercise of such reasonable care for his life and limb, and he is injured in consequence, the company will be liable notwithstanding the fact, if the passenger had not been drunk, he would not have misbehaved, and if he had not misbehaved, he would not have been expelled and injured. The right to make reparation rests upon the moral obligation, resting upon every one, so to exercise his own rights as not to injure another. As was well expressed in *Isbell v. New York & N. H. R. Co. supra*: "A remote fault in one party does not of course dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are, to a greater or less extent, incidental to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances,—to the imminency of the danger, the evil to be avoided, and the means at hand for avoiding it." If, therefore, the case, as decided in 92 Ala. 204, contains expressions or lays down principles, as is contended by appellant, contrary to our later utterances on the subject (16 So. 75), to which we adhere, it must be modified conformably to what we here hold; and if decisions may be found to the contrary we decline to follow them. The evidence clearly shows, that the deceased was very drunk when he boarded the train and when ejected from it. It admits of much doubt if he had any intelligent understanding or comprehension of his situation, perils, and duties, whether he knew where he was, or whither he wandered. It was in the night-time, and very dark and rainy. The place was at Speagler's Cut, which was a reverse curve in the road, in the shape, as described by a witness, of the letter S. The evidence tends to show that deceased was put off about midway of the cut, and on the eastern side of it; that the wall was high and precipitous, and on the western side it was rough, rocky, and sloping down to a creek, which was swollen from the recent and falling rain; that deceased's only escape was down or up the

track; and at the point where he was killed his only escape was to walk the track; on the south end of the cut, there were cattle guards, and on the north, a bridge over a creek, about 25 feet wide; and over the one or the other of these, whichever way the deceased took, he was compelled to go, to get out. It further tended to show that the track where the body was found was ballasted with limestone and sandstone mixed, and was rough; that through the cut there was space on the sides of the track wide enough for a person to walk, and that deceased lived not very far distant, and was well acquainted with the cut. It must be admitted that it was a terrible place to put a passenger off, in the night-time, whether drunk or sober. To the deceased, in the drunken condition he was, if he had any consciousness, it must have appeared a very hell. The conductor testified that the deceased acted like he had been drinking, but he did not know the fact. He refused, in a very nonsensical way, to pay his fare, and used rude, obscene language to the conductor,—at which the latter says he did not become offended,—such, as no one but a crazy or drunken man would employ. Such language and conduct evidenced a want of rationality. All this tends to show that the conductor knew deceased's condition; and that he knew when and where he put him off, and the horrors and perils of the situation, cannot be disputed. The fact, too, that deceased was run over and killed by an approaching train in a very short time after his ejection from the train tends to show how drunk and irresponsible he was. Whether the place was a proper one at which to eject him, having reasonable regard to the safety of his life and limb; how drunk he really was; and whether the conductor knew of his condition,—we held before, were questions to be ascertained by the jury, and as to the correctness of this ruling, there can be no question.

We notice only these errors assigned, which have been insisted on in argument. There was no error in allowing plaintiff's witness, Smith, to answer the questions as to how the track was ballasted at the point where deceased was killed, and its character as to roughness; and if the field, near by, was overflowed with water, and how deep, the morning after the accident. These questions related to the character and condition of the place where deceased was killed. The state of the weather, as well as the kind of night and place he was put off, were facts relevant and proper to be considered by the jury, in determining the question of the negligence of the conductor and its character. The appellant requested eleven written charges, each of which was refused by the court. Some of them, it may be, assert correct, abstract principles of law; but, as applicable to the facts of this case, the charges are either incorrect in principle, are abstract, or ignore important facts in evidence, or are calculated to mislead the jury, and were properly refused. Some of them improperly require the court to pass upon the facts of the case, and to withdraw them from the consideration of the jury. From what we have said, the

vice of each, without taking the time and labor to discuss them separately, will be apparent.

Affirmed.

Rehearing denied February 8, 1896.

W. D. SCOTT *et al.*, *Appts.*,
v.
STANDARD OIL COMPANY.

(.....Ala.....)

1. The words "fire-proof oil" cannot be claimed as a trademark for an illuminating oil, since the words are descriptive of oil which is not inflammable, although it is not literally proof against fire.
2. An injunction against a wrongful or fraudulent imitation of a distinctive label used by a manufacturer or trader can be granted although the label is not a trademark and contains no word, sign, or symbol which can be protected as such.

(May 21, 1895.)

APPEAL by defendants from a judgment of the City Court of Decatur in favor of complainant in a suit brought to enjoin defendants from using certain words alleged to be the property of complainant in connection with illuminating oils, and to recover damages for their alleged wrongful use. *Reversed.*

The bill alleged that complainant after experimenting and developing produced from petroleum an illuminating oil of fine quality giving a bright light when burned in lamps, emitting but a minimum of offensive odors, and charring the wick or smoking a lamp chimney less than any other brand. It was called fire-proof oil. Complainant built up a large trade in it. The words "fire-proof oil" were original with it and were intended to indicate its origin. There was no other article known to commerce as fire-proof oil, and there could be no such thing as fire-proof oil in the literal acceptance of the term. The term deceived no one but was merely arbitrary and fanciful to indicate the origin and ownership of the oil so manufactured. Defendant Scott had been in the habit of buying oil in car-load lots and selling it at various points to consumers under various names including the name fire-proof oil, all brands being taken from the same tank. By doing so he interfered with complainant's established trade and injured the reputation of its oil. In so doing Scott held himself out as the representative of the Southern Oil Company. In his dealings he had infringed a label brand, or device which complainant claimed to own but which it alleged that he had simulated for use in the sale of his oil. That he had even bought up old barrels which had contained complainant's oil and filled them with oil from his, defendant's, for resale. By so doing he had realized

large profits. It is further averred on information and belief that defendants, the Southern Oil Company and W. D. Scott, are one and the same, Scott operating under the name of the Southern Oil Company, and that both were insolvent. The bill prayed an injunction against the use of the label, the use of barrels bearing complainant's name or trademark, and the use of the words "fire proof oil," and prayed an account of profits and a personal decree against defendants. A decree was rendered granting the relief prayed and defendants appealed.

Mr. John M. Chilton, for appellants:

The decree *pro confesso* against the Southern Oil Company was irregular in that it was not proved that W. D. Scott, upon whom service was made as its president, actually occupied that relation to the corporation, or any other relation that would authorize service upon him for the corporation.

Talladega Ins. Co. v. McCullough, 42 Ala. 667; *Montgomery & E. R. Co. v. Hartwell*, 43 Ala. 508; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287; *Wetumpka & C. R. Co. v. Cole*, 6 Ala. 655.

It could not be sued as a partnership in equity by its common name.

Opelika v. Daniel, 59 Ala. 211.

A decree *pro confesso* to support a final decree must state the facts upon which it is founded, and must declare the sentence of the court upon these facts.

1 *Brickell's Dig.* p. 398, § 511; *McDonald v. McMahon*, 66 Ala. 115; *Chilton v. Alabama Gold L. Ins. Co.* 74 Ala. 290.

In the note of submission for final decree, no other evidence of the relation of Scott to the corporation is noted, except the sheriff's return and the decree *pro confesso*.

Code, p. 824; Rules of Ch. Pr. 77, 78; *Reese v. Barker*, 85 Ala. 474.

Although the defendants did not appear, they may still, on appeal, question the equity of the bill.

McDonald v. McMahon, *supra*.

A trademark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied.

Stachelberg v. Ponce, 23 Fed. Rep. 430; *Devereaux & H. Canal Co. v. Clark*, 80 U. S. 13 Wall. 811, 20 L. ed. 581; *Browne*, Trademarks, §§ 143, 144.

To constitute an infringement, the imitation must be so close that by the form, marks, contents, words or their special arrangement, or by the general appearance of the infringing device, purchasers exercising ordinary caution are likely to be misled into buying the article bearing it, for the genuine one.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; *Pratt Mfg. Co. v. Astral Ref. Co.* 27 Fed. Rep. 492; *Radam v. Microbe Destroyer Co.* 81 Tex. 123.

Words descriptive of the quality of an article cannot be made the subject of a valid trademark. Any other position would tend to build up monopoly by stifling competition.

Singleton v. Bolton ("Dr. Johnson's Yellow Ointment"), 3 Dougl. 298; *Wolfe v. Goulart* ("Schiedam Schnapps"), 18 How. Pr. 64; *Burk v. Cassin* ("Wolfe's Aromatic Schiedam Schnapps"), 45 Cal. 467, 13 Am. Rep. 204; *Cor-*

NOTE.—For protection of labels against infringement, even when they contain no valid trademark, see also *Weener v. Brayton* (Mass.) 8 L. R. A. 641; *Prince Mfg. Co. v. Prince's Metallic Paint Co.* (N. Y.) 17 L. R. A. 129.

win v. Daly ("Club House Gin"), 7 Bosw. 222; *Young v. Macrae* ("Paraffine Oil"), 9 Jur. N. S. 322; *Ginter v. Kinney Tobacco Co.* ("Straight Cut"), 12 Fed. Rep. 782; *Van Beil v. Prescott* ("Rye & Rock"), 82 N. Y. 630; *Larabee v. Lewis* ("Snowflake"), 67 Ga. 561, 44 Am. Rep. 735; *Phalon v. Wright* ("Extract of Night-Blooming Cereus"), 5 Phila. 464; *Bisinger v. Wattles* ("Old London Dock Gin"), 28 How. Pr. 206; *Liebigs Extract of Meat Co. v. Hanbury*, 17 L. T. N. S. 298; *Town v. Stetson* ("Desiccated Codfish"), 3 Daly, 58; *Caswell v. Davis* ("Ferro-Phosphorated Elixir of Calisaya Bark"), 58 N. Y. 223, 17 Am. Rep. 238; *Delaware & H. Canal Co. v. Clark* ("Lackawanna Coal"), 80 U. S. 18 Wall. 311, 20 L. ed. 581.

The words "fire proof" are certainly descriptive of quality. If they are so extravagant as to be untrue, this, so far from entitling the complainant to relief, "furnishes an additional reason why he should be denied the assistance of a court of equity."

Ginter v. Kinney Tobacco Co. 12 Fed. Rep. 782; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706.

There is a class of words or terms which are called "suggestive" of quality, and which are yet held not to be descriptive of quality. But this class is limited to those where the "descriptive character that might attach to a word is so very remote as to be but secondary, so that the word will be understood by the public, not as a descriptive, but as a fanciful term; it may thus constitute a valid trademark," as "The Rising Sun."

Morse v. Worrell, 10 Phila. 168; *Am. Trademark Cas. p. 8*; *O'Rourke v. Central City Soap Co.* ("Anti-Washboard"), 26 Fed. Rep. 576; *Am. Trademark Cas. p. 1043*.

"Fire-proof," as applied to kerosene oil, is not remotely or secondarily descriptive.

Complainant has a complete and adequate remedy at law.

Root v. Lake Shore & M. S. R. Co. 105 U. S. 189, 26 L. ed. 975; *Knotts v. Tarver*, 8 Ala. 743; 1 Brickett's Dig. p. 644, § 7980.

An injunction should not issue until the right has been established at law.

Browne, Trademarks, §§ 462, *et seq.*, and cases there cited.

An injunction should not be granted in such cases unless it clearly appears the complainant will be entitled to relief.

Browne, Trademarks, §§ 462 *et seq.*

Messrs. Thomas G. Jones, W. L. Martin, and E. W. Godbey, for appellee:

In ordinary acceptance, "fire-proof" means proof against fire,—that is, that fire will not destroy or materially injure it.

7 Am. & Eng. Enc. Law, p. 1056; *Hickey v. Morrell*, 102 N. Y. 454, 55 Am. Rep. 824; *Vaughan v. Matlock*, 23 Ark. 9.

The words must be held fanciful, not descriptive.

Consumers know full well that the very purpose to which oil is devoted would be destroyed, and that it would be useless for illuminating purposes, if it were in fact fire-proof.

Davis v. Kendall, 2 R. I. 566; *O'Rourke v. Central City Soap Co.* ("Anti-Washboard"), 26 Fed. Rep. 576; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286. 31 L. R. A.

The office of a trademark is to point out distinctly the origin or ownership of the article to which it was affixed, or, in other words, to give notice who is the producer.

Bouraman v. Meriden Britannia Co. 35 Conn. 402, 95 Am. Dec. 270; Browne, Trademarks, §§ 145 *et seq.*

Persons buying this oil and seeing the words "fire proof" upon it would not take them to be merely descriptive of the quality of the oil, rather than as indicating origin and ownership.

Burton v. Stratton, 12 Fed. Rep. 696; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 547, 34 L. ed. 1004; *Re Leonard & E. Trademark*, L. R. 26 Ch. Div. 288; *Fulton v. Sellers*, 4 Brewst. (Pa.) 42; *Funk v. Dreyfus*, 84 La. Ann. 80; *Ex parte Heyman*, 18 Off. Gaz. 922; *American Fibre Chamotte Co. v. DeLee*, 67 Fed. Rep. 330.

The specific words or names by which an article is known are generally more firmly engraved in men's minds and thoughts than either the name or place of business of the producer or manufacturer, though both be constantly used on the same label or trademark.

Gillott v. Esterbrook, 47 Barb. 455, 48 N. Y. 374, 8 Am. Rep. 553.

This case cannot be distinguished from that of the "insurance oil."

Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 287.

Mr. E. W. Godbey, for appellee in support of petition for rehearing:

If the nomenclature is not apt, or not "merely deceptive," then its selection as a trademark will be protected by the judiciary.

It is not a condition of judicial protection that a trademark should be nonsensical or meaningless.

If the designation is accurate and spontaneous, it is generally fatal to the trademark; but if it is remote, far-fetched, fanciful or figurative, rather than literal, it will be protected, though it will be suggested by the nature of the article itself.

Amoskeag Mfg. Co. v. Trainor, 101 U. S. 55, 25 L. ed. 994; 26 Am. & Eng. Enc. Law, p. 282; *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 477; *O'Rourke v. Central City Soap Co.* 26 Fed. Rep. 576; *Davis v. Kennedy*, 13 Grant, Ch. (U. C.) 523; *Shrimpton v. Laight*, 18 Beav. 164; *Hiram Holt Co. v. Wadsworth*, 41 Fed. Rep. 34; Browne, Trademarks, § 275; *Ex parte Glives*, 8 Pat. Off. Gaz. 435; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Stoughton v. Woodard*, 39 Fed. Rep. 902; *Selchow v. Baker*, 98 N. Y. 59, 45 Am. Rep. 169; *D. Ransom, Son & Co. v. Ball*, 7 N. Y. Supp. 238; *Am. Trademark Cas. pp. 361, 863*.

Unless the word gives some reasonably accurate, some tolerably distinct, knowledge of what the ingredient is, it is clear that it is not descriptive within the meaning of that term as used with reference to a trademark.

Keasbey v. Brooklyn Chemical Works, 142 N. Y. 474; *Battle v. Finlay*, 45 Fed. Rep. 796; *Lloyd v. William S. Merrill Chemical Co.* 25 Ohio L. J. 319; *Burnett v. Phalon*, 3 Keyes, 594; *Burnett v. Phalon*, 9 Bosw. 193; *Burnett v. Phalon*, 5 Abb. Pr. N. S. 212; *Electro-Silicon Co. v. Hazard*, 29 Hun, 369; *Carnie v.*

Morrison, L. J. notes, cases 1877, p. 21; *Leonard v. White's Golden Lubricator Co.* 38 Fed. Rep. 922; *N. K. Fairbank Co. v. Central Lard Co.* 64 Fed. Rep. 133; *Improved Fig Syrup Co. v. California Fig Syrup Co.* 54 Fed. Rep. 175, 7 U. S. App. 588; *Kerry v. Toupin*, 60 Fed. Rep. 272; *George v. Smith*, 52 Fed. Rep. 830; *Menendez v. Holt* ("La Favorita"), 128 U. S. 514, 32 L. ed. 526; *Braham v. Rustard*, 1 Hem. & M. 447, 9 L. T. N. S. 199; *Waterman v. Shipman*, 130 N. Y. 301; *O'Rourke v. Central City Soap Co.* 26 Fed. Rep. 576.

There are cheaper grades of oil known as "prime white" and "water white." These are much inferior to the "fire proof" brand. Defendant, however, in his operations, invariably procured a tank car of ordinary and inferior oil. From this tank he filled barrels for those customers desiring fire-proof oil, and sold them under that name. From the same tank he filled barrels for those customers willing to pay only the lower prices for the inferior goods.

Injury is done to appellee. Demand for its product is destroyed or will be destroyed, and the court will interfere, independent of any trademark.

Von Mumm v. Prash, 56 Fed. Rep. 834; *Carlsbad v. Tibbetts*, 51 Fed. Rep. 852.

Both defendants were regularly served with a summons. The summons was served on Scott as president. The security for costs was signed by the "Southern Oil Company by W. D. Scott."

Decatur, C. & N. O. R. Co. v. Crass, 97 Ala. 519; *Hatchett v. Billingslea*, 65 Ala. 16.

The assignment of errors being joint, a defect personal to one defendant cannot be reached.

Kimbrell v. Rogers, 90 Ala. 339; *McGehee v. Lehman*, 65 Ala. 316.

If there is any defect of which the Southern Oil Company can take advantage, it would operate a reversal of the case only as to it, leaving the decree in full force against Scott.

Windham v. National Fertilizer Co. 99 Ala. 578.

McClellan, J., delivered the opinion of the court:

There was a decree *pro confesso* against W. D. Scott and the Southern Oil Company, the sole defendants to this bill; a submission for final decree on bill and decree *pro confesso*; a decree declaring the complainant entitled to relief, and referring the case to the register to ascertain and report the profits for which the defendants should account or the damages to which the complainant was entitled; a report upon said reference, to which no exceptions were filed; and a final decree enjoining the defendants as prayed in the bill, confirming the report of the register as to profits which defendants had made through the infringement of complainant's alleged trademark, fraudulent imitation of complainant's label, and fraudulent use of packages or barrels labeled by complainant, and previously used by it in the sale of oil, but which the defendants procured, after they had been emptied of their contents, and refilled and sold, and adjudging the defendants liable to the complainant for the amount of

said profits. From that decree both defendants prosecute this appeal though they did not appear at all or for any purpose in the city court, nor before the register on reference. It is conceded that the defendants, notwithstanding their being in contempt below, may on this appeal question and have passed upon the equity of complainant's bill.

A prominent question in the case, going to the equity of the bill in part, is whether certain words stamped upon or affixed to packages of goods sold by the complainant constituted a trademark. Of course, it is well settled that a mere word, or several words in a certain sequence, may constitute a trademark, the exclusive use of which courts will protect. To entitle words to this protection, however, they must indicate the source or origin, and the ownership, of the article to which they are attached. By this is not meant that such indication shall result from their intrinsic significance, but it may well be the consequence of such continued and uniform use of them by a manufacturer or dealer as to create in the mind of the public an association between the words and the commodity to which they are attached, on the one hand, and the manufacturer or dealer, or the place of manufacture, on the other; so that mere words which, upon their face, import no reference to or connection with the dealer in, or owner or manufacturer of, goods to which they are constantly affixed, nor any index to their origin, may, because of their customary use upon the goods of a certain person, come to indicate very clearly that a particular package bearing the mark of them was produced by or belongs to that person. But a word which is the name of the thing to which it is affixed cannot become a trademark in respect to that thing, nor words which describe the thing to which they are attached, and indicate its characteristics, its virtues, the quantity contained in the package, etc. For, if the thing is not patented, all men have the right to make and vend it, to the use of its name, and to every word in the language to aptly describe it; and the exclusive use by one of words which are thus necessary to all, and equally belong to all, will not be protected.

It not infrequently happens—very generally, indeed—that words used for the purposes of a trademark, and which, either in themselves as originally used, denote only origin or ownership, or by user come, in the public mind, to indicate origin or ownership, though intrinsically importing nothing of the kind, come finally to a sort of adjective or descriptive significance in respect of the wares upon which they appear, and to be in the nature of an assurance that the commodity possesses certain virtues and qualities. But this is not because the words themselves are descriptive of the thing, but because they point to an origin or ownership known by experience to be the source, or the manufacturer or vendor, of goods of certain qualities. The words do not describe the thing, but they indicate who made it. This knowledge of the maker involves an assurance of quality, through the reputation which articles manufactured by him, and

put on the market under his mark, have acquired. This reflex descriptive quality in words which, dissociated from their use in connection with the article, are not descriptive of it at all, constitutes, indeed, the chief value of trademarks composed of them, both to the manufacturer or dealer and the public. Such words are not descriptive, in the sense of the proposition stated next above; and that they come in this indirect way to show quality is no objection to their employment in trademarks, since their exclusive use by one would not deprive another of the full vocabulary of primarily descriptive words to which the public are entitled, and to which these do not belong. On the other hand, it is often the case that words used as, and intended to constitute, trademarks, and which are primarily and intrinsically descriptive merely, come, by their continued use by one person, to mark goods manufactured or sold by him, to clearly indicate the origin and ownership of such goods. But they do not thereby lose their primary meaning, or become the exclusive property of the person who thus uses them. They continue to belong to the common vocabulary of adjective words, and, as such, the public has a right to use them in the description of its wares, which cannot be interfered with by the courts on the theory of preventing infringement of trademarks. Such words, however clearly they may finally come to perform the legitimate offices of a trademark, by indicating origin or ownership, still have their primary significance, and they cannot be wrenched out of their places as descriptive words for the common use of all, merely because one of the public has assumed, for a time, to use them for a purpose the law does not warrant. 26 Am. & Eng. Enc. Law, pp. 289, 300, 302-305; Browne, Trademarks, chaps. 3, 4; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 55, 25 L. ed. 994.

In the case at bar the complainant claims as its trademark, in respect of a certain brand or grade of coal oil manufactured and sold by it, the words "fire-proof oil." These words, it is alleged,—and proved for all the purposes of this case,—were first used by the complainant, as a part of the brand or label for barrels of oil of a certain excellent quality many years ago, and have been ever since so used by it; that they had not been so used by others for this purpose before their adoption by complainant, and have not since then been so used except by the defendants. It appears, also, that by this uniform and long-continued use upon barrels of oil of a certain grade by the complainant alone, these words upon such packages have come by association with the name of the complainant in the public mind, to denote, in and of themselves, the origin and ownership of the commodity to which they are attached, though originally, of course, they did not afford any indication of origin or ownership. And, by further association of ideas, as it also appears in the case, the words, wholly apart from any intrinsic significance they may have, have come, also, to indicate a certain excellence of quality in the oil to which they are affixed, through the reputation

which oil of this brand manufactured by the complainant has acquired. On the principles stated above, neither the fact that the words did not originally indicate the source or ownership of the commodity, nor that they now indirectly give assurance of its quality, can hinder the complainant in its effort to have its exclusive use of them as a trademark protected; and, on the other hand, if the words, disconnected from their long association with complainant's products, are descriptive thereof, the fact that their use in this connection had also made of them a symbol or index of origin or ownership would not justify their attempted appropriation to the purposes of a trademark. So that the real and only inquiry on this branch of the case is as to whether these words, in the collocation of their use, are descriptive of the article to which they are attached, and, in and of themselves, as thus arranged, indicate the grade, quality, characteristics, etc., of such article, and did so indicate quality, etc., when they were first used by complainant in this way.

The question is not without difficulty, even upon principle; and the difficulty is rather enhanced than relieved by adjudications of courts and departments. The trouble does not, of course, arise upon the literal and abstract meaning of the words "fire-proof" (that is clear enough,—proof against fire; incombustible); but upon their meaning, as used here, in collocation with, and having manifest reference to, an illuminating oil. We know that, in a general sense, this oil is not proof against fire, not incombustible, not "fire-proof;" and hence it is that these words, in that sense, do not, and cannot, accurately indicate a grade or quality of the thing to which they are attached. But we know, also, that oils of the class involved here contain inflammable vapors, which are evolved or thrown out at a greater or less temperature, as the oil in a given instance is of a greater or less degree of density and refinement. The evolution of these vapors gives an explosive character to the oil. The baser grades will evolve these vapors, it may be, under normal temperature; but the higher grades will not throw off explosive vapors except when subjected to a temperature so high as practically never to exist under normal conditions,—say 110 to 120 degrees. So that, under ordinary circumstances, the oil is not explosive, and a lighted match may be plunged into it without ignition. The grade or quality of oil in this respect is ascertained or proved by means of an apparatus "for proving light hydrocarbon oils by heat, to find the temperature at which they evolve explosive vapors." Century Dict. p. 6250. This apparatus, or its application, is called an "oil test," or a fire test of oil; and oils which are shown to be explosive at a low temperature are said to be of a low fire test and those from which explosive vapors are evolved only at a high degree of heat are said to be of a high fire test. And when it appears that the fire test is so high as that, under normal conditions, the temperature is never high enough to evolve these inflammable vapors, producing explosion in contact with fire, that oil is

practically nonexplosive,—i. e. it is unflammable: it will not explode from contact with fire; it is proof against explosion by fire; it is, in the sense of inflammability, "fire-proof oil." And in this sense, the words claimed by complainant to constitute its trademark must, in our opinion, be taken and understood. As first used by the complainant, they clearly gave no indication of origin or ownership of the commodity; and, as they were never used by the complainant except upon a label which contained, aside from them, the most unmistakable reference to the source and ownership of the article, being no other than the full name of the complainant and of its place of business, it is not readily conceivable that they have ever been intended to indicate origin or ownership. It would be absurd to say that complainant intended by their use to indicate that the illuminating oil to which they were attached was incombustible, would not burn, could not be used for the purpose of illumination. Yet they stand in an adjective relation to "oil," and are adjective in character. Bearing, as they do, no relation to origin or ownership, and obviously not intended to denote incombustibility, the purpose of their use must have been to affirm that the oil was nonexplosive from fire contact,—that it was of that high degree of purity which is fire-proof against explosion. And this purpose of the complainant is a fact to be considered in determining whether the words themselves are descriptive of the article to which they are attached. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993.

Moreover, the public, knowing that the words "fire-proof" as applied to illuminating oil could not imply incombustibility, and knowing, also, that such oil, of a certain high degree of purity and excellence, was, as to inflammability, and consequent explosiveness, proof against fire, would and does readily and naturally understand these words, in this connection, to refer to and carry assurance of that valuable quality of unflammability in oil of this kind; so that it may well be said that they are not only of a general descriptive character, but also that they aptly and unmistakably, to common apprehension, point out a very desirable quality or grade of the thing to which they are applied. Fully capable of this meaning, and in point of fact conveying it as here used, there is no room to say that this use of them is arbitrary or fanciful. They clearly differ, we think, in this respect from the terms "sunlight," "daylight," "gaslight," and "insurance," as applied to illuminating oils, which have been protected as trademarks, and also even from the term "snowflake," as applied to breads and starch, which has been denied protection because descriptive. All these terms, upon the face of them, it seems to us, are clearly fanciful in the connection in which they are thus used, and are arbitrarily applied,—not to indicate that the oil is sunlight of gaslight or daylight, nor that the light it makes is as bright as sunlight or daylight, or as soft and bright as gaslight, nor any positive quality of the oil, but as a mere fanciful name or designation for the

particular commodity. And so with "insurance oil," and perhaps, also, "snowflake" bread or starch (which latter, however, have been held descriptive, and not appropriable as trademarks). It cannot be said that "insurance" indicates any quality in the oil to which it refers, or is a generic name for oil; and, at the most "snowflake" is a mere fanciful suggestion of whiteness. But the words "fire-proof," in the sense they were used by the complainant and understood by the public, are descriptive, and assertive of a positive, inherent quality, and a consequent high degree of excellence in the product to which they are attached. They do not present a mere similitude between the oil and other very different things having pretty and catchy names, but they refer alone to the oil, and directly characterize and describe it. They are in the category of words which have been rejected for trademark purposes, and which embrace such terms as "Beeswax Oil," "Paraffin Oil," "Macassar Oil," "Invisible" with reference to face powder, "Crack-Proof" rubber goods, "Razor Steel," "Tasteless" for drugs, because either descriptive or deceptive, "Straight Cut" tobacco, "Cable Twist" tobacco, etc., and, like these terms, are not appropriable to this use, because they are descriptive. It is of no consequence that the complainant first produced oil of this quality, and first applied to such, or other, oil the appellation of "Fire-Proof." If, as we think, these words are descriptive, every other person who subsequently produced or dealt in oil of this quality had an equal right with complainant to the use of them in describing his product or wares. Of course, the complainant might have coined a word to identify its oil, and been protected in its exclusive use; but this is a very different matter from the use of words (or a single word, rather; for that used is really but one compound word) which already existed as a part of the language, and hence was *publici juris*.

We therefore conclude that the bill presents no case of infringement of a trademark, and that, so far as it seeks an injunction of the use of the words "fire-proof oil" by the defendants, and an account of profits accruing to them through the use of said words, dissociated from complainant's label, it is without equity. This conclusion will operate a reversal and remandment of the cause. The question whether the defendants have imitated complainant's label can better be determined in the chancery court—and in this court, should there be another appeal—upon answer and proof than on the present appeal; and, since the bill on another ground clearly has equity, we will not now undertake to decide whether defendants have fraudulently or wrongfully imitated the label of the complainant, but will content ourselves with saying (what is not questioned in this case, we believe) that a manufacturer or trader is entitled to an injunction against a wrongful or fraudulent imitation of his distinctive label, though the label is not a trademark, and contains no word, sign, or symbol filling the definition of a trademark or to be protected as such. The bill presents a clear

case for injunction, and an accounting for profits in respect of the use by the defendants of barrels bearing complainant's label, which, after being sold by complainant, containing oil, and emptied of their contents, are bought up by the defendants, refilled with their oil, and sold. This is a flagrantly fraudulent appropriation of the complainant's label, and the good will attaching to it, to the manifest injury of the complainant

and the public. Browne, Trademarks, §§ 443 *et seq.* Unless the Southern Oil Company answers the bill, or some further showing is made that it is a partnership or a myth, service upon some agent of it should be proved before the register before decree *pro confesso* passes.

Reversed and remanded.

Rehearing denied February 8, 1896.

VIRGINIA SUPREME COURT OF APPEALS.

COMMONWEALTH of Virginia, *Appt.*,
v.

John MYERS.

(.....Va.....)

An exemption of manufacturers who have paid taxes on capital employed, from the provisions of a statute imposing a license tax upon peddlers, renders the statute unconstitutional as a regulation of commerce when applied to a nonresident acting as an agent or employed in the sale of goods owned and manufactured by a nonresident corporation.

(January 16, 1896.)

A PPEAL by the Commonwealth from a judgment of the Hustings Court of Richmond in favor of defendant in a prosecution against him for peddling without a license. *Affirmed.*

The facts are stated in the opinion.

Mr. R. Taylor Scott, Attorney General, for appellant:

The merchandise called "soapine," the manufactured product of the Kendall Company, a corporation domiciled in the state of Rhode Island, when sold in the city of Richmond, had become incorporated into the bulk of said city's property, therefore was subject to the state and city property tax, and its sale to such license tax as was imposed thereon by the revenue laws of this commonwealth.

Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538.

State laws are held obnoxious to art. 1, § 13, ¶ 3, of the Federal Constitution in—

Woodruff v. Parham, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Ward v. Maryland*, 79 U. S. 13 Wall. 418, 20 L. ed. 449; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638; *Brimmer v. Rebnan*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

NOTE.—For peddlers as related to interstate commerce, see note to *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97; see also *Carrollton v. Bazette* (Ill.) *post*.

31 L. R. A.

3 Inters. Com. Rep. 36; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

State laws are held constitutional and valid in—

Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595; *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. ed. 621; *Western U. Teleg. Co. v. Atty. Gen.* 141 U. S. 40, 35 L. ed. 628; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 39 L. ed. 311; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68.

In *Emert v. Missouri*, *supra*, Missouri's statute which imposed a license upon peddlers was adjudged valid and constitutional.

Mr. Edmund Waddill, Jr., for appellee:

The Congress of the United States has the power to regulate the peddling of articles within the several states, except as to such matters as come within the police power of the states.

The states may, however, prescribe the manner and method of peddling articles of foreign production, after they become a part of the mass of the property of the state, provided such law affects foreign and home products alike.

An act which makes any discrimination between peddlers as to their residence, and the place where the articles peddled are manufactured, is void.

Woodruff v. Parham, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658; *Sayre v. Phillips*, 148 Pa. 482, 16 L. R. A. 49.

Keith, P., delivered the opinion of the court:

At the April term, 1895, of the hustings court for the city of Richmond, the attorney for the commonwealth proceeded against John Myers by information, setting forth that he was not a manufacturer, nor a manufacturer assessed with the tax imposed upon his capital employed under Schedule C of an act (Acts 1889-90, p. 200) to provide for the assessment of taxes on persons, and on

licenses to transact business, and for the support of the government, but is one who has no regular place of business in this city, open at all times in regular business hours; and that on the 4th day of April, 1895, within the jurisdiction of the hustings court of the said city, he was engaged in going from house to house and street to street, with a wagon and horse, offering for sale an article known as "soapine," and did sell and offer for sale the said merchandise in the said city to one Mrs. James Woolridge, without first having obtained the license required by law. To this information John Myers appeared, and filed a general demurrer, which was overruled, and thereupon he pleaded "Not guilty;" and a jury was impaneled for his trial, which resulted in his acquittal. Upon the petition of the commonwealth, through its attorney general, a writ of error was awarded by this court.

The record contains several bills of exceptions, in the first of which the evidence is set out, from which it appears that every fact set out in the information was sufficiently proved. It also appears from the evidence of the accused, who was examined as a witness on his own behalf, that he is an employee of the Kendall Manufacturing Company, whose domicile is in the state of Rhode Island; that he did not own or have any interest in the merchandise which he offered for sale, nor in the proceeds of such sale; that soapine was manufactured by the Kendall Company in the state of Rhode Island, and that he was paid regular wages for his services as the agent and salesman of the said company, and that the soapine so offered by him for sale was the property of the Kendall Manufacturing Company; that it was shipped by the said company to him as their agent in Richmond, and by him offered for sale, and sold for the company; that he made daily reports of sales, and received weekly wages; that all the officers of the company are nonresidents of the state of Virginia, and that he was also a nonresident of the state of Virginia, being a citizen of the state of Maryland; that the merchandise offered for sale was the product and manufacture of the Kendall Company; that it was not injurious to health, nor damaging to morals, but to be used in cleansing and purifying, and had been for a long time used for these purposes; and that the said company and the said Myers have no place of business in Richmond. Thereupon the commonwealth asked the court to instruct the jury as follows: "If the jury believe from the evidence that John Myers did, as charged in the information, go from street to street in the city of Richmond, with a wagon and horse, and that in the wagon said Myers carried merchandise called 'soapine,' and further believe that said Myers, without the license required by law, sold, or offered for sale, said merchandise, *viz.*, soapine, then they must find him guilty, and assess him with a fine, so that the same shall be not less than \$100 nor more than \$500 for each offense,"—which was refused. And Myers, the defendant, asked the following instructions, which were given: "The court in-

structs the jury that if they believe from the evidence that the defendant, at the time he offered to sell, and sold, the commodity in the information mentioned, known as 'soapine,' was the employee or representative of the Kendall Manufacturing Company; and that the said defendant had no other interest in said goods; and that the said goods were the product and manufacture of said Kendall Manufacturing Company; and that the company, as such manufacturers, at the time of the sale, were engaged, through their representative, the said defendant, in selling and vending their products,—then they should find the defendant not guilty." "The court further instructs the jury that if they believe from the evidence that the defendant, at the time he offered to sell, and sold, the commodity in the information mentioned known as 'soapine,' was in the employ of the Kendall Manufacturing Company, of the state of Rhode Island; that such goods were the product and manufacture of the Kendall Manufacturing Company; and that the alleged offense, mentioned in the information, consisted of said nonresident corporation, through its employee, the defendant, also a nonresident, offering its said commodity, duly manufactured by it, for sale in the city of Richmond, Va.; and that such article was not injurious in its character, either to public health or morals, but was useful as a cleansing commodity, to be used for general household purposes, and, as such, had been long in general use,—then they must find the defendant not guilty, although they may believe he had taken out no license to sell such commodity." And to the refusal of the court to give the instruction asked by it, and to the giving of the instructions asked by the defendant, the commonwealth excepted.

The statute under which this prosecution took place is to be found in sections 32 and 33 of the Acts of Assembly 1889-90 (p. 217). Section 32 provides: "That any person who shall carry from place to place any goods, wares, or merchandise, and offer to sell or barter the same, or actually sell or barter the same, *in transitu* or otherwise, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles. . . . Any peddler who shall peddle for sale, or sell or barter, without a license, shall pay a fine of not less than one hundred nor more than \$500 for each offense. . . . This section shall be construed to include persons engaged in peddling lighting rods; provided, however, that any manufacturer who has been assessed and paid up on the capital employed by him, under Schedule C of this act, shall not be required to take out the license named in this section for the privilege of selling articles actually manufactured by him: provided, also, that all persons who do not keep a regular place of business (whether it be in a house, or vacant lot, or elsewhere), open at all times in regular business hours and at the same place, who shall offer for sale goods, wares, and merchandise, shall be deemed peddlers

under the provisions of this act." Section 33 prescribes the license tax to be paid for the privilege of peddling or bartering in any county or corporation, with a proviso annexed to it, which we do not deem it necessary to discuss.

The question presented in the record is as to the constitutionality of section 32 of the Acts of 1889-90, just quoted. On the part of the defendant in error it is contended that this statute is repugnant to article 4, § 2, cl. 1, and to article, 1, § 8, cl. 3, of the Constitution of the United States, and is therefore null and void. Upon the part of the commonwealth it is contended that it was merely an ordinary tax upon the business or occupation of a peddler, equal and uniform in its operation, upon all engaged in that business, and is not an attempt to regulate commerce between the states, and can have no such tendency. It is not my purpose to attempt any general discussion of the very numerous decisions of the Supreme Court of the United States upon this and kindred subjects. It is indeed, happily for us, unnecessary to do so, as it has been done in a recent and able opinion delivered by Mr. Justice Gray in the case of *Emert v. Missouri*, reported in 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68. That a state may impose a tax upon the occupation of itinerant peddlers, and require them to obtain a license to practice their trade, is fully sustained by that case; nor can it be denied that the Virginia statute correctly describes those who shall be deemed to be peddlers. "Any person who shall carry from place to place goods, wares, or merchandise, and offer to sell or barter the same, shall be deemed to be a peddler;" for "the leading primary idea of a peddler," says Chief Justice Shaw in *Com. v. Ober*, 12 Cush. 493, "is that of an itinerant or traveling trader, who carries goods about, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business." In *Emert v. Missouri* the statute under consideration provided "that whoever shall deal in the selling of any goods, wares, or merchandise (except books, charts, maps, and stationery) by going from place to sell the same," is declared to be a peddler, and is prohibited from dealing as a peddler without a license. The facts agreed were that on a certain day the Singer Manufacturing Company was a corporation of New Jersey, and that the defendant was, on and prior to that day, in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it in New Jersey. In deciding this case, Mr. Justice Gray says: "The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other states, and manifests no intention to interfere, in any

way, with interstate commerce. Its object in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, . . . appears to have been to protect the citizens of the state against cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door." In *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, the Supreme Court of the United States held that the statute of the state of Tennessee, as construed by the supreme court of Tennessee, made no discrimination in the tax which it imposed on account of the place of growth or produce of material or of manufacture, but that it applied alike to the sale of sewing machines manufactured in the state of Tennessee and out of it, and that, inasmuch as all sewing machines were placed upon the same footing with respect to the tax complained of, its action was not unusual or unreasonable, and the state had an unquestionable right to impose the burden. In *Woodruff v. Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 382, it was held by Mr. Justice Miller that "a simple tax on sales of merchandise imposed alike on all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state or some other, was valid and constitutional, there being no attempt to discriminate injuriously against the products of other states or the rights of other citizens. It was therefore not an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But," said the court, "a law having such operation would be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void." In *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449, a statute of Maryland which required all traders residing within the state to take out licenses at certain rates, and subjecting to indictment and penalty persons not residents of the state, who, without taking out a license at a higher rate, should sell or offer for sale, by card, sample, or trade list, within the limits of the city of Baltimore, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in the state, was held to be unconstitutional, because it imposed a discriminating tax upon the residents of other states. In *Webber v. Virginia*, 108 U. S. 344, 26 L. ed. 565, the statute there called in question was held to be unconstitutional because it made "a clear discrimination in favor of home manufacturers and against the manufacturers of other states."

Enough has been said, and sufficient authorities have been cited, to show the line of distinction which runs between those statutes which have been held constitutional and those which have been declared void for repugnancy to the Constitution. The right of the state to impose a license tax upon peddlers, where it operates uniformly upon all citizens, and does not discriminate in favor

of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power, and is not a regulation of commerce under cover of that power, although incidentally it may have that effect, has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as against the nonresident, or with respect to the sales of articles manufactured in this state over similar articles manufactured abroad, the state laws are declared to be void, as repugnant to the Constitution of the United States.

In this case the defendant in error was engaged in selling an article owned and manufactured by the Kendall Manufacturing Company, of Rhode Island. It is not pretended that it was hurtful or injurious in any way, and the same article, if manufactured within the limits of the state of Virginia, could have been sold under exactly the conditions set out in the information in this case, and made the basis of prosecution against the defendant in error, without incurring any penalty whatever. A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the commonwealth without incurring the penalties denounced by § 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and does deprive the citizen of another state of the privileges and immunities possessed by citizens of this state, and is an infringement of the provisions of the Constitution, and therefore void.

It follows that *the judgment of the Hastings Court of the City of Richmond must be affirmed.*

Amanda M. VIOLETT *et al.*, *Appts.*,

v.

City Council of ALEXANDRIA.

(.....Va.....)

1. **Failure to provide for a notice to the person whose property may be affected** by a local assessment, and give opportunity to appear and contest the legality, justice, and correctness of the assessment at some stage in the proceedings before it becomes final, renders the statute authorizing such assessments void for want of due process of law.
2. **An assessment upon abutting property for street improvements** levied according to benefits is not a violation of Const. art. 10, § 1, requiring taxation to be equal and uniform upon all property according to value.
3. **An ordinance for a local assessment by the front foot** is not authorized by a statute providing for assessments according to benefits.

(February 13, 1886.)

NOTE.—The validity of frontage assessments is the subject of a note to *Raleigh v. Peace* (N. C.) 17 R. A. 380.

R. A.

APPEAL by defendants, heirs of Robert G. A. Violet, deceased, from a decree of the Corporation Court of Alexandria in favor of the city in a proceeding to enforce the lien of a special tax assessed for street improvements. *Reversed.*

The facts are stated in the opinion.

Mr. A. W. Armstrong, for appellants:

The ordinance is contrary to the 14th Amendment of the Constitution of the United States.

Where an assessment is to be paid by benefits, property owners have the absolute right to be heard, and a law making it without provision for a hearing is void.

Cooley, Const. Lim. p. 617, note 1; *Garrin v. Dausman*, 114 Ind. 427; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655; *State v. Fond du Lac*, 42 Wis. 287; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *McMillan v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637; *Gilmore v. Hentig*, 33 Kan. 156.

The charter and ordinances are in conflict with article 10, § 1, of the state Constitution.

Weeks v. Milwaukee, 10 Wis. 258; Const. 284; *Lumden v. Gross*, 10 Wis. 282; *Hurford v. Omaha City*, 4 Neb. 386; *King v. Portland*, 2 Or. 146; *Re Dorrance Street*, 4 R. I. 230; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *Peay v. Little Rock*, 32 Ark. 81; *Mobile v. Dargan*, 45 Ala. 310; *Mobile v. Royal Street R. Co.* Id. 322; *Irwin v. Mobile*, 57 Ala. 6; *Palmer v. Way*, 6 Colo. 106; *Brown v. Denver*, 7 Colo. 305; *Pueblo v. Robinson*, 12 Colo. 593; *Stinson v. Smith*, 8 Minn. 366; *McBean v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308.

The ordinances set forth in the bill are not in conformity to the charter.

2 Dill. Mun. Corp. p. 914, note.

No man's property can be taken from him without his consent, except by due process of law.

Welty, Assessments, p. 286; *Read v. Dingess*, 60 Fed. Rep. 21, 8 C. C. A. 398, note; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Remsen v. Wheeler*, 105 N. Y. 579; *People v. Spencer*, v. *New Rochelle*, 83 Hun. 186; Cooley, Taxn. 362, 363; *Garrin v. Dausman*, 114 Ind. 429; *Davis v. Lynchburg*, 84 Va. 870; 2 Dill. Mun. Corp. p. 922.

Where an attempt is made to cast upon his particular property a certain portion of the burden of the cost for the construction of local improvements, the taxpayer has a right to be heard.

Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637; *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031; Cooley, Const. Lim. p. 617, note 1; *Langhorne v. Robinson*, 20 Gratt. 667.

No power can be exercised by the municipality which is not clearly granted, and the power granted must be strictly pursued.

Craw v. Tolono, 96 Ill. 255, 36 Am. Rep. 143; *Burroughs*, Taxn. 471; Cooley, Taxn. 213 *et seq.*; 2 Dill. Mun. Corp. pp. 939, 940; *Green v. Ward*, 82 Va. 324.

These assessments are not founded upon any idea of revenue, but upon the theory of benefits conferred by such improvements upon the adjacent lots.

Norfolk City v. Ellis, 26 Gratt. 227.

Strike out the element of benefit and a special assessment loses its foundation.

Elliott, Roads & Streets, p. 405.

Messrs. E. B. Taylor and Samuel G. Brent, for appellee:

Where there is jurisdiction the property owner who sees the improvement made, and offers no objection until after the work has been done, cannot defeat the assessment upon the ground that the proceedings did not give notice.

Davis v. Lynchburg, 84 Va. 861; *Norfolk City v. Ellis*, 26 Gratt. 227; *Elliott, Roads & Streets*, p. 419; 2 Dill. Mun. Corp. pp. 922, 980; *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619; *Walston v. Nerin*, 128 U. S. 578, 32 L. ed. 544.

An assessment for a local improvement is not a tax within the meaning of the constitutional provision requiring uniformity of taxation.

Burroughs, Taxn. p. 459; *Elliott, Roads & Streets*, pp. 369, 370; *Cleveland v. Tripp*, 13 R. I. 50; *Charnock v. Fordoche & G. T. Special Levee Dist. Co.* 38 La. Ann. 323; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Norfolk City v. Ellis*, 26 Gratt. 224; *McGehee v. Mathis*, 21 Ark. 40; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *King v. Portland*, 2 Or. 146; *Rzees v. Wood County*, 8 Ohio St. 333; *Palmyra v. Morton*, 25 Mo. 593; *Willard v. Presbury*, 81 U. S. 14 Wall. 676, 20 L. ed. 719; *People, Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Com. v. Woods*, 44 Pa. 113; *Lexington v. McQuillan*, 9 Dana, 514, 35 Am. Dec. 159; *State v. Dean*, 23 N. J. L. 335; *Moale v. Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Hines v. Leavenworth*, 3 Kan. 186; *Hurford v. Omaha City*, 4 Neb. 336; *Sewall v. St. Paul*, 20 Minn. 511; *Palmer v. Stumph*, 29 Ind. 329; 2 Dill. Mun. Corp. p. 911, § 752, p. 956; *Illinois C. R. Co. v. Decatur*, 147 U. S. 204, 37 L. ed. 136; *White v. People*, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Enos v. Springfield*, 113 Ill. 65; *Sterling v. Galt*, 117 Ill. 11; *Springfield v. Green*, 120 Ill. 269.

The legislature may constitutionally confer upon municipal corporations the power to improve their streets at the expense of the owners of the real estate improved.

Palmyra v. Morton, 25 Mo. 593; *Egyptian Levee Co. v. Harding*, 27 Mo. 495; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *Lockwood v. St. Louis*, 24 Mo. 20; *St. Louis, McGrath v. Clemens*, 36 Mo. 467; *Eyerman v. Blakesley*, 78 Mo. 145; *Busbee v. Wake County Comrs.* 93 N. C. 143; *Galveston v. Heard*, 54 Tex. 420; *Sinton v. Ashbury*, 41 Cal. 525; *Raleigh v. Peace*, 110 N. C. 32, 17 L. R. A. 330; *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *Cain v. Davie County Comrs.* 86 N. C. 8; *Wilmington v. Yopp*, 71 N. C. 76; 2 Dill. Mun. Corp. § 761; *Cooley, Const. Lim.* 506; 1 Hare, Am. Const. Law, 301; *Elliott, Roads & Streets*, p. 370; *People, Griffin v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Whyte v. Nashville*, 2 Swan, 364; *Franklin v. Maberry*, 6 Humph. 868; *Washington v. Nashville*, 1 Swan, 177; *Warren v. Henty*, 31 Iowa, 31 L. R. A.

81; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *State v. Portage*, 12 Wis. 563; *Indianapolis v. Mansur*, 15 Ind. 112; *Allen v. Drew*, 44 Vt. 174; *Cruikshanks v. Charleston*, 1 McCord, L. 225.

The law of assessments is based upon the theory that whoever receives the benefits bears the burden.

Raleigh v. Peace, *supra*; *Elliott, Roads & Streets*, p. 269; 2 Dill. Mun. Corp. pp. 911, 912; *Burroughs, Taxn.* p. 459; *Welty, Assessments*, p. 415.

"Assessments" are charges laid upon individual property, because the property on which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others as citizens of the commonwealth.

Elliott, Roads & Streets, p. 369; 2 Dill. Mun. Corp. pp. 911, 956; *Welty, Assessments*, p. 415.

In determining questions of assessment the law of taxation does not apply, because the law of assessments proceeds on the theory that the property benefited shall share the burden, as it is a personal benefit.

Peay v. Little Rock, 32 Ark. 31; *Burnett v. Sacramento*, 12 Cal. 76; *People, Blanding v. Burr*, 13 Cal. 343; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Emery v. Bradford*, 29 Cal. 75; *Walsh v. Mathews*, Id. 123; *Taylor v. Palmer*, 31 Cal. 240; *Crosby v. Lyon*, 37 Cal. 242; *Chambers v. Satterlee*, 40 Cal. 497; *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 569; *Edgerton v. Green Cove Springs*, 19 Fla. 140; *White v. People*, 94 Ill. 604; *Falch v. People*, 99 Ill. 137; *McLean v. Bloomington*, 106 Ill. 209; *Scammon v. Chicago*, 42 Ill. 192; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Virginia v. Hall*, 96 Ill. 278; *Goodrich v. Winchester & D. Turnp. Co.* 26 Ind. 119; *Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Lafayette v. Jenners*, 10 Ind. 70; *Bank of the State v. New Albany*, 11 Ind. 139; *Anderson v. Kerns Draining Co.* 14 Ind. 199; *Turpin v. Eagle Creek & L. W. L. Gravel Road Co.* 48 Ind. 45; *Hines v. Leavenworth*, 3 Kan. 186; *Municipality No. 2 v. Dunn*, 10 La. Ann. 57; *New Orleans v. Elliott*, Id. 59; *Featman v. Crandall*, 11 La. Ann. 220; *Wallace v. Shelton*, 14 La. Ann. 503; *Bishop v. Marks*, 15 La. Ann. 147; *New Orleans Drainage Co.* 11 La. Ann. 338; *Municipality No. 2 v. Guillotte*, 14 La. Ann. 295; *Re Opening of Casacotte & M. Streets*, 20 La. Ann. 497; *State v. New Orleans*, 15 La. Ann. 354; *Dorgan v. Boston*, 12 Allen, 223; *Merrick v. Amherst*, Id. 500; *Molz v. Detroit*, 18 Mich. 495; *Hoyt v. East Saginaw*, 19 Mich. 39; *Lefere v. Detroit*, 2 Mich. 586; *Williams v. Detroit*, 2 Mich. 580; *Woodbridge v. Detroit*, 8 Mich. 274; *Warren v. Grand Haven*, 30 Mich. 24; *Walcott v. People*, 17 Mich. 68; *Kitson v. Ann Arbor*, 26 Mich. 325; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Smith v. Aberdeen*, 25 Miss. 458; *Alcorn v. Hamer*, 38 Miss. 652; *Daily v. Scope*, 47 Miss. 367; *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451; *Garrett v. St. Louis*, 25 Mo. 505; *Uhrig v. St. Louis*, 44 Mo. 458; *Neenan v. Smith*, 50 Mo. 525; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Hurford v. Omaha City*, 4 Neb. 336; *Young v. Henderson*, 76 N. C. 420; *Cain v. Davie Coun-*

ty Comrs. 86 N. C. 8; *Shuford v. Lincoln County Comrs.* Id. 552; *Raleigh v. Peace*, 110 N. C. 33, 17 L. R. A. 330; *Hill v. Hydon*, 5 Ohio St. 243, 87 Am. Dec. 289; *Marion v. Epler*, 5 Ohio St. 250; *Ernst v. Kunkle*, 5 Ohio St. 530; *Reeves v. Wood County*, 8 Ohio St. 333; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Raymond v. Cleveland*, 42 Ohio St. 522; *Hastings v. Columbus*, Id. 585; *Zanesville v. Richards*, 5 Ohio St. 589; *King v. Portland*, 2 Or. 146; *Re Dorrance Street*, 4 R. I. 230; *Weeks v. Milwaukee*, 10 Wis. 243; *Lumsden v. Cross*, Id. 282; *Bond v. Kenosha*, 17 Wis. 284; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Norfolk City v. Ellis*, 26 Gratt. 224; *Davis v. Lynchburg*, 84 Va. 861; *Green v. Ward*, 82 Va. 324; *Illinois C. R. Co. v. Decatur*, 147 U. S. 204, 37 L. ed. 136; *Re New York*, 11 Johns. 77; *Sharpe v. Speir*, 4 Hill, 76; *Livingston v. New York*, 8 Wend. 85; *Re Furman Street*, 17 Wend. 649; *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Northern Liberties v. St. John's Church*, 13 Pa. 107; *Schenley v. Allegheny*, 25 Pa. 128; *Wray v. Pittsburgh*, 46 Pa. 365; *Hammett v. Philadelphia*, 65 Pa. 146, 3 Am. Rep. 615; *Washington Avenue*, 69 Pa. 352; *Lexington v. McQuillan*, 9 Dana, 513, 35 Am. Dec. 159; *Burnes v. Atchison*, 2 Kan. 454; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *St. Joseph v. Anthony*, 30 Mo. 537; *Municipality No. 2 v. White*, 9 La. Ann. 446; *Cummings v. Police Jury*, Id. 503; *Richardson v. Morgan*, 16 La. Ann. 429; *Maloy v. Marietta*, 11 Ohio St. 636; *Lima v. Cemetery Asso.* 42 Ohio St. 128, 51 Am. Rep. 809; *Raymond v. Cleveland*, 42 Ohio St. 522; *State, Mann, v. Jersey City*, 24 N. J. L. 662; *Vasser v. George*, 47 Miss. 713; *Fairfield v. Rutcliffe*, 20 Iowa, 396; *Jones v. Boston*, 104 Mass. 461; *Alexander v. Baltimore*, 5 Gill, 383; *Baltimore v. Green Mount Cemetery Proprs.* 7 Md. 517; *Hale v. Kenosha*, 29 Wis. 599.

Cardwell, J., delivered the opinion of the court:

The 33d section of the charter of the city of Alexandria, as amended by an act of the legislature approved March 1, 1888, provides that, "whenever any street shall be laid out or extended or any existing street graded, paved, or repaved, or culvert or sewer built, or curbing put down, two thirds of the expense thereof shall be paid by the owners of the real estate benefited thereby. Whenever any sidewalk shall be laid, the whole expense thereof shall be paid by the owners of the real estate benefited thereby." The city council of Alexandria, by an ordinance approved May 12, 1886, provided that, "whenever paving, graveling, or other improvements of the street shall be ordered to be done by the city council, whether of the sidewalk or carriage-way, that it shall be the duty of the superintendent of police immediately upon the completion of the same to return to the clerk of the common council a statement of the total expense thereof with a list of the proprietors of the ground in front of which said paving, graveling, or other improvements shall have been done or being put down, showing the extent of the

R. A.

front ground of every such proprietor, and including the half of any joint alley running into the street paved, gravelled, or otherwise improved, or upon which curbs have been put down, which statement shall be filed and preserved by the said clerk, who shall also forthwith make out and deliver to the proper collector of taxes for collection according to law bills against every such proprietor for two thirds of an amount which shall bear the same ratio to the cost of all the work done on that half of the street on which his lot fronts as the front of the proprietor's ground bears to the front of all the lots on the same side of and binding on that portion of the said street so paved, gravelled, or otherwise improved. And the like proceedings and privileges shall be had by said collector in regard to such bills as in regard to bills for other taxes, assessments, or charges."

By virtue of the aforesaid 33d section of the charter, the city council of Alexandria passed the following ordinance:

"Be it ordained by the city council of Alexandria, Va., that the committee on streets are hereby authorized and directed to have the curbing set, gutters paved, and a 6-foot brick sidewalk put down on both sides of Alfred street, from the south line of Duke street to the north line of Wilkes street, and the said committee on streets shall advertise for ten days in some newspaper published in the city of Alexandria, for proposals to do said work, and shall enter into contract with the lowest responsible bidder for said work, and require of the person or persons contracting to do said work or furnishing the material therefor, to give bonds in the penalty of \$1,000 with surety or sureties to be approved by said committee, conditioned for the faithful performance of said contract,

"Be it further ordained, that an assessment shall be levied upon the property binding on said street as described in this ordinance, to wit: Two thirds of the cost of such guttering and curbing to be paid by the owners of the real estate fronting on said street, and the whole of the cost of putting down said brick sidewalk to be paid by the owners of the real estate on said street. The committee on streets are authorized to employ a competent engineer to superintend said work at a cost not to exceed \$5 a day."

Pursuant to this ordinance the curbing was set, gutters paved, and a 6-foot brick sidewalk put down on both sides of Alfred street, from the south line of Duke street to the north line of Wilkes street, as provided for in the ordinance. The total cost of this work amounted to \$1,989.36, and this was apportioned according to frontage among the owners of the lands abutting on Alfred street, as to two thirds of the costs of curbing and paving the gutters, and as to the whole of the costs of the sidewalks; the city of Alexandria paying one third of the cost of curbing and paving gutters. Of this frontage the heirs of Robert G. Violet, who are the appellants here, owned 353 feet 3 inches, extending back with that width 123 feet 3 inches, and were assessed with the sum of

\$396.03, as the proportion of the total costs of the improvements to Alfred street to be borne by their property abutting on that street; this sum including two thirds of the costs of curbing and paving the gutters, and the entire cost of the sidewalk, and apportioned according to frontage. On the 29th of March, 1895, the city council of Alexandria filed its bill in the corporation court of the city of Alexandria, against appellants, to enforce the lien claimed by the complainant on appellant's property on Alfred street, for the amount assessed against the property, as stated. The defendants demurred to and answered this bill. The answer admitted that the work was done as set out in the bill, but denied that the lot or ground on which complainant claimed a lien had been benefited by the improvements to Alfred street, and denied that complainant had a lien on the lot or ground as claimed. Upon the hearing of the cause, on the bill and exhibits therewith, and the demurrer and answer thereto, the corporation court of Alexandria overruled the demurrer, and decreed a sale of the property, to be made by commissioners appointed, unless the defendants paid to the complainant, the city council of Alexandria, within thirty days, the amount claimed in the bill and the costs of this suit. From this decree, an appeal and supersedeas was awarded by a judge of this court.

The facts in the case are few, and need not be considered, as they are, in the main, not controverted; but the grounds upon which appellants deny the validity of the claim asserted by appellee are as follows:

(1) The ordinance under which the claim arises is contrary to the 14th Amendment to the Constitution of the United States, which declares that no state shall "deprive any person of life, liberty, or property without due process of law." (2) The charter and ordinances of the city of Alexandria are in conflict with § 1, art. 10, of the Constitution of Virginia, in which it is provided: "Sec. 1. Taxation, except as hereinafter provided, whether imposed by the state, county, or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value." (3) The city council of Alexandria did not have the authority, under the provision of the 33d section of the charter, to pass the ordinances set forth in the bill of complaint; and said ordinances are in conflict with the charter, and null and void.

The first question to be considered may be stated in this form: Can an assessment for local improvement be exacted by a municipal corporation until the person of whom it is exacted shall have had opportunity to appear and contest the legality, justice, and correctness of the proposed assessment? It will be observed that the section of the charter of Alexandria, and the ordinance under which the controversy arises, quoted in full above, do not provide for any notice to the owners of the lots abutting on Alfred street

which gave them the opportunity to be heard before their property was assessed to meet the costs of the proposed improvements to the street. The earnest contention of counsel for appellee is that the 14th Amendment to the Constitution of the United States does not apply to local assessments for improvements, but relates principally to the exercise of the right of eminent domain; while, on the other hand, it has been argued in the courts of some of the other states of the Union that it does not apply to the exercise of the eminent domain power. This question, however, is reviewed by Lewis, in his work on Eminent Domain (§ 865), where he shows, upon reason and authority, that the provision cannot be restricted either to the exercise of the right of eminent domain or to other proceedings affecting liberty or the rights of property. He says that the provision that private property shall not be taken for public use without just compensation is simply an additional guaranty to the provision that a citizen shall not be deprived of his liberty or property without due process of law; that "the one provision is not exclusive of the other. . . . The one prevents the property of the citizen being taken under that power [of eminent domain], for any purpose except a public use, and then only upon making just compensation; while the other prevents his property being taken for public use without due process of law." And he then adds: "Without attempting to answer this question [What is due process of law?] by a general definition, it is sufficient for the present inquiry to say that all the authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property." We need not extend the discussion as to what is due process of law; for it is not pretended that there has been due process of law in the proceedings leading up to the assessment in the case at bar, but the claim is that the provision does not apply. "That local assessments are made under the taxing power does not admit of a doubt," says Burroughs, in his excellent work on Taxation (p. 461). See also Cooley, Taxn. pp. 623, 624, where he says: "That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed,"—citing numerous authorities. Bedle, J., in the opinion of the supreme court of New Jersey in the case of *State v. Fuller*, 84 N. J. L. 227, says: "This class of assessments is distinguishable from our general idea of a tax, but owes its origin to the same source or power; and this power to tax should exist in the discretion of the legislature, without the interference of the courts, unless some radical principle is violated or the guaranties of the Constitution are disturbed under color of its exercise."

A clearer statement of the rule that should govern in considering the question arising in this case cannot be found, and it brings us directly to the question whether the enforce-

ment of a local assessment for improvements to a street, where the person of whom the assessment is exacted has had no opportunity to appear and contest the legality, justice, and correctness of the assessment before it is finally determined upon, and a lien fixed on his property, is the taking of his property without due process of law, within the meaning of the provision of the Federal Constitution. In every instance where the rights of property are involved, before the liability of the taxpayer is finally determined, he must have some kind of notice of the proceedings, and an opportunity to be heard with reference to the value of his property and the amount of the charge. 2 Hare, Const. L. 871, and cases cited in note 8. In *Cooper v. Wandsworth Dist. Bd. of Works*, 14 C. B. N. S. 181, involving the action of the board of public works, in pursuance of a statute which did not require notice, Willes, J., said: "I apprehend that a tribunal which is by law invested with power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that that rule is of universal application, and founded upon the plainest principles of justice." Judge Earl, in an elaborate opinion of the court of appeals of New York in *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289, said: "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given, would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States Supreme Court, 'to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.'" *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619. It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. . . . We cannot conceive of due process of law without this." And, again: "It has always been the general rule in this country, in every system of assessment and taxation, to give the person to be assessed an opportunity to be heard at some stage of the proceeding. That 'due process of law' requires this, has been quite uniformly recognized."

The case of *Stuart v. Palmer*, *supra*, arose under the act of the general assembly of New York, passed in 1869, and amended in 1870, entitled "An Act to Lay out, Open, and Grade Atlantic Avenue in the Town of New Lots, Kings County." The act provided for two assessments,—one for the damages awarded to the owners of the land, under § 3 of the act of 1869, as amended, and another for the expense of regulating, grading, etc., under § 4, as amended. The former assessment was to be made and confirmed after proper notice to and hearing of the parties interested. The latter assessment could be made without

any notice to or hearing of any person, and was, under the provisions of the act, made a lien upon the lands upon which they should be assessed, and to be levied and collected in the same manner as other taxes are required by law to be collected. Stuart, upon whose land an assessment had been made under this act, brought his action against Palmer, collector of the taxes of the town of New Lots, to vacate the assessment as a cloud upon his title to the land, and to restrain the collector from collecting the tax, upon two grounds, one of which was that the assessment had been made without any notice to or hearing of him or other property owners. The opinion of the court of appeals of New York, by Judge Earl, as stated, held the act unconstitutional, and that the assessment and lien thereof was void, and vacated and set it aside because it was made, levied and confirmed without any notice to plaintiff or other property owners affected by it, and that, as the act required no notice, and a provision for notice could not be implied, it was, in effect, to deprive the owner of his property without due process of law; citing a great number of authorities to sustain this conclusion. Mr. Justice Field, in discussing this question in the opinion of the circuit court of the United States, district of California (*Santa Clara County v. Southern P. R. Co.* 18 Fed. Rep. 410), says: "The notice to which we refer need not be a personal citation; it is sufficient if it be given by a law designating the time and place where parties may contest the justice of the valuation. As a general rule only a statutory notice is given. The state may designate the kind of notice and the manner in which it shall be given. All that we assert, or have asserted, is that there must be a notice of some kind which will call the attention of the parties to the subject, and inform them when and where they will be permitted to expose any alleged wrong in the valuation of which they may complain. It was with reference to the class of cases where values are to be found upon evidence, that we said in the *San Mateo* suit that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the taxpayer's property was taken from him would not be due process of law. This eminent jurist goes so far as to say that to exclude the operation of this constitutional provision in matters of taxation would necessitate a limitation by implication upon the broad and comprehensive language used, so as to make it read, 'Nor shall any state deprive any person of his property without due process of law, except it be in the form of taxation,' and adds 'that the power of oppression by taxation is not thus permitted.' He also says 'that the contention that there is a difference in the law as to notice and opportunity to be heard when an assessment is made for local purposes, and where it is made under a statute providing revenue for the state, is without foundation;' that 'nothing is better established, by a weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceed-

ing." This case afterwards went to the United States Supreme Court, and the decision of the lower court was affirmed, Mr. Justice Harlan delivering the opinion, though he does not discuss the constitutional question so elaborately argued by both Mr. Justice Field and Judge Sawyer in the lower court, saying that it was unnecessary to do so, as the judgment could be affirmed on another ground.

In discussing the question whether the right to be heard in tax cases is a right which is indefeasible (Cooley, *Taxn.* 1st ed. 265, 266), Judge Cooley says: "We should say that notice of the proceedings in such cases, and an opportunity for a hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of what is 'due process of law' for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended, or could be construed, to sanction legislation under which officers might secretly assess one for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers, that 'it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose, without giving any notice to the owner. It is a power liable to great abuse,' and it might safely have been added, it is a power that, under such circumstances; would be certain to be abused. 'The general principles of law applicable to such tribunals oppose the exercise of any such power.'" See also authorities cited in notes 1, 2, p. 266. Due process of law requires that he (the land owner) shall have a chance to interpose objection to the validity of the tax, or to the contention that his land is liable for it, or to the manner of assessing or collecting it, at some stage of the proceedings, before his property is irrevocably gone; and this before some authority competent to afford relief in case of invalidity or injustice. Mr. Black, in note to case of *Read v. Dingess*, 8 C. C. A. 398.

Counsel for appellee cite, in support of their contention, the case of *Davidson v. New Orleans*, *supra*, quoting from the opinion of Mr. Justice Miller, in which he says—substantially what is said by Mr. Dillon in his work on Municipal Corporations (pages 930-932, § 760)—"that whenever, by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceedings in regard to the property, as is appropriate in such proceedings, it cannot be said to deprive the owner of his property without due process of law, however obnoxious it may

be to other objections. So the determination of the taxing district and the manner of the apportionment are all within the legislative power; and whenever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." But it is clear to my mind that this does not sustain appellee's contention, as the court there declares, in plain language, that whenever the laws there discussed provide a mode for contesting the charge imposed in a court of justice, with such notice to the person, or such proceedings in regard to the property, as are appropriate to the nature of the case, then they do not deprive a person of his property without due process of law; thus clearly making the constitutionality of the law dependent upon its giving notice to the party to be affected, and an opportunity of contesting the charge. In every case that I have been able to examine which has gone to the Supreme Court of the United States, and in which the question under consideration was considered, that court has upheld the validity of the laws upon the ground that notice and hearing had been provided for, or held the laws to be unconstitutional and void because notice to the party to be affected and an opportunity to be heard were not provided for. *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *Davidson v. New Orleans*, *supra*; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Spencer v. Merchant*, 125 U. S. 345, 31 L. ed. 763; *Walston v. Nevin*, 128 U. S. 578-582, 32 L. ed. 544-546; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637; *Pittsburg, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031. But for extending the discussion of this question to too great a length, if such is not already the case, innumerable decisions of the courts of other states might be cited and reviewed, wherein assessments for local improvements were held to be void, and were vacated, because made, levied, and confirmed without any notice to property owners affected.

We come now to consider the cases that have been before this court since the adoption of the 14th Amendment to the Federal Constitution, growing out of assessments for local purposes. They are *Norfolk City v. Ellis*, 26 Gratt. 224; *Sands v. Richmond*, 31 Gratt. 571, 31 Am. Rep. 742; *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473; *Green v. Ward*, 82 Va. 324; *Davis v. Lynchburg*, 84 Va. 870, and *Norfolk v. Chamberlain*, 89 Va. 196. In neither of these cases was the question as to whether the assessment was in conflict with the Federal Constitution raised or discussed, except in the case of *Davis v. Lynchburg*. In that case, Judge Lacy, delivering the opinion of the court, in discussing the question that no provision was made for the person to appear and contest the proceedings, and that this deprived him of his property without due process of law, says that, while the cases cited by counsel (for Davis) held that the ordinance, without such provision for notice, was unconstitutional, yet, as an original question, it was "obvious that all possible notice is

given by the progress of the work itself, and under our system of laws every citizen is held charged with the notice of the public law." In the abstract, this latter proposition is sound, but I do not think that the first can be maintained upon reason or authority. It is not enough that the owners of the property affected by a local assessment may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them a right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of the law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The legislature may prescribe the kind of notice, and the mode in which it shall be given, but it cannot dispense with all notice. *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289. The object of the Constitution in requiring notice and the opportunity to be heard is that a man may be able to protect himself from wrong. What opportunity is afforded him of doing so by seeing work being done on the street in front of his property, when neither before nor after the passage of the ordinance is he given an opportunity to be heard as to the legality of the ordinance, or the charge against and lien upon his property by the work being done? While he may be held charged with notice of a public law, he cannot be held so charged by a law that is unconstitutional. In addition to the fact that the question of "due process of law," guaranteed by the Federal Constitution, was not raised or discussed when the case of *Norfolk City v. Ellis*, *supra*, was decided by this court, the 14th Amendment had been but a few years before adopted, and, so far as I have been able to find, no case had been decided by either a state or Federal court at that time, in which this question was raised; and the cases relied on as authority by Judge Staples for the decision in *Ellis' Case*, were cases determined before the adoption of the 14th Amendment. At all events, none of them are decisive of the question. Upon this question, I am of opinion that, where a statute (*i. e.* the charter of a municipal corporation) authorizes an assessment of any part of the costs and expenses of opening, extending, grading, or otherwise improving the streets or sidewalks of such corporation, upon the land or lots abutting on the street opened, extended, graded, or otherwise improved, without providing for a notice to the person whose property may be affected by the assessment, giving such person an opportunity to appear and contest the legality, justice, and correctness of the assessment at some stage in the proceedings before the assessment becomes final, such statute is in conflict with the 14th Amendment to the Constitution of the United States, and that an assessment made thereunder is void, and creates no lien upon his property.

The validity of assessments for local purposes, made under the charters and ordinances of the cities concerned, was fully considered

A. R. A.

and decided in the Virginia cases named above, in each of which, with the exception of *Chamberlain's Case*, *supra*, the assessment was declared not to be in violation of § 1 of article 10 of the state Constitution; the right to make the assessment being upheld upon the theory of benefits to the abutting lot owners. *Chamberlain's Case* was typical of that class referred to by Judge Staples in the opinion of this court in *Norfolk City v. Ellis*, *supra*, where he says, "I do not mean to say that cases may not occur of such gross oppression and injustice as to require judicial interference;" and the decision of the court, holding that the assessment on Chamberlain's land or lot was void, was on this ground. It may therefore be said that the decisions of this court uniformly hold that an assessment upon abutting lands or lots to meet the expense of improvements to the street in front of such land or lots, levied according to benefits to such land or lots, is not in violation of § 1 of article 10 of the state Constitution. The decisions of a majority of the courts of the other states of the Union having similar constitutional provisions are to the same effect. Among them are the states of New York, Ohio, Wisconsin, Missouri, California, Kansas, Connecticut, New Jersey, North Carolina, Louisiana, Tennessee, Iowa, Indiana, Vermont, and South Carolina. See also Burroughs, *Taxn.* pp. 467 *et seq.*; Elliott, *Roads & Streets*, pp. 369, 370, and citation in note 2; 2 Dill. *Mun. Corp.* pp. 911, 912, 936. Mr. Burroughs says (on page 369): "It is but just, it is well reasoned, to compel the land owner, who gains by the value added to his land by the improvement, to pay that value, rather than to exact it from those who receive no direct benefit. It detracts nothing from his gain that others profit by the improvement." So, as was said by Judge Lacy in *Davis v. Lynchburg*, *supra*, "we cannot be unmindful of the salutary principles *stare decisis*," and it must therefore be said that it is well-settled law in Virginia that an assessment for local improvement, such as is authorized by § 38 of the charter of Alexandria city, is not in conflict with § 1 of article 10 of the Constitution of Virginia.

It remains, however, to be determined whether the city ordinances of Alexandria, under which the assessment was made, are in conflict with the charter of the city, and therefore void. As will be readily observed, the thirty-third section of the charter provides for an assessment upon the owners of the real estate benefited (*i. e.* according to the benefits to the property assessed by the improvements), while the ordinances of the city provided, and the assessment in this case was made, according to the proportion the front of appellants' ground bears to the front of all the lots on the same side of and binding on that portion of Alfred street improved. In other words, the assessment was authorized by the ordinances, and actually made, according to the frontage of appellants, and not according to the benefits to their ground by the improvements to Alfred street. Municipalities having no inherent power in these cases, it is necessary to the validity of their action that they keep closely

to the authority conferred. Their ordinances and resolutions must be adopted in due form of law, and they must keep within them afterwards. They can bind the taxpayer only in the mode prescribed, and can substitute no other. This is the general proposition of law as laid down by Judge Cooley in his work on Taxation (2d ed. 656). In discussing this question, Mr. Burroughs on Taxation (§ 148, pp. 472, 473) says: "It will be noticed that the questions discussed in this section are totally different from those in § 147. In that section the question was as to the power of the legislature to adopt one mode in preference to another; here the question is, when the legislature has delegated the authority to cities or towns to assess the expense on the lots or property benefited, whether such a delegation of power limits the municipal authorities as to the mode of making the assessment, or whether, having such authority, they may select the mode of apportioning the expense, and impose it by the front foot, square foot, or value, just as the legislature might have done. The weight of authority and of the analogies of law are decidedly that such a delegation limits the municipal authorities to the mode of assessment according to the benefits conferred by the improvement.

No case can be found, it is believed, in which an assessment not according to the benefit conferred has been sustained, when the delegation of authority was to assess on the property benefited." He then adds: "The case of *Norfolk City v. Ellis*, *supra*, which is seemingly opposed to this position, does not discuss this question. It merely discusses and decides the general question that an assessment by the front foot is not void, and even in that case it is said that there should be a remedy for cases of hardship by appeal to the council for abatement." In this section (148) the writer does say that "in Pennsylvania, however, a general delegation of authority 'to make rules and regulations and keep streets in repair, and to collect a tax for that purpose,' was considered sufficient to sustain an assessment by the front foot." Here the statute delegating the authority was considered broad enough to confer upon the city authorities the power to select the mode of assessment. It may also be said, with reference to *Ellis' Case*, *supra*, that the assessment was made under a provision of the charter of Norfolk city, which conferred upon the council of the city authority to raise annually, by taxes and assessments, such sums of money as they might deem necessary to defray the expenses of street improvements, and in such manner as they should deem expedient.

Whether an assessment by the front foot, *i. e.* according to the frontage on the street
31 L. R. A.

improved, where the charter expressly authorizes this to be done, or is broad enough to plainly confer upon the city the power to select the mode of assessment, would be a valid assessment, I express no opinion, nor as to whether an assessment upon the land or the lots abutting on a street improved for the entire costs of improvements would be valid, as a decision of these questions is not necessary in this case. The question here is, as we have seen, whether the ordinance by which the assessment is per frontage is authorized by § 33 of the charter of Alexandria, which section authorizes an assessment on the property benefited, and clearly means, I think, that the assessment is to be made in accordance with the peculiar benefits accruing to the property assessed by reason of the improvements,—certainly not in excess of such benefits. Upon the theory of benefits rest all of the decisions of this court and of other courts upholding assessments of this character, and upon this theory alone are they looked upon with favor by text writers; nor can they, upon reason and sound principles of justice, be justified upon any other theory. All of the authorities maintain that, when the power to levy such assessments is delegated by the legislature to a municipal corporation, the act must be strictly construed, and that the city authorities must keep closely within its provisions. To this effect are the decisions of the court in *Green v. Ward*, *supra*, and *Kirkham v. Russell*, 76 Va. 956. Strike out the element of benefit and a special assessment loses its foundation. *Elliott, Roads & Streets*, p. 405; *Ashberry v. Roanoke* (Va.) 22 S. E. 361. It may be that the assessment upon the property of appellants per front foot does not exceed the peculiar benefits to their property. They deny that it has been benefited at all and there is no proof on the subject; but this is immaterial to a decision of the question here. It is clear to my mind that, where the statute confers this power, and limits its exercise to the benefits by the improvements to the property assessed, or is not broad enough to be considered as by fair intendment to confer upon the authorities of the city the power to select the mode of assessment, an assessment per frontage is an unwarranted assumption of benefits, and does not meet the requirements of the statute, but is in conflict therewith.

For the foregoing reasons, I am of opinion that the decree of the Corporation Court of the City of Alexandria overruling appellants' demurrer to the bill filed in this cause was erroneous, and should be reversed, and that this court should enter such decree as the Corporation Court ought to have entered, sustaining the demurrer, and dismissing the bill.

MISSISSIPPI SUPREME COURT.

George RICHBERGER, *Appt.*,

v.

AMERICAN EXPRESS COMPANY.

(.....Miss.....)

The cursing, abuse, and maltreatment of a person by an agent of an express company immediately after refunding to such person overcharges which he had come to the office to obtain, and the delivery of a receipt therefor, are part of the *res gestæ* and make the company liable for the tort.

(January 6, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Coahoma County in favor of defendant in an action brought to recover damages for abuse of plaintiff when he went to defendant's office to transact certain business. *Reversed.*

The facts are stated in the opinion.

Messrs. Cook & Yerger for appellant.*Mr. D. A. Scott*, for appellee:

It cannot be said with any reason that the appellee was under any obligation whatever to protect the appellant from the wilful abuse or insult of its agent; and this, too, notwithstanding the fact that the alleged injury or actionable language was used by the appellee's agent in its office. Unmistakably when this agent thus acted towards appellant he was acting, not within the line of his duty nor within the scope of his employment, but evidently in direct violation of his duties to his principal, and to that extent violated his obligation to his principal. And if any liability whatever was incurred by this wanton act of his, it was a personal liability, and not one for which the court will hold the appellee to account.

M'Manus v. Crickett, 1 East, 106.

The master's responsibility is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which if he did it wilfully he might do in the employer's name.

Cooley, Tortis, 536; *Williams v. Pullman Palace Car Co.* 40 La. Ann. 87.

When the agent, acting in the capacity bestowed upon him by the corporation, and in discharge of some duty or employment directed by the employer or incidental to his situation, does an act that causes damage, the corporation is responsible. But where the agent does any act of his own free will, without reference to his functions as an agent, the corporation is not responsible.

Etting v. Commercial Bank, 7 Rob. (La.) 459; *Dyer v. Rieley*, 28 La. Ann. 6; *Pierce, Railroads*, 279; *Field, Corp.* §§ 524, 623; *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 Am. Rep. 418; *Evanville & C. R. Co. v. Baum*, 26 Ind. 72; *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251.

For the acts of the agent or servant wilfully and intentionally done without command or authorization of the master, the servant is liable and the master is not.

NOTE.—As to liability of master for assaults by servant, see note to *Davis v. Houghtelin* (Neb.) 14 R. A. 737.

L. R. A.

Story, Agency, 456; 2 Kent, Com. marginal notes, 259, 260; Addison, Cont. 635; 1 Smith. Lead. Cas. Hare & W's notes, p. 560; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Edwards, Bailm.* 318, 319; *Angell, Carr.* §§ 541, 604; *Richmond Turnp. Co. v. Vanderbilt*, 1 Hill, 480; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Cox v. Keahey*, 86 Ala. 340, 76 Am. Dec. 325; *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Muckle v. Rochester R. Co.* 79 Hun, 32; *Chicago Consol. Bottling Co. v. McGinnis*, 51 Ill. App. 325; *Mayer v. Thompson-Hutchison Bldg. Co.* (Ala.) 28 L. R. A. 433.

A master is not liable for the acts of a servant committed outside of the line of his duty.

Western U. Teleg. Co. v. Mullins (Neb.) 62 N. W. 880; *Georgia R. & Bkg. Co. v. Wood*, 94 Ga. 124; *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264; *Harris v. Nicholas*, 5 Munf. 483; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Alabama & V. R. Co. v. McAfee*, 71 Miss. 70; *Alabama G. S. R. Co. v. Harris*, 71 Miss. 74.

Whitfield, J., delivered the opinion of the court:

Plaintiff had been made to pay an overcharge on express matter from Clarksdale to Tulwiler, in this state, by the local agent of appellee, and the general agent had been seen, and stated that the matter would be arranged. Plaintiff saw the local agent about it on December 25, but was put off. Subsequently, the declaration avers, "said plaintiff, on or about the first day of January, 1895, went to the office of said express company, upon business with said company, when said agent of said company, in charge of the office, informed plaintiff that he then and there desired to refund to plaintiff the said overcharge, and did then and there pay to plaintiff said overcharge, and required plaintiff then and there to sign a receipt for same, and when the said plaintiff signed and delivered said receipt to said agent, the said agent did then and there, immediately upon the reception of said receipt, and while plaintiff was there in the office of said company, wilfully, wantonly, oppressively, and wrongfully curse, abuse, insult, and maltreat plaintiff, because plaintiff had demanded and received from said company said overcharge," etc. The old doctrine of *M'Manus v. Crickett*, 1 East, 106, that the master is never liable for the wilful or malicious act of his servant (like the early doctrine that a corporation was never so liable, which latter doctrine arose out of the early misconception of the nature of a corporation. See 5 Thomp. Corp. §§ 6275, 6277, 6280, 6298) has long since been repudiated. Cowen, J., put the whole argument for the opposite view in a single sentence when he said, in *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507, that "the dividing line was the wilfulness of the act." But the whole argument against liability, on such reasoning, is definitely and conclusively answered in *Thompson on Corporations*.

where the whole question is exhaustively treated. Says this author, in section 6298: "The courts which have so ruled have proceeded on the theory that authority from the master to the servant to commit a wilful wrong or a crime will not be implied, and that the servant, when so acting, will therein be deemed to act, not for his master, but for himself. If he makes use of his master's property in committing this wrong, he will be deemed, according to the fantastic reasoning of Lord Kenyon, in *M'Manus v. Crickett*, borrowed from Rolfe's Abridgment, to have acquired, for the time being, a special property therein. The fallacy of this reasoning was, that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not. Moreover, with respect of all intentional acts done by a servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right; and if it was wrong, it clothed him with a like immunity because it was wrong. He thus got the benefit of all his servant's acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such a rule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business, springing from the imperfection of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile the public, obliged to deal or come in contact with his agents, for intentional injuries done by them, might be left wholly without redress. . . . A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence." And he states that it is repudiated by eminent text writers, and the great weight of modern authority, citing quite fully the authorities to date. He then clearly shows the true test to be, not whether the act was committed in pursuance of orders from the master or against orders, whether the master ratified or not, whether the tort was wilful and malicious or not, but whether, and solely whether, the act constituting the tort was done in the master's business. As well said in *Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78: "If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." Sections 6299-6316, inclusive. He also clearly points out that the rule is not one of logic, but of public policy and necessity,—a view concurred in by Judge Andrews in *Higgins v. Waterliet Turnp. & R. Co.* 46 N. Y., at page 27, 7 Am. Rep. 293, the reasoning in which case, and in *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597, is unanswerable. To the same effect, see *Pulmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136; *Cooley, Torts*, p. 626 (1); *Mechem*, 31 L. R. A.

Agency, §§ 740, 741, and the authorities cited by these writers. Judge Thompson is not alone in his criticism of *M'Manus v. Crickett*, *supra*. Chief Justice Ryan, in *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504, points out the fact that *M'Manus v. Crickett* rested on *Middleton v. Fowler*, 1 Salk. 282, the only case cited in its support, and that that case was not a case of malice, but of negligence; and said, with great pertinence and power, that "one employing another in good faith, to do his lawful work, would be as little likely to authorize negligence as malice," and that "either would be equally *dehors* the employment." See also *American Exp. Co. v. Patterson*, 73 Ind. 430; *Southern Exp. Co. v. Fitzer*, 59 Miss. 581; *Williams v. Planters' Ins. Co.* 57 Miss. 759, 34 Am. Rep. 494.

It thus appears that *M'Manus v. Crickett* is not now law. Counsel for appellee relies upon and cites this case and the cases of *McCoy v. McKowen*, 26 Miss. 487, 59 Am. Dec. 264, and *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 356. It is true that both these cases are based on *M'Manus v. Crickett*. It is also true that both expressly declare that "it is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him," thus declaring immaterial that which is the very test of liability in this class of cases. So far as this declaration is concerned, these cases are hereby overruled expressly, that they may not further mislead. They have been practically overruled by repeated subsequent decisions of this court, *Williams v. Planters' Ins. Co. supra*. As to *New Orleans, J. & G. N. R. Co. v. Harrison, supra*, it is correctly said by Judge Thompson (sec. 6300, bottom of page 4929), that "the true reason of the decision was, not that the act was wilful or malicious, but that it was plainly outside of the line of duty of the servant."

But it is urged that, however applicable this doctrine may be to carriers of passengers, it is not applicable to an express company. Doubtless, there is a difference in the extent of the application of the principle, as between carriers of passengers and express companies, measured exactly by the difference in the things done by them in the discharge of their duties, respectively. But the principle applies to both. An express company does not transport passengers, and cannot be made liable as a carrier of passengers might, for wilful torts committed by its agent on passengers in their transportation; but it keeps offices for the transaction of its proper business, a business calling to its offices every day thousands of citizens, and in its dealing with its customers in its offices, in its business, it is bound, in Judge Story's language, "for respectful treatment and for decency of demeanor." It is impossible to say, on the allegations of this declaration, that the tort committed immediately upon the delivery of the receipt to the agent,

and because of the demand for the refunding of what was plaintiff's conceded due, was so separated in time or logical sequence as not to have been an act done in the master's business. The whole transaction occurred in the shortest time, and was one continuous and unbroken occurrence. The cursing and abusing and maltreatment were all administered in connection with the taking of the receipt, and immediately upon its delivery, and because of the demand for his rights in that matter, and while plaintiff was in appellee's office to transact, and transacting, this very business. What was said and done thus immediately upon the delivery of the receipt was part of the *res geste*. As well said by Judge Thompson, in his Commentaries on Corporations (sec. 6299, top of page 4928): "In this view, even under the modern doctrine, the acts and declarations of the servant or agent, tending to show his state of mind at the time of the act complained of, would be admissible in evidence

as part of the *res geste*." We have heretofore quoted from the masterly opinion of Judge Andrews in *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y., at page 186, in *Illinois C. R. Co. v. Latham* (Miss.) 16 So. 757, to show when in this character of case the corporation would not be liable. Complementary to that we close this opinion with the words of the same great judge, in the same case, at page 184, 64 N. Y., to show here a case of liability: "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority and inflicts an unjustifiable injury upon another."

Reversed, demurrer overruled, and cause remanded.

TEXAS SUPREME COURT.

WACO WATER & LIGHT CO., *Appt.*,

v.

City of WACO *et al.*

(86 Tex. 661.)

The "very question to be decided" which is required to be certified by the court of civil appeals, under the Texas

statutes, is not presented by a certificate of the question whether or not a demurrer should be sustained to plaintiff's petition.

(May 10, 1894.)

CERTIFICATION by the Court of Civil Appeals for the Third Supreme Judicial District for the opinion of the Supreme Court of

NOTE.—Definiteness of question to be certified.

The practice of certifying questions to a higher court for decision pending the hearing in the lower court without taking up the whole case for review seems to have originated in the statutes governing such practice in the Federal courts in this country. The practice has been more or less fully adopted in several of the states, but must be distinguished from the reporting or reservation of a whole case by a single justice for the opinion of the whole court or by a lower court for the opinion of a higher one which has been practiced in England and in some states in this country. The proper practice as to the form of the question to be certified has been very fully settled by the Supreme Court of the United States, and such decisions will doubtless be regarded as authoritative in states which have adopted the practice.

The whole case must not be sent up.

If the judges divide on the whole case, and not on one or more points contained in it, the supreme court will not take jurisdiction of the case. *Saunders v. Gould*, 29 U. S. 4 Pet. 392, 7 L. ed. 397.

If the whole record of the case is sent up with a statement that the judges have differed in opinion, with no statement as to what the point of difference is, the supreme court will not take jurisdiction of the case. *Wolf v. Usher*, 28 U. S. 3 Pet. 269, 7 L. ed. 675.

The provision for certificates of division in opinion is meant to meet a case where, two judges sitting, a clear and distinct proposition of law, material to the case, arises, on which, differing in opinion, they may make such a certificate as will enable the supreme court to decide the question.

L. R. A.

If in reality more than one question occurs they may be embraced in the certificate; but where it is apparent that the whole case is presented to the supreme court for decision with all its propositions of law and fact, the case will be dismissed. *Waterville v. Van Slyke*, 116 U. S. 699, 29 L. ed. 772. The whole case must not be brought up. *Webster v. New England Mortg. Co.* 106 U. S. 605, 27 L. ed. 99. A certification of the whole case *pro forma* does not confer jurisdiction. *Webster v. Cooper*, 51 U. S. 10 How. 54, 13 L. ed. 325.

The case cannot be split up into distinct points to take up whole case.

The whole case cannot be certified by splitting it up into several distinct questions. *Jewell v. Knight*, 123 U. S. 432, 31 L. ed. 192; *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267.

United States v. Giles, 13 U. S. 9 Cranch, 212, 3 L. ed. 708, was an action on a marshal's bond for money alleged to have been converted by him to his own use. The jury found the facts and assessed the damages conditionally upon each of the alleged breaches, leaving it to the court to say whether or not there had been a breach of the bond. The court being divided in opinion certified to the supreme court that they were opposed upon all the points submitted by the special verdict and certified the disagreement to the supreme court. The court ruled that the points on which the judges were divided were too imperfectly stated to enable the court to form an opinion, and remanded the case. The circuit court then certified that they were opposed upon ten questions, and proceeded to state them in order, as to whether judgment should be given for plaintiff or defendant upon each of the breaches assigned. The supreme court

questions arising upon the appeal of plaintiff from a judgment of the District Court for McLennan County in favor of defendants in an action brought to enjoin the collection of a tax levied upon plaintiff's property. *Dismissed.*

The facts are stated in the opinion.

Messrs. Richard I. Monroe and William B. Hord for appellant.

Messrs. L. C. Alexander and James A. Harrison for appellees.

proceeded to consider the questions in that form and decided the case upon that certification.

But in later cases that practice was disregarded.

The submission of the case in distinct points which in fact cover the whole case will not be sufficient to cause the supreme court to take jurisdiction if by doing so it would exercise original rather than appellate jurisdiction. *White v. Turk*, 37 U. S. 12 Pet. 238, 9 L. ed. 1069.

The principle involved in the objection to acting on several points which dispose of the whole case is not that the whole case may not properly be disposed of by a decision on what is certified, but that the division must in substance be not on several questions arising in various stages of the case and some of them anticipated and presented so as to cover the whole case. *United States v. Chicago*, 48 U. S. 7 How. 185, 12 L. ed. 660.

The mere fact that the certificate is divided into points will not suffice if it is evident that the whole case is thereby sent up. *Nesmith v. Sheldon*, 47 U. S. 6 How. 41, 12 L. ed. 335.

The whole case cannot be brought before the supreme court by splitting it up into fragments so as to procure the opinion of the supreme court before the trial of the case in the lower court. *United States v. Hall*, 131 U. S. 51, 33 L. ed. 97; *United States v. Reilly*, 131 U. S. 58, 33 L. ed. 75.

But the fact that the questions are several in number and involve the whole case will not defeat the jurisdiction if they arise at one time, at one stage in the cause, and involve little beyond one point. *United States v. Chicago*, *supra*.

The importance of the question is immaterial.

In some of the earlier cases a practice was recognized of permitting difficult questions to be sent up *pro forma*, but this practice was subsequently discontinued and the court refused to consider such cases.

In *Jones v. Van Zandt*, 46 U. S. 5 How. 215, 12 L. ed. 122, it is said the questions extend to the unusual number of fourteen; not, however, that the presiding judge in the circuit and his associate sustained strong doubts concerning the general points involved in all of them, but because the questions involved could not otherwise be brought here. And they present so wide and deep an interest as to render it desirable that they should come under the revision of this court. For that purpose in conformity to what is understood to have been the usage in the circuit they accommodated the parties by letting a division *pro forma* be entered on all the points presented.

In *United States v. Stone*, 30 U. S. 14 Pet. 524, 10 L. ed. 572, the court says: "We are aware that in some cases where the point arising is one of importance and difficulty, and it is desirable for purposes of justice to obtain the opinion of this court, the judges of the circuit court have sometimes by consent certified the point in this court as upon a division of opinion where in truth they both rather doubted than differed about it. We do not object to a practice of this description when applied in proper cases and on proper questions. But they

Stayton, Ch. J., delivered the opinion of the court:

The statute provides that "whenever, in any case pending before the court of civil appeals, there should arise an issue of law which said court should deem it advisable to present to the supreme court for adjudication, it shall be the duty of the presiding judge of said court to certify the very question to be decided to the supreme court, and during the pendency of the decision by the supreme

must be cases sanctioned by the judgment of one of the justices of this court in the circuit."

But in a later case the court said: "It is the divisions of opinion *pro forma* and from courtesy to counsel and on a variety of points and at times at which they have not actually arisen but being anticipated which appear to transcend the original design of vesting such power in the supreme court. And although an indulgence has sometimes been given to certificates where in important cases a division was certified *pro forma*, yet we do not feel justified in repeating it." *United States v. Chicago*, 48 U. S. 7 How. 185, 12 L. ed. 660.

The point of difference must be certified.

A statement in a certificate that the judges are not able to agree, one being of opinion that judgment should be rendered for plaintiff and the other being of opinion that judgment should be entered for defendant, does not state such a distinct point or points as will give the court jurisdiction. *Sadler v. Hoover*, 48 U. S. 7 How. 646, 12 L. ed. 855.

If no point in the case is certified the case will be dismissed. *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581.

The question must not be general.

The question whether or not upon the facts as stated and proved the action can be maintained is too general and will not be answered. *Daniels v. Chicago & R. I. R. Co.* 70 U. S. 3 Wall. 250, 18 L. ed. 224.

The question of the right of plaintiff to recover cannot be certified. *State Nat. Bank v. St. Louis Rail Fastening Co.* 122 U. S. 21, 30 L. ed. 1121.

The question whether plaintiff or defendant is entitled to judgment on a special verdict is too general. *Hosford v. Germania F. Ins. Co.* 127 U. S. 399, 32 L. ed. 196; *Fire Ins. Asso. v. Wickham*, 123 U. S. 434, 32 L. ed. 506.

The question whether upon the facts stated the plaintiffs have any right or title to the lands taken for a street is too general to require an expression of opinion by the supreme court. *Harris v. Elliott*, 35 U. S. 10 Pet. 25, 9 L. ed. 333.

The question must not be abstract.

The court will not answer an abstract question if no facts are disclosed in the record which show that it has arisen or can thereafter arise in the case. *Havemeyer v. Iowa County*, 70 U. S. 3 Wall. 294, 18 L. ed. 38.

The question must be perfectly stated.

A question is insufficient which requires the court to find out for itself the point intended to be presented by searching through the allegations of the answer and the provisions of a statute relied on in the case, and by also examining either the whole Constitution of the state or else reports or records of decisions of its cases referred to in the answer and made a part thereof. *Dublin Twp. v. Milford Five Cent Sav. Inst.* 128 U. S. 513, 32 L. ed. 534.

If the points reserved are too imperfectly stated by reason of the fact that the evidence upon which the questions arise is too indefinitely pointed out

court the cause in which the issue is raised shall be retained for final adjudication in accordance with the decision of the supreme court upon the issue submitted." Laws 1892, p. 31, § 35. The certificate presented is as follows: "This suit was instituted by appellant in the district court of McLennan county, December 19, 1891. On hearing in chambers, the district judge refused to grant an injunction, and on the 9th day of March, 1892, in term time, a general demurrer to plaintiff's petition was sustained. A copy of the petition and exhibits thereto is hereto attached. The appel-

lant assigns as error the ruling of the court on the demurrer to the petition, and the court of civil appeals for the third supreme judicial district hereby certifies that question to the supreme court for decision." The petition and exhibits referred to are attached, and from them it may be seen that a water company is seeking to enjoin the collection of a tax on its property, levied for the purpose of paying for water which the city authorities had contracted to take from a rival water company.

The determination of the question whether the demurrer was properly sustained to the pe-

for the court to determine which is referred to so as to pronounce an opinion on them, no direction as to their solution will be given to the court below. *Perkins v. Hart*, 24 U. S. 11 Wheat. 287, 6 L. ed. 463.

In *Leland v. Wilkinson*, 35 U. S. 10 Pet. 294, 9 L. ed. 430, one of the questions was whether the description of the demanded premises in a certain deed taken in connection with the confirmatory act was sufficient in law to divest the plaintiff's title to the same and convey the same to the grantees, and the court held that the reference to the description of the demanded premises was not so stated as to enable it to decide the question.

It must not involve a question of fact.

To give the supreme court jurisdiction there must be questions of law and not questions of fact—not such as involve or imply conclusions or judgment by the judges upon the weight or effect of testimony or facts adduced in the cause. And they must be distinctly and particularly stated with reference to the point of the case upon which such question or questions shall have arisen, and the points must be single and must not bring up the whole case for decision. *Dennistoun v. Stewart*, 59 U. S. 18 How. 565, 15 L. ed. 499.

A certificate which involves a finding of fact is not sufficient. *Adams v. Jones*, 37 U. S. 12 Pet. 207, 9 L. ed. 1058.

The question as to whether or not a certain patent infringes another patent involves a question of fact and is not sufficient to give the court jurisdiction. *Wilson v. Barnum*, 49 U. S. 8 How. 258, 12 L. ed. 1070; *California Artificial Stone Paving Co. v. Molitor*, 113 U. S. 609, 28 L. ed. 1106.

The question of fraud or no fraud cannot be certified unless the facts upon which it is based are found and distinctly stated, so that a legal conclusion can be reached therefrom. *Ogilvie v. Knox Ins. Co.*, 59 U. S. 18 How. 577, 15 L. ed. 490.

The question whether or not a contemplated bridge will, if erected, constitute a material obstruction to navigation is one of fact and cannot be certified. *Silliman v. Hudson River Bridge Co.*, 66 U. S. 1 Black, 582, 17 L. ed. 81.

The question whether or not grantees of one who obtained title to property by fraud are affected with his fraud so that the title is not good in them involves a question of fact which cannot be certified to the supreme court. *Brobst v. Brobst*, 71 U. S. 4 Wall. 2, 18 L. ed. 387.

There must be no facts to be found by the supreme court. *Weeth v. New England Mortg. Co.*, 106 U. S. 605, 27 L. ed. 99.

Whether a sale of goods was fraudulent is a mixed question of law and fact and cannot be certified. *Jewell v. Knight*, 123 U. S. 432, 31 L. ed. 192.

Fraud is a question of fact. *Smith v. Craft*, 123 U. S. 436, 31 L. ed. 267.

Necessary facts must be stated.

The certificate must be accompanied by a proper statement of the facts on which the questions or 31 L. R. A.

propositions of law to which answers are desired arise. *Cincinnati, H. & D. R. Co. v. McKeen*, 149 U. S. 259, 37 L. ed. 725.

The statement of facts should be of ultimate facts, leaving nothing but a conclusion of law to be drawn; not a statement of particular facts leaving an inference of fact to be drawn before a decision can be made. *Jewell v. Knight*, 123 U. S. 432, 31 L. ed. 192.

The question as to the power of an officer of a foreign government under certain circumstances will not be sufficient to obtain the opinion of the supreme court if it does not state sufficient facts as to the extent of such officer's authority under the laws of his government to enable the court to pass upon the question. *Carrington v. Merchants' Ins.*, 33 U. S. 8 Pet. 495, 8 L. ed. 1021.

The question whether or not a certain act of a bank cashier makes a valid contract on behalf of the bank cannot be certified unless the facts regarding the general power and authority of the cashier and any authorization or ratification of his act on the part of the bank and all other facts affecting the question of the validity of his act are found and reported with the certificate. *United States v. City Bank*, 60 U. S. 19 How. 385, 15 L. ed. 662.

In *Enfield v. Jordan*, 119 U. S. 680, 30 L. ed. 523, the court says it might refuse to consider the report of a case referred to but not printed in the record as an embodiment of facts upon which the question was based.

Question whether evidence or indictment sufficient.

The question whether the evidence in a criminal case is sufficient to establish the offense denounced by the statute under which the prosecution is had brings up the whole case and is not a proper form for a certification. *United States v. Bailey*, 34 U. S. 9 Pet. 267, 9 L. ed. 124.

The question whether upon the whole evidence the plaintiff is entitled to recover is not proper. *Williamsport Nat. Bank v. Knapp*, 119 U. S. 357, 30 L. ed. 446.

The question whether or not an indictment is sufficient in law is too broad and indefinite for consideration. *United States v. Arjona*, 120 U. S. 490, 30 L. ed. 732.

The question whether either of the counts of an indictment charges defendant with an offense under the laws of the United States is too vague and general to be considered. *United States v. Northway*, 120 U. S. 327, 30 L. ed. 664.

The question whether an indictment charges an offense is too general. *United States v. Chase*, 135 U. S. 255, 34 L. ed. 117; *United States v. Brewer*, 139 U. S. 278, 35 L. ed. 190.

The question whether or not an indictment presents facts sufficient to constitute an offense cannot be certified, especially where it is impossible to decide the question without the most laborious wandering through the whole three counts of the indictment and passing upon the whole question whether under all the circumstances set out the

tion would require an investigation of the powers of the city of Waco under the law incorporating it, the powers of the water company with which it made contracts for water, as well as an inquiry whether the contract between the city and the water company was in due form, executed by proper officers, and within the lawful powers of the two corporations. In the consideration of these general questions, many questions subordinate in nature would necessarily arise, and would require determination before it could be determined whether a general demurrer to the

petition was properly sustained. Questions would also arise as to the effect of the several averments of fact which it would be necessary to decide; and the inquiry arises whether it was the purpose of the legislature to permit an entire case on law and fact thus to be certified for decision, or whether it was only intended that this court, on certificate, should decide specific questions of law formulated by a court of civil appeals from a record before it. The statute declares that the question to be certified must present "an issue of law," and that it shall be "the duty of the presiding

parties are liable to the indictment. *United States v. Perrin*, 181 U. S. 56, 33 L. ed. 89.

A question whether an offense against a certain section of the United States statutes is charged in certain counts in an indictment will not be answered. *United States v. Lacher*, 134 U. S. 624, 33 L. ed. 1080.

Question whether demurrer should be sustained.

The question whether or not a demurrer shall be sustained is too indefinite to be answered. *United States v. Waddell*, 112 U. S. 77, 28 L. ed. 673; *United States v. Minor*, 114 U. S. 253, 29 L. ed. 110.

In case of a demurrer upon three grounds to an indictment it is not sufficient to state that the judges are divided in opinion as to whether or not the demurrer should be sustained. *United States v. Briggs*, 46 U. S. 5 How. 208, 12 L. ed. 119.

In *Mason v. Haile*, 25 U. S. 12 Wheat. 370, 6 L. ed. 600, a question was certified whether defendant was entitled to judgment on the ground that the matters set forth in the pleas were sufficient to bar the action or whether the plaintiff was entitled to judgment upon the demurrers and joinders. The court said it is not understood that any question as to the sufficiency of the pleas in point of form is drawn under examination, but simply whether upon the merits the matters thereby set up are sufficient to bar the action, and the court then proceeded to consider the question.

What will be considered.

The certificate gives jurisdiction over the single point upon which the judges were divided, not over the whole case. *Wayman v. Southard*, 23 U. S. 10 Wheat. 1, 6 L. ed. 253.

Nothing can come before the supreme court for decision under a certificate of division in opinion except such single, definite questions as shall arise and become the subject of disagreement in the court below. *Ward v. Chamberlain*, 67 U. S. 2 Black. 430, 17 L. ed. 319.

Where the certificate involves the question of the jurisdiction of the court so that until the question is disposed of no further proceedings can be had in the case, the supreme court will consider that question although irrelevant matters which will not be regarded are also embraced in the certificate. *United States v. Thomas*, 151 U. S. 577, 38 L. ed. 276.

Questions which have been held proper.

It is a sufficient certificate of the question of jurisdiction that the petition of appeal is upon that sole ground, and that the circuit court in the order allowing the appeal states that the appeal is grounded "solely on the question of jurisdiction" and directs the portions of the record to be certified to the supreme court to present that question. *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660.

Under the act of 1891 permitting appeals or writs of error in cases where the question of jurisdiction is involved, but requiring a certificate from the judges that such is the question involved, a certificate is sufficient which recites that it was "held 31 L. R. A.

that the court did not have jurisdiction of the suit and ordered the same to be dismissed," and the order allowing the writ of error certified in effect that it is allowed "upon the question of jurisdiction." *Re Lehigh Min. & Mfg. Co.* 156 U. S. 322, 39 L. ed. 438.

Under the act of 1891 respecting the certifying of cases by the United States courts of appeal the questions must be distinctly and clearly certified and the certificate must show that the instructions of the supreme court as to the proper decision is desired. *Columbus Watch Co. v. Robbins*, 148 U. S. 266, 37 L. ed. 445.

Illinois decisions.

If an appeal is allowed to the supreme court of Illinois by the appellate court because of the importance of the questions involved the whole case goes up and the supreme court will consider such questions as arise upon the record in the ordinary way, which it will ascertain by looking at the pleadings and rulings of the court and the orders in the case, and not to the certificate of the appellate court. *Ohio & M. R. Co. v. Wachter*, 123 Ill. 441; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112.

It is not necessary that the certificate shall point out the questions considered of sufficient importance to be passed upon by the supreme court. *Steele v. Grand Trunk Junction R. Co.* 125 Ill. 385.

A certificate that the case is sent to the supreme court because of a large number of suits and the large number of interests dependent on the final result of the suits will not confer jurisdiction on the supreme court. *Lamar Ins. Co. v. Gulick*, 96 Ill. 619.

Iowa decisions.

Each question certified should present a question of law distinct from other questions of law or fact, and the certification of questions of fact or questions involving questions of fact does not give jurisdiction. *Benaley v. Chicago & N. W. R. Co.* 79 Iowa, 266.

The question whether the evidence set out in the certificate shows contributory negligence is a question of fact and cannot be certified to the supreme court. *Chilton v. Chicago, R. I. & P. R. Co.* 72 Iowa, 689.

All of the necessary facts should be stated in the certificate. *Vreeland v. Ellsworth*, 71 Iowa, 347.

Questions of fact cannot be certified. *Hanna v. Collins*, 69 Iowa, 51; *Riddle v. Fletcher*, 72 Iowa, 454.

The court will not go behind the certificate to determine the facts in the case. *Miller v. Haley*, 66 Iowa, 290.

The certificate must state that the question certified was involved in the case. *Van Sickle v. Downs*, 72 Iowa, 624; *Ball v. Van Riper*, 74 Iowa, 146; *Beach v. Donovan*, 74 Iowa, 543; *Beeler v. Garrett*, 76 Iowa, 231.

A certificate is sufficiently definite which asks if, under a certain statute limiting appeals from a justice's court to amounts exceeding \$25, on defendant's appeal to the circuit court should plaintiff's motion to dismiss for want of jurisdiction be

judge of said court to certify the very question to be decided." The purpose of this is manifest. There may be many questions arising, on general demurrer or otherwise, in a cause, necessary to its decision, about which a court of civil appeals will entertain no doubt, while there may be but a single question about which doubt is entertained; and the purpose of the law is to permit courts of civil appeals to have the

decision of that question, or such questions made by the supreme court; but the very question for decision here must be stated by the court of civil appeals. Whether a petition is sufficient to maintain an action is a question of law; but, as is frequently the case, the decision of that question involves the decision of many and different questions of law, and, in order that the time of this court may not be

sustained, when the petition alleged damages in the sum of \$100, a general denial, trial in the justice's court resulting in a judgment for plaintiff of 5 cents and \$27 costs. *Nichols v. Wood*, 66 Iowa, 225.

The certificate must show that the questions upon which the opinion of the supreme court is desired are involved in the case. *Estep v. Yetmire* (Iowa) 65 N. W. 327.

The court has no jurisdiction to go behind the certificate and determine from the record whether the case involves the questions of law included in the certificate. *Curran v. Excelsior Coal Co.* 63 Iowa, 94; *Lamb v. Ross*, 84 Iowa, 579.

But in *Swails v. Ciesna*, 61 Iowa, 603, it is said: "We have repeatedly held that in this class of cases we will look into the record for the purpose of determining whether the questions certified fairly arise in the case." But in *Beach v. Donovan*, 74 Iowa, 544, that is explained upon the ground that in these cases the certificates on their face were sufficient to confer jurisdiction. The record was gone into for the purpose of determining whether or not the case in fact involved the determination of the question propounded, not for the purpose of giving, but of defeating or limiting, jurisdiction.

The record may be looked to to see if the questions certified are involved in the case, but questions certified must be decided upon what is shown on the certificate. *Jennings v. Bacon*, 84 Iowa, 403.

The certificate must be sufficient in itself to present the questions to be determined, and must not refer the court to the record to ascertain such questions. *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.* 62 Iowa, 494.

The questions should be intelligible in and of themselves, and when they are not and it is necessary to examine the whole record to ascertain what the questions are, the case will not be considered. *Votaw v. Corwin*, 62 Iowa, 39; *Bower v. Kavanaugh*, 62 Iowa, 757; *Long v. Chicago, M. & St. P. R. Co.* 64 Iowa, 541; *Bennett v. Parker*, 67 Iowa, 451; *Hawkeye Ins. Co. v. Lewis*, 63 Iowa, 514; *White v. Beatty*, 64 Iowa, 331.

A certificate stating that the court submitted to the jury certain special interrogatories, and asking, "Was the action of the court error in view of the evidence in this case? Should a new trial be granted?"—is not proper, especially when it is not shown that all of the evidence is in the abstract. *Gilliooby v. Chicago, M. & St. P. R. Co.* 61 Iowa, 53.

The questions, Does the evidence legally establish an express contract of payment? and Does the evidence legally establish a release of defendant from payment?—are insufficient. *Landers v. Boyd*, 59 Iowa, 758.

A question whether the evidence is sufficient to support the verdict is not sufficient. *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692.

The trial judge must certify that it is desirable to have the opinion of the supreme court upon the question to render the certificate sufficient. *Milliken v. Daugherty*, 59 Iowa, 294.

The question whether or not the trial court has jurisdiction of the case is too general when the jurisdiction is questioned on more than one ground. *Wheaton v. Foster*, 58 Iowa, 661.

More than one question may be submitted in the case, but the several questions must be specifically
"1 L. R. A.

stated so that the supreme court may determine the precise questions submitted, and questions of law and fact cannot be mingled and called a question of law. *Centerville v. Drake*, 58 Iowa, 564.

A question as to the validity of a gift of a note as against creditors of the donor under the facts of the case is too general. The specific facts relied upon to defeat the gift should be set out. *Fitch v. Flynn*, 58 Iowa, 159.

A question whether or not the court erred in determining that plaintiff was entitled to judgment is improper. *Ibid.*

A question, "Can judgment be rendered in favor of plaintiff and against defendant upon the agreed statement of facts in this case?" is not sufficient. *Dawley v. Houck*, 53 Iowa, 733.

If no finding of facts appears in the record the supreme court will assume that the question certified did arise upon facts as found. *Thorpe Bros. v. Dickey*, 51 Iowa, 676.

The certificate need not state the particular question upon which the opinion of the supreme court is desired. *Fell v. Burlington, C. R. & M. R. Co.* 43 Iowa, 177.

But a rule of court was subsequently made requiring the question to be pointed out. *King v. Derby*, 51 Iowa, 11; *Wetz v. Austin*, Id. 342; *Minnich v. Chicago, R. I. & P. R. Co.* Id. 363; *Barnes v. Independent Dist. No. 2*, Id. 700.

And now by the rules of the Iowa supreme court a case will not be considered on a certificate of importance from the lower court unless the certificate states what the question is. *Wilson v. Iowa County*, 52 Iowa, 339; *Throckmorton v. Horton*, Id. 737; *Stormer v. Henzie*, Id. 743; *Gregg v. White*, 55 Iowa, 744; *Bradenburger v. Rigler*, 68 Iowa, 300.

The certificate must state that the question involved is one of law. *Kierulff v. Adams*, 40 Iowa, 31.

That the question is necessary and involved in the case may be made to appear by showing that unless the ruling made by the trial court upon the question is overruled defendant will be entitled to judgment. *Seamans v. Zimmerman*, 91 Iowa, 363.

If the question certified is a general one involving the determination of other distinct questions of law not stated, the certificate is insufficient. *Hawkeye Ins. Co. v. Erlandson*, 84 Iowa, 197.

If the certificate sets forth and numbers two questions, and then states that the case involves the determination of "a question" of law, to wit, the question heretofore set out and numbered 1 and 2, the certificate is not rendered defective by the fact that two questions are numbered while the certificate speaks of them in the singular number. *Walters-Cates v. Wilkinson* (Iowa) 60 N. W. 514.

If the opinion of the supreme court is desired upon whether certain facts will enable the plaintiff to maintain his action, the facts which are to form the basis of the opinion must be set out in the certificate. *Brown v. Petrie*, 56 Iowa, 209.

Questions not involved under the pleadings will not be considered. *Martin Steam-Feed Cooker Co. v. Olive*, 62 Iowa, 122.

The certificate should plainly point out the questions to be determined, and should recite the facts on which the questions of law arise so that they may be determined without resorting to the evidence in the case. *McLenon v. Kansas City, St. J. & C. B. R. Co.* 69 Iowa, 320.

taken up in deciding questions about which a court of civil appeals may have no doubt and desires no decision, those courts are required to certify—to make certain or definite—the very question to be decided. It was never intended that this court, on certificate, should determine

what questions of law are involved in a cause, and those decide, but it was intended that courts of civil appeals should propound questions which they may deem it proper to certify. The certificate in question does not differ in any material respect from one in which

The certificate must point out the questions upon which the opinion is desired so explicitly as to render an examination of the record unnecessary. *Martin Steam-Feed Cooker Co. v. Olive, supra.*

Abstract questions cannot be certified. *Eckert v. Pickel, 59 Iowa, 545.*

The question will not be considered if it involves assumptions of fact in conflict with the record. *Cunningham v. Chicago, B. & Q. R. Co. 67 Iowa, 519; Miller v. Buena Vista County, 68 Iowa, 712.*

The question, "Can plaintiff recover under the facts agreed upon herein as per stipulation on file?" presents the whole case for consideration, and is insufficient. *Dunn v. Zoller, 61 Iowa, 227.*

New Jersey decisions.

Under the New Jersey act before a case can be certified from the circuit to the supreme court for its advisory opinion all disputed facts must be settled. *Destefano v. Calandriello (N. J.) 31 Atl. 385.*

Ohio decisions.

There is a practice something like the certification of questions in Ohio. But there is also a difference which makes the practice approach that of report or reservation.

In Ohio the cause itself is reserved into the supreme court. *Grant v. Ludlow, 8 Ohio St. 1; Foreman v. Haag, 37 Ohio St. 143.*

The whole case may be reserved for the opinion of the supreme court. *Chase v. Washburn, 2 Ohio St. 103.*

The judgment which was rendered in the trial court and the manner in which the case was removed to the intermediate court must be made to appear. And the intermediate court cannot send to the supreme court questions for determination before they have been regularly presented for determination. *Young v. Schenck, 6 Ohio St. 111.*

Under the Ohio practice for the reservation of questions for the opinion of the supreme court, before the legal questions arising on the merits can be properly presented to that court the facts should be found or presented on an agreed statement between the parties. *Hubble v. Renick, 1 Ohio St. 171.*

The finding of facts must be a positive finding upon which a final and not a provisional judgment may be rendered. *Patterson v. Lamson, 44 Ohio St. 487.*

Questions of fact cannot be reserved. *Ogborn v. Taylor, 6 Ohio St. 190.*

The supreme court will not entertain a case unless the facts have been settled before it is reserved. *Wilson v. Hamilton, 4 Ohio St. 723.*

The case cannot be reserved until the facts are settled. *Duffy v. Meyers, 44 Ohio St. 245.*

Texas decisions.

The very question is not certified within the meaning of the Texas statute by presenting a petition of plaintiff covering a number of pages with exceptions thereto. *Union C. L. Ins. Co. v. Chowning, 86 Tex. 680, 24 L. R. A. 504.*

The general question whether correspondence was properly admissible in evidence without stating the objection to it will not be considered. *Laughlin v. Fidelity Mut. L. Asso. 87 Tex. 115.*

The question whether upon the pleadings and evidence the court erred in instructing the jury to return a verdict for defendant will not be considered. *Ibid.*

The entire case embracing questions of both

law and fact cannot be certified. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co. 87 Tex. 112.*

Neither question will be answered where two hypothetical questions are asked based on different statements of facts which cannot coexist in the case. *Missouri, K. & T. R. Co. v. Belcher (Tex.) 32 S. W. 518.*

A question if any of five special charges requested and refused stated correct propositions of law in the case and if so which should have been given, is too general and will not be considered. *Laughlin v. Fidelity Mut. L. Asso. supra.*

Wyoming decisions.

An order stating that there is an important question arising at the trial, but not stating what that question is, brings up nothing for review. *Corey v. Corey, 3 Wyo. 210.*

Criminal cases.

In Minnesota and Wisconsin there are provisions for certifying difficult and important questions arising in criminal cases for the opinion of the supreme court.

The Minnesota statute provides that when in the opinion of the judge presiding at the trial a question of law arises in the trial of a criminal action, in which defendant shall be convicted of sufficient importance or doubt to require the decision of the supreme court, he may report the case to that court as far as shall be necessary to present the question. *Bonfanti v. State, 2 Minn. 126.*

Under the Wisconsin statute permitting the trial court to submit questions to the supreme court it must appear upon the record that the defendant has been tried and convicted upon an information or indictment which charges some crime or offense punishable under the laws of the state. *State v. Wentler, 76 Wis. 89.*

The trial court must report definitely the exact question or questions on which the opinion of the supreme court is desired, and must not send up the whole record. *State v. Anson, 20 Wis. 663; State v. Hill, 30 Wis. 416; State v. Rowan, 35 Wis. 304.*

The Wisconsin statute provides for the report of questions arising at the trial of a criminal case in which defendant is convicted. *State v. Kneiffe, 12 Wis. 440.*

In Wisconsin the reporting of the case to the supreme court is a summary proceeding to obtain before judgment the speedy decision of the supreme court of doubtful questions of law arising on the trial, and such questions must be specially stated. *State v. Jenks, 60 Wis. 599.*

The questions will not be answered if they involve an examination of the entire record. *State v. Cornhauser, 74 Wis. 42.*

Only questions of law can be reported, and even such questions cannot be reported if their determination requires that all the testimony shall be before the court. *State v. Gross, 62 Wis. 41.*

A question which does not appear to have arisen in the case cannot be certified. *State v. Hickok, 90 Wis. 161.*

Tax cases.

In certifying proceedings for the enforcement of taxes the trial judge should state what points he certifies and make a statement of the facts bearing upon such points together with his decision or conclusion thereon. *Morrison County v. St. Paul & N. P. R. Co. 42 Minn. 451; State v. St. Croix Boom Corp. 49 Minn. 450.*

H. P. F.

a court of civil appeals would find the facts existing in a cause before them, these certify to this court, and therein propound the question whether judgment should have been rendered in favor of the one party or the other. To decide such a question, appellate jurisdiction was conferred on courts of civil appeals, and neither the statute nor the Constitution contemplates the exercise of such appellate jurisdiction by this court, so long as the cause remains undetermined by a court of civil appeals.

This court, however, has held that so much of the statute as authorizes courts of civil appeals to certify questions of law to them for decision, and makes such decisions binding, is not in violation of the Constitution; but, to confer such jurisdiction, the statute must be complied with. The practice of certifying questions for decision is new in this state, but has long existed under the laws of the United States and examination of the decisions of the Supreme Court of the United States will show the practice, as well as the jurisdiction which may be lawfully exercised on such certificates by that court. There are several statutes bearing on that matter. One of them relates to criminal proceedings, and provides that, when "the judges are divided in opinion, and the point upon which they disagree is certified to the supreme court according to law, such point shall be finally decided by the supreme court." U. S. Rev. Stat. §§ 651, 697. Another related to civil proceedings, and provided that when "any question has occurred upon which the opinions of the judges were opposed, the point on which they so disagree shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record." U. S. Rev. Stat. § 652. There was still an earlier law, which required a circuit court, at the request of either party, to certify to the supreme court a question of law existing in a cause in reference to which the judges might differ, and on this the supreme court was required to decide the questions so certified, which would govern in the after-disposition of the cause. Under these statutes, many decisions were made, and reference to some of them will be given to illustrate the construction placed on such statutes. Demurrers to an indictment were filed, and, after argument, certified to the supreme court for decision, without stating upon what point a decision was desired. In disposing of the case, Chief Justice Taney said: "Now in the case before us, the question upon which the disagreement took place is not certified. The difference of opinion is indeed stated to have been on the point whether the demurrer (which was certified) should be sustained. But such a question can hardly be called a point in the case, within the meaning of the act of Congress; for it does not show whether the difficulty arose upon the construction of the act of Congress on which the indictment was founded, or upon the form of proceeding adopted to inflict the punishment, or upon any supposed defect in the counts in the indictment. On the contrary, the whole case is ordered to be certified upon the indictment, demurrer, and joinder, leaving this court to look into the record, and deter-

31 L. R. A.

mine for itself whether any sufficient objection can be made in bar of the prosecution, and without informing us what questions had been raised in the circuit court, upon which they differed." *United States v. Briggs*, 46 U. S. 5 How. 209, 12 L. ed. 119. "The question, whether a demurrer shall be sustained is not sufficiently definite. The precise legal point involved . . . should be stated. The court is not bound to look beyond the certificate to ascertain the point. . . . In the case before us the questions certified are, 'whether, in point of law, upon facts as stated and proved, the action could be maintained; and whether, consequently, the jury should be instructed that, under the facts as proved, the plaintiff could not recover.'" *Daniels v. Chicago & R. I. R. Co.* 70 U. S. 8 Wall. 250, 18 L. ed. 224. The certificate was dismissed. "This court cannot take jurisdiction of this case because, besides the manifest attempt to refer to this court for decision substantially the whole case by the device of splitting it up into several questions, neither of the questions certified presents a distinct point or proposition of law, clearly and precisely stated; but each requires this court to find out for itself the point intended to be presented, by searching through the allegations of the answer and the provisions of the statute relied on by the plaintiff, and by also examining either the whole Constitution of the state, or else reports or records of decisions of its courts, referred to in the answer and made part thereof. The certificate is even more irregular and insufficient than one undertaking to present the question, arising on demurrer or otherwise, whether an indictment, or a court therein, sets forth any offense, which this court has constantly held not to be a proper subject of a certificate of division of opinion, *Dublin Twp. v. Milford Fire Cent. Sav. Inst.* 128 U. S. 513, 32 L. ed. 534. "The question certified 'must be a distinct point or proposition of law, clearly stated, so that it can be definitely answered, without regard to other issues of law or fact in the case. . . . It must be a question of law only, and not a question of fact, or of mixed law and fact; hence it must not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the cause,—as, for example, a question of fraud, which is necessarily compounded of fact and of law. . . . It must not embrace the whole case, even where its decision turns upon matters of law only, and even though it be split up into the form of questions." *Fire Ins. Assn. v. Wickham*, 128 U. S. 434, 32 L. ed. 506. The opinions in the following cases, in which are cited many others, are to the same effect: *Jewell v. Knight*, 123 U. S. 432, 31 L. ed. 192; *United States v. Hall*, 131 U. S. 51, 33 L. ed. 97; *United States v. Perrin*, 131 U. S. 56, 33 L. ed. 89; *United States v. Reilly*, 131 U. S. 58, 33 L. ed. 75; *United States v. Lacher*, 134 U. S. 625, 33 L. ed. 1081; *United States v. Chase*, 135 U. S. 255, 34 L. ed. 117. The statute in force in this state, permitting questions to be certified, is more peremptory than the acts of Congress in the requirement that the very point or question must be certified, and a certificate which does not comply with its requirements must be dismissed.

It is so ordered.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
John William McCLELLAND, *Appt.*,
v.

James A. ROBERTS, *Receipt.*

(148 N. Y. 360.)

1. The constitutional provisions respecting the powers and duties of the superintendent of public works, which the New York Constitution of 1894 adopted from the former Constitution, must be read and understood in connection with the new section of the Constitution requiring civil service appointments to be made according to merit, ascertained so far as practicable by competitive examinations.

2. The self-executing mandate of Const. 1894, art. 5, § 9, declaring that civil service appointments "shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations which so far as practicable shall be competitive," requires the courts in a proper case to pronounce appointments made without compliance with its requirements illegal.

3. The re-enactment of the New York civil service law after the adoption of the Constitution of 1894 is not necessary in order to make it applicable to the department of public works, to which it could not apply under the Constitution in force when the act was passed, as the new Constitution not only adopts the principle of the law, but declares: "Such acts of the legislature . . . as are now in force shall be and continue the law of this state, subject to such alterations as the legislature shall make."

(*Martin, J., dissents.*)

(February 18, 1896.)

A PPEAL by relator from an order of the General Term of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County in favor of defendant in a proceeding, brought to compel defendant as comptroller of the state, to audit and pay the salary of relator as clerk in the office of canal statistics. *Affirmed.*

The facts are stated in the opinions.

Mr. Myer Nussbaum, for appellant:

The provisions of chap. 354, laws of 1883, did not originally apply to the department of public works, and are not extended by § 9, art. 5, of the Constitution over that branch of the civil service.

People, Killeen, v. Angle, 109 N. Y. 564.

An unconstitutional act is as if it had never been passed.

Chenango Bridge Co. v. Paige, 83 N. Y. 190, 38 Am. Rep. 407.

Constitutions must be "held to be prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend to be set in practical operation."

People, Jackson, v. Potter, 47 N. Y. 375.

If the act of 1883 be still in force, new legislation is necessary to extend its operation to

the public works, because: (1) there was no original intention to include that department in the act; (2) the constitutional provision does not extend it, but merely permits the legislature to do so.

N. Y. Ops. Atty. Gen. (1871), p. 566.

If it be competent for the legislature to pass such a statute, clearly the concluding sentence of § 9 makes that a legislative duty and a legislative duty cannot be delegated.

Cooley, Const. Lim. 137.

The legislature neither must, nor can, transfer the power of making laws to anybody else or place it anywhere but where the people have placed it.

Locke, Civil Government, § 162; *Barlo v. Himrod*, 8 N. Y. 488; *Santo v. State*, 2 Iowa, 165; *Geebrick v. State*, 5 Iowa, 491; *State v. Beneke*, 9 Iowa, 203; *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480.

Upon all questions of the expediency of general statutes the legislature must determine for itself definitely and finally. The determination of that question cannot be delegated.

People v. Fire Assn. of Philadelphia, 92 N. Y. 316, 44 Am. Rep. 380.

Mr. Matthew Hale, respondent:

The act to regulate and improve the civil service of the state of New York (chap. 354 of 1883), by its terms applied to the entire public service of the state of New York.

By the new Constitution which took effect January 1, 1895, the law of 1883 was made applicable to the department of public works; and it follows that the reclassification, or restoration of the old classification, made by Governor Morton April 15, 1895, was valid and effectual.

The two provisions of article 5 of the Constitution must be considered together. The provisions of § 3, which gives the superintendent of public works the appointment and removal of employees, is subject to the provision of § 9 of that article, that all appointments and promotions in the civil service of the state shall be made according to merit and fitness, to be ascertained so far as practicable by competitive examinations.

See *Smith v. Lawrence County Supers.* 148 N. Y. 187; *Re Sweeney*, 12 Misc. 174, *Affirmed* 146 N. Y. 401.

The constitutional provision, § 9 of art. 5, required no legislation in order to the enforcement of its provisions so far as it related to competitive examinations.

Chapter 354 of the laws of 1883 was a valid act, and has been so held by this court.

Rogers v. Buffalo, 123 N. Y. 173, 9 L. R. A. 579.

It is only the application of the act to the department of public works which this court decided in the case of *People, Killeen, v. Angle*, 109 N. Y. 572, to be void.

O'Brien, J., delivered the opinion of the court:

The relator, in the month of April, 1895, was appointed to the position of clerk to the collector of canal statistics by the superintendent of public works of the state at a

NOTE.—As to self-executing constitutional provisions, see note to *Willis v. St. Paul Sanitation Co.* (Minn.) 16 L. R. A. 281.

31 L. R. A.

salary of \$65 per month. When he applied for his monthly compensation, the defendant, as comptroller of the state, refused to audit or pay the same, and the relator thereupon applied for a peremptory writ of mandamus, to be directed to the comptroller, commanding him to draw his warrant for the payment of the claim. The application for the writ was denied and the order denying the same affirmed at general term.

The only question involved in this appeal is whether, upon the undisputed facts disclosed upon the application, the relator was entitled to the writ. It is admitted that the relator was appointed to the position without having passed the civil service examination, and that his name has never been certified to the comptroller by the civil service commission, and it was for that reason that the comptroller refused to pay the claim.

The legal question thus presented has been so fully and ably discussed in the courts below that we feel relieved from the necessity of much further argument in support of the conclusions there indicated. Indeed there is very little further to be said upon the important and interesting subject which is involved in the controversy beyond a brief statement of the grounds upon which we think the order below should be sustained.

The statute of this state, commonly known as the civil service law (chap. 354, laws of 1883, as amended by chap. 681, laws of 1894), not only required that clerks and other subordinates in the civil service of the state should be appointed or selected from lists, constituted as therein provided, after competitive examination, but that it should be unlawful for the comptroller to pay the compensation of any clerk in the civil service who had not been appointed pursuant to the provisions of the law, and whose name had not been certified to him by the civil service commission. It is not necessary to subject these statutes to a very close analysis in order to determine the general purpose and policy of the legislature with reference to appointments and promotions in the civil service. It is too plain for argument that these enactments require appointments to be made from the civil service lists, made up in the manner indicated in the statute and in the rules formulated by the commission under the authority of the law; and, in order to insure obedience to the system on the part of the appointing power, the chief financial officer of the state was prohibited from making payment to any clerk of his salary or compensation who had not been appointed as required by the law. It is quite clear, also, that the civil service statutes constitute a general system of statute law applicable to appointments and promotions in every department of the civil service of the state, with such exceptions only as are specified in the statute itself. It was held in the case of *People, Killeen, v. Angie*, 109 N. Y. 564, that the law could not apply to the department of public works for the reason that the Constitution, as then in force, vested in the head of that department the exclusive power and duty of appointment and removal, and that any re-

striction upon such power imposed by the legislature, through the civil service act, was inoperative. That case did not hold that the civil service act or any part of it was unconstitutional. The power of the legislature to enact the law, as it appears on the statute book, has never been doubted or questioned, and the only point raised in that case was with respect to its application to a particular department of the state government under the Constitution as it then existed, and it was held that, notwithstanding the general language and scope of the act, and the purpose of the legislature in enacting a general law, without excluding any department from its operation, the law could not reach the superintendent of public works, for the reason that the words of the Constitution would not permit it. If the fundamental law which governed the question then before the court is the same now it is quite clear that the order in this case should be reversed, since the same question is involved. But it is apparent that the Constitution has been changed in such a manner as to include within the scope and operation of the civil service law just such a case as this court then held to be beyond its application. This clearly appears, not only from the plain words since incorporated into the Constitution, but from the debates on the subject in the recent constitutional convention. The new or amended and revised Constitution of this state, adopted by the people in 1894, and which went into effect on the first day of January, 1895, has superseded the decision in the case of *People, Killeen, v. Angie, supra*. It is quite true that the identical words of art. 5, § 3, upon which that decision turned, are still in the Constitution. Instead of changing the language or arrangement of the different provisions of that article, the convention adopted and the people have inserted and added an entirely new section, which reads as follows: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness, to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive.

Laws shall be made to provide for the enforcement of this section" (§ 9). The provisions of the article with respect to the powers and duties of the superintendent of public works in the appointment and removal of persons employed in the care and management of the canals, which were under consideration in the case of *People, Killeen, v. Angie*, must now be read and understood in connection with this new section, and, reading them all together, there can be little doubt that the obstacles then found to exist to the full operation of the civil service law in every department of the state government have been entirely removed. *Smith v. St. Lawrence County Supers*. 148 N. Y. 187, 193. That such was the intention of the convention that framed and adopted the amendment is clear beyond all question. If anything in support of this view is wanting, beyond the broad and comprehensive words of the

amendment itself, it will be found in the debates on this subject in the convention, in which the intention of that body was declared in the most explicit terms, to bring every department of the government within the operation of the law by such a change in the Constitution as would meet and obviate the difficulties pointed out by this court in the case referred to. The declared views in favor of that course by some of the leading members of the convention are to be found in the learned opinion below, and the whole discussion on the question leaves no doubt of the intention to remove every constitutional objection to the full operation of the law, and to its application to all appointments in the civil service in all the public departments of the state. There was no provision in the Constitution of 1846, or in any of its numerous amendments, requiring appointments in the civil service to be made according to a general system based upon a merit and fitness to be ascertained by competitive examinations under public authority. That is a conception of comparatively recent date with us, and a step in the line of administrative reform which had forced itself upon public attention, until it finally received practical approval and recognition by the passage of the act of 1883. The operation of that act, the obstacles in the way of its general application, as well as the general merits and advantages of the system to the public service, were all familiar to the members of the convention of 1894, called to revise the Constitution, and it cannot be doubted that the intention was not only to permit, but to require, its general application to appointments in all departments. This result has been effectually accomplished by the adoption of a new provision in the fundamental law. The principle that all appointments in the civil service must be made according to merit and fitness, to be ascertained by competitive examinations, is expressed in such broad and imperative language that in some respects it must be regarded as beyond the control of the legislature, and secure from any mere statutory changes. If the legislature should repeal all the statutes and regulations on the subject of appointments in the civil service the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal.

It is therefore apparent that a new principle, far reaching in its scope and effect, has been firmly imbedded in the Constitution. Like many other reforms, this work has not been accomplished without a long and persistent struggle. The friends and the opponents of the measure have debated its merits and the difficulties in the way of its practical and harmonious operation before the public for years. The considerations which entered largely into this debate are no longer pertinent, since the principle has become an accomplished fact and placed by the people beyond the possibility of any substantial change in a contrary direction. This court, upon more than one occasion, has, with

entire unanimity, expressed its approval of the principle, and exercised all of its powers in every proper case in aid of all laws intended to carry out the idea which was always at the foundation of the question. *Rogers v. Buffalo*, 123 N. Y. 178, 9 L. R. A. 579; *Peck v. Belknap*, 180 N. Y. 394; *Re Keymer*, 148 N. Y. 219. Whatever doubt or distrust may exist with respect to the possibility of obtaining for the law an honest and fair execution, there is none and can be none, at least among thinking men, with respect to its ultimate beneficial effect upon the service. That it must, if fairly and honestly administered, go far to suppress very grave evils and abuses that have become peculiarly rife and active in our political system few intelligent people who have given the subject much attention can doubt. In so far as its administration may depend upon the action of the judicial department, it is entitled to, and doubtless will, receive a fair and liberal construction, not only according to its letter, but its true spirit and the general purpose of its enactment. The Constitution, as it now exists, must be read and considered in all its different parts, and each provision must be given its appropriate place in the system and some office to perform, and at the same time all must be so construed as to operate harmoniously. The application of these familiar rules of constitutional construction removes all doubt or difficulty with respect to the question under consideration, and the conclusion must follow that, while the power of appointment and removal is still with the superintendent of public works, it is subject to legislative regulation as to the mode and manner, and is brought within the operation of general laws on that subject.

There is another question in the case which is pressed with much vigor by the learned counsel for the relator. He contends, as I understand his position, that the new section of the Constitution referred to contemplated the enactment of appropriate laws to carry it into effect, and that, since the civil service act of 1883 and its amendments did not, and, when passed, could not, apply to the department of public works, they cannot now be made to operate upon the appointments of public officers formerly beyond the power of legislative regulation. In other words, that the new section of the Constitution is not self-executing, and, as the civil service law has not been re-enacted since the change or any other legislation supplied, there is now no law or regulation applicable to the relator's appointment save the will of the superintendent himself.

We do not think that this contention is at all tenable. The act of 1883 and its amendments constitute a general system in terms applicable to the whole service. It is not limited to any particular department, but is broad enough to embrace all. Statutes of this character, framed in general terms, apply to new cases as they arise from time to time that fall within their general scope and policy. Since the enactment of the civil service laws new offices have been created, to which the power to appoint subordinates

attached, but it cannot be doubted that this power, when given, came within the operation of all general regulations on the subject. A general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but so long as it is expressed in general language the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy. So a general law, when passed, may be incapable of application to certain cases within its general scope and policy by reason of the existence of other and conflicting enactments of equal or higher authority, but when the latter are repealed or modified, the general law is given full operation. In the present case it will be observed that there is nothing in the civil service act indicating any intention to exclude any department from its operation. On the contrary, it was manifestly intended to have general operation, and not until the decision of the courts in *People, Killeen, v. Angle*, was it understood to be inapplicable to the department of public works. The section of the Constitution with which it was then found to be in conflict, and which had the effect to suspend its operation as to that department, having been since modified in such a manner that both the organic law and the general statute are in harmony, each expressing the same general policy and directing the same thing to be done, the suggestion that, in order to make the general law operate upon this case, the legislature must re-enact it, has no reasonable or just foundation, and, so far as I am aware, is not sustained by authority.

Moreover, it is evident from the language of the new provision of the Constitution and from the debates in the convention which followed its introduction into that body, that it was framed and adopted with reference to existing laws, which were intended to give to it immediate practical operation. So that in adopting the new Constitution, the people, in their original capacity, decreed that thereafter all the departments of the government should be brought within the operation of existing laws on the subject of appointments. The mandate to the legislature to enact laws to provide for the enforcement of the section does not in any degree conflict with this view. That was a prudent and proper, though, perhaps, an unnecessary precaution. But it affords no ground for the inference that the people intended to ignore the aid and utility of existing laws to give immediate practical effect to the principle, or that they were content to wait for the reform until the legislature should make new regulations on the subject. It was the intention to put all the new provisions of the Constitution into operation through the instrumentality of such laws as were then in force, so far as practicable, and if, in practice, they were found to be in any respect insufficient for that purpose, they were to be replaced or supplemented by new ones. This view does not depend entirely upon construction, since the instrument itself contains an express pro-

vision on that subject. The people declared in § 16, art. 1, that "such acts of the legislature of this state as are now in force shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same; but all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated."

If the act of 1883 or any of its amendments needed new life and vigor in order to bring this case within their operation, it has thus been given to them by an authority from which even the legislature itself has derived all of its powers. All these questions, and others of a minor character, have been so thoroughly examined in the court below, upon the hearing of the original application, that in our opinion further discussion is unnecessary.

Our conclusion is that, since it appears that the position to which the relator was appointed had, prior to that time, been classified by the civil service commission, in pursuance of the statute, as one subject to competitive examination, and as the commission had not certified to the comptroller that he had been lawfully appointed, but, on the contrary, refused the certificate, his application for the writ of mandamus was properly denied, and that the order appealed from should be affirmed, with costs.

All concur with **O'Brien, J.**, for affirmance, except **Martin, J.**, who reads for reversal; **Vann, J.**, not voting.

Martin, J., dissenting:

That chap. 354 of the laws of 1883, so far as it related to the department of public works, was held by this court to be unconstitutional and void in the *Killeen Case*, 109 N. Y. 564, is manifest from the opinion and admitted by the respondent. If this statute was unconstitutional, and consequently void, when passed, so far as it applied to that department, I am unable to agree to the proposition that the constitutional amendment which went into effect January 1, 1895, revived or infused new life into it and rendered it valid. It makes no difference that it was only void in part, for so far as it was void it had no effect, and could not be rendered valid except by re-enactment. Judge Cooley, in his work on Constitutional Limitations, at page 188 [6th ed. p. 222], says: "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force." That language was quoted and approved by this court in *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 191, 38 Am. Rep. 407. See Endlich, Interpretation of Statutes, § 538; *Meagher v.*

Storey County, 5 Nev. 244, 250; *Sumner v. Reeler*, 50 Ind. 341, 342, 19 Am. Rep. 718; *Woolsey v. Dodge*, 6 McLean, 142; *Astrom v. Hammond*, 3 McLean, 107, 110; *Strong v. Daniel*, 5 Ind. 348; *Clark v. Miller*, 54 N. Y. 528, 532. The statute of 1883, having been declared unconstitutional and void so far as it affected the department of public works, was invalid and had no existence so far as it related to that department. To that extent it was as if it had never been enacted. It being so far void, I think the subsequent amendment infused no life into it as to that department. It was so held in *State, Stevenson, v. Tufts*, 20 Nev. 427, and in *Opinions of Attorneys General of the State of New York for 1871* (p. 566). I am aware of no principle upon which it can be held that this statute became valid by the subsequent constitutional amendment, unless the amendment was self-executing. That it was not seems manifest, as, after providing for civil service appointments and promotions, it expressly declares that "laws shall be made to provide for the enforcement of this section." This provision is inconsistent with and negatives the idea that the amendment was self-executing, or that it was intended to reinstate a statute already declared to be unconstitutional. The logic of the position that the Constitution, before it was amended, simply obstructed or suspended the statute of 1883 as to the department of public works, and that the amendment removed the obstruction and leaves the statute in full force, is not apparent to me. That argument seems to me fallacious. If any constitutional obstruction existed which prevented the enactment of a statute including the department of public works in the provisions of the civil service act, it was so complete as to render the statute to that extent unconstitutional and void. As to the department of public works, the statute was either valid or void. If valid, it could have been enforced when passed; if void, it could not, and the amendment effected no change that would render the statute valid.

Again, if it be said that the decision in the *Killen Case* was based upon the theory that the legislature did not intend to include the department of public works in the statute of 1883, because it would be in conflict with the Constitution, then the statute did not affect that department. If that was the intent of the legislature, I know of no principle by which an amendment of the Constitution would breathe into that statute an intent which never existed.

If the legislature never intended to pass such a statute, its intent must govern, and the statute of 1883 should not be regarded as applicable to the department of public works. If it did intend to include that department, then it violated the Constitution and was so far null and void. Therefore, whatever view may be taken of the question, it seems to me that it cannot properly be held that the statute is applicable to the department of public works.

I think the judgment of the general and special terms should be reversed.

31 L. R. A.

FARMERS' LOAN & TRUST COMPANY,
Trustee, etc., *Recept.*,

BANKERS' & MERCHANTS' TELE-
GRAPH COMPANY, *Recept.*

Re THIRD NATIONAL BANK of the City
of New York, *Appt.*

(148 N. Y. 315.)

1. A loan by a bank to an embarrassed telegraph company which is in pressing need of money to meet its current expenses, and which uses the money in paying debts of a character for which receivers' certificates were authorized to be issued, will not give the bank a lien on the assets superior to a first mortgage on the property if neither the bank nor the persons who were paid out of the loan obtained receivers' certificates.

2. A party loaning money to an embarrassed corporation subsequently adjudged insolvent, and taking security therefor, cannot in equity claim a lien on its mortgaged property or the proceeds thereof, in preference to a pre-existing mortgage, no matter for what purpose the loan was made or how the money loaned was applied, providing the mortgage bondholders were not parties to the transaction.

3. Attachment of the lines and property of a telegraph company in other states after a receiver has been appointed in the state of which the attachment creditor is a citizen and service on such creditor of a copy of an injunction against interfering with the receivership is a violation of the injunction, and can give the creditor no lien which can be asserted in an equitable administration of the assets in the state where the receiver was appointed.

(January 28, 1896.)

A PPEAL by petitioner from an order of the General Term of the Supreme Court, First Department, affirming an order entered upon the report of a referee denying its petition to share in the proceeds arising from a foreclosure sale of defendant's property. *Affirmed.*

Statement by **Andrews**, Ch. J.:

The Third National Bank of the city of New York, in May, 1884, upon the application of the officers of the Bankers' & Merchants' Telegraph Company, a New York corporation owning and operating lines of telegraph in New York, Massachusetts, Rhode Island, and other states, loaned to the company \$50,000, upon the statement that that amount was needed to meet current supply bills and contract obligations; taking as collateral security \$300,000 of the bonds of the company, secured by a trust mortgage for \$10,000,000, dated November 24, 1883, on all its property and lines, executed to the Farmers' Loan & Trust Company, as trustee. The telegraph company was financially embarrassed at the time, but the officers represented to the bank that the

NOTE.—As to effect of insolvency transfers in other states, see note to *Long v. Forrest* (Pa.) 23 L. R. A. 33.

amount of the proposed loan would relieve the company, and enable it to go on with its business. The company paid \$10,000 of this loan, and on August 4, 1884, the bank renewed the loan for thirty days, taking the company's note for \$40,000, giving additional bonds to the amount of \$100,000 as further security: so that the bank held bonds to the amount of \$400,000, then worth in the market 20 cents on the dollar, as security for the note of \$40,000. The note went to protest, and the bank subsequently sold the bonds, and after applying the proceeds of the sale there remained due to the bank, December 2, 1885, the sum of \$28,350.09, which has never been paid. One Day, a judgment creditor of the company, execution on his judgment having been returned unsatisfied, commenced in the fall of 1884 an action in the supreme court of this state against the company, to sequester its property, and for the appointment of a receiver; and receivers were appointed, September 24, 1884, of all its property and effects, real and personal, wheresoever situate, with power to operate and manage its lines of telegraph, and by the order appointing the receivers all persons were enjoined from interfering in any manner with the receivers in the discharge of their duties. In October and December, 1884, the receivers in the Day suit were authorized by the court to issue receivers' certificates for money to be borrowed to carry on the business and to pay certain claims, which certificates, it was declared, would constitute a first lien on the property of the company. Under this authority, receivers' certificates were issued, aggregating \$195,000. After the commencement of the Day suit, an action was commenced by one De Haven, a bondholder, against the company, the receivers in the Day suit, and the trustee of the mortgage, for the dissolution of the company and the appointment of a receiver; and January 6, 1885, judgment was entered in the action, appointing the same persons who had been appointed receivers in the Day suit receivers in the De Haven suit, and the entry of the judgment in the De Haven suit substantially superseded the prior proceedings in the Day suit. The judgment in the De Haven suit made very broad provision for the issue of receivers' certificates to take priority of the mortgage, and, under its provisions and the prior order referred to, receivers' certificates were issued amounting in the aggregate to \$602,802.66. The judgment in the De Haven suit contained a provision enjoining interference by any person with the receivers in the discharge of their duties, similar to the provision in the order in the Day suit.

On the 23d of April, 1885, the Farmers' Loan & Trust Company, the trustee under the mortgage, commenced an action for the foreclosure of the mortgage; and May 1, 1885, receivers were appointed therein as successors to the receivers appointed in the Day and De Haven suits. June 5, 1885, judgment of foreclosure was entered in the action, which, among other things, authorized the purchasers on the sale under the judgment to receive on the bid receivers' certificates theretofore issued in the Day and De Haven suits, and to pay over any surplus to the bondholders. The sale under the foreclosure took place August 10,

1885, and the property was bid in by or for a corporation known as the United Lines Telegraph Company, for the sum of \$500,000; and by an order of distribution made July 2, 1894, it appears that the entire proceeds of the sale, above costs and expenses, were applied on receivers' certificates, and were sufficient to pay thereon only 69 per cent of their amount. The Third National Bank of the city of New York never, so far as appears, applied for or received from the receivers any certificates. On the 5th of May, 1885, long after the appointment of the receivers in the Day and De Haven suits, and the appointment of receivers in the foreclosure suit, and about six weeks after it had been served with a copy of the order in the De Haven suit appointing receivers, and enjoining interference with the receivers so appointed, the bank instituted attachment suits in the states of Massachusetts and Rhode Island against the Bankers' & Merchants' Telegraph Company, upon their debt, and caused the attachments to be levied upon the poles and lines and other property of the company in those states, respectively. It is undisputed that the receivers, at the time of these attachments, were in possession of the property of the company in these states, and were operating the lines of telegraph therein, and had been in such possession since their appointment, and this was known to the bank when the attachments were issued. On the 11th of June, 1886, on the matter being brought to the attention of the court in this state, the bank was enjoined from the further prosecution of the attachment suits commenced in Massachusetts and Rhode Island. On July 31, 1885 (the same day on which the judgment of foreclosure was entered), the bank entered into a stipulation, entitled in the foreclosure action, that "in case the petitioner [the bank] shall establish, on a reference to be ordered herein, that it is entitled to share in the proceeds of the sale in preference to the bondholders, then the petitioner shall be paid the amount that it may be adjudged as entitled to receive out of the proceeds." March 19, 1886, the court on motion, in the foreclosure action and the actions of Day and De Haven, directed the bank to cancel and annul of record its attachments obtained in Massachusetts and Rhode Island, so that the property of the telegraph company could be sold on the foreclosure judgment free of all encumbrances created thereby, and that the liens, if any, thereunder, be transferred to the proceeds; but in the order it was directed that the order was not to be taken "as an adjudication that any such lien actually existed, or that the bank is entitled to share in preference to such bondholders." Other facts are stated in the opinion.

Mr. Everett P. Wheeler, with Messrs. Shearman & Sterling, for appellant:

In equity, a person who, at the request of a corporation, furnishes money for the specific purpose of paying an indebtedness which, by law, or the contract of the parties, or by the order of the court, becomes entitled to a preference, is subrogated to the rights of the creditors whose debts are paid by the money so furnished.

Newbold v. Peoria & S. R. Co. 5 Ill. App.

367; *Re Cork & Y. R. Co.* L. R. 4 Ch. 748; *Lidderdale v. Robinson*, 2 Brock. 159. Affirmed, 25 U. S. 12 Wheat. 594, 6 L. ed. 740; *Cole v. Malcolm*, 66 N. Y. 363; *Cottrell's Appeal*, 23 Pa. 294; *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171, Reversing, 10 Hun, 59; *Blackburn Bldg. Soc. v. Cuntliffe*, L. R. 22 Ch. Div. 61; *Eversen v. McMullen*, 113 N. Y. 293, 4 L. R. A. 118.

If a person is induced to pay off debts by representations that turn out to be untrue he becomes subrogated to the rights of the creditors whose debts he has paid.

Barnes v. Mott, 64 N. Y. 397, 21 Am. Rep. 625; *Green v. Milbank*, 3 Abb. N. C. 138; *Sidener v. Pavey*, 77 Ind. 241; *Harris*, Subrogation, § 13; *Lockwood v. Marsh*, 3 Nev. 138; *Cotton v. Dacey*, 61 Fed. Rep. 481; *Mutual L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 74 Hun, 505; *Stevens v. King*, 84 Me. 291; *Flower v. Maus*, 141 Ind. 47; *Draper v. Ashley* (Mich.) 62 N. W. 707; *Stewart v. Stewart*, 90 Wis. 516; *London & N. W. A. Mortg. Co. v. Tracy*, 58 Minn. 201.

The subrogation takes place "without any assignment or act of transfer by or on the part of the mortgagee."

Ellsworth v. Lockwood, 42 N. Y. 89; *Dings v. Parshall*, 7 Hun, 522.

In all cases of subrogation there is no expectation at the time of the original contract that the party advancing the money will be compelled to resort to subrogation.

Connecticut F. Ins. Co. v. Erie R. Co., and *Re Cork & Y. R. Co.* *supra*.

In Rhode Island the mortgage from the Bankers' & Merchants' Telegraph Company to the Farmers' Loan & Trust Company was not recorded as a mortgage of real estate. The law of that state is that a mortgage on real estate, if not recorded in the registry of real estate mortgages, is absolutely void as to all persons except the parties and their heirs.

R. I. Pub. Stat. 1882, chap. 176, § 4, p. 443 in Record, pp. 193, 196; *Harris v. Arnold*, 1 R. I. 125; *American U. Teleg. Co. v. Middleton*, 80 N. Y. 406; *Hynes v. McDermott*, 82 N. Y. 41; *Chapin v. Dobson*, 73 N. Y. 74, 34 Am. Rep. 512.

In Massachusetts the mortgage to the Farmers' Loan & Trust Company was not recorded as a mortgage of personal property. The law of Massachusetts in relation to telegraph poles and wires is peculiar.

The intention of the legislature evidently was to treat these poles and wires as personal property.

Mass. Pub. Stat. chap. 109, pp. 588, 590, § 15; *Ashmun v. Williams*, 8 Pick. 402.

Possession of this mortgaged property was not delivered to or retained by the mortgagee, but the mortgagor remained in possession.

The mortgage, therefore, not having been recorded as a mortgage of personal property, and possession not having been delivered under it to the mortgagee, it is void as against the attaching creditor.

Huntington v. Clemence, 103 Mass. 482.

The attorney for the telegraph company expressly requested that execution should not be issued upon the judgments in Rhode Island and Massachusetts.

He cannot now take advantage of the com-
81 L. R. A.

pliance by the attorneys for the bank with this request.

Shellington v. Howland, 53 N. Y. 371; *Broom*, Legal Maxims, 136, 700; *Root v. Wagner*, 30 N. Y. 9, 86 Am. Dec. 348; *Bernheim v. Daggett*, 12 Abb. N. C. 316.

Orders in the case had made it impossible to collect anything under execution, and had withdrawn the property attached from the jurisdiction of the sheriff. In all such cases it is held that the issuing of an execution is dispensed with.

Shellington v. Howland, *supra*; *Hardman v. Sage*, 124 N. Y. 25; *Ward v. Kilpatrick*, 85 N. Y. 413; *Morton v. Tucker*, 145 N. Y. 244; *Sheffield v. Robinson*, 73 Hun, 173; *Bates v. Masonic Hall & A. Fund*, 7 Misc. 609.

So far as the lines in Rhode Island are concerned which have been shown to be real estate, the appointment of the receivers did not transfer the title.

Chautauque County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347.

Even in regard to the lines in Massachusetts which were personal property, the order appointing the receiver did not operate to transfer the title.

Ongood v. Maguire, 61 N. Y. 524; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; *Fincke v. Funke*, 25 Hun, 616; *O'Callaghan v. Fraser*, 37 Hun, 484; *Brigham v. Luddington*, 12 Blatchf. 237; *King v. Cutts*, 24 Wis. 627; *Adler v. Milwaukee Patent Brick Mfg. Co.* 13 Wis. 57.

If it is desired to transfer the title, an assignment should be directed to be made by the company.

Buswell v. Supreme Sitting O. of I. H. 161 Mass. 224, 23 L. R. A. 846; *Faucett v. Supreme Sitting O. of I. H.* 64 Conn. 170, 24 L. R. A. 815; *Day v. Postal Teleg. Co.* 66 Md. 354; *Port Royal & A. R. Co. v. King*, 93 Ga. 63, 24 L. R. A. 780.

These attachments did not interfere with the receiver's possession. The title remained in the company, and its interest was the subject of attachment.

Dunlop v. Patterson F. Ins. Co. 74 N. Y. 145, 30 Am. Rep. 283; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981.

Mr. William W. Cook, for plaintiff, respondent:

A general creditor cannot claim priority over the bondholders, or a parity with receiver's certificate holders, even though that general creditor loaned the money to the company in order to keep it a "going concern."

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625; *Penn v. Calhoun*, 121 U. S. 251, 30 L. ed. 915; *Re Kelly*, 5 Fed. Rep. 846; *Re Regent's Canal Ironworks Co. L. R.* 3 Ch. Div. 411.

The attachments in Massachusetts and Rhode Island were waived under the stipulation, and were dissolved under the prohibitive order of the court. As a matter of law, even if they had not been waived or dissolved, they were illegal and in contempt of court.

Chafee v. Quidnick Co. 13 R. I. 442; *Vermont & C. R. Co. v. Vermont C. R. Co.* 46 Vt. 792; *Sercomb v. Catlin*, 128 Ill. 556; *Dehon v. Foster*, 4 Allen, 545; *Moore v. Potter*, 87 Hun. 336; *Woerishoffer v. North River Constr. Co.* 99 N. Y. 398.

Andrews, Ch. J., delivered the opinion of the court:

It is claimed in behalf of the Third National Bank that the money loaned to the Bankers' & Merchants' Telegraph Company created a debt which, in equity, was entitled to rank as a charge on the proceeds of the foreclosure sale prior to the claim of the bondholders. It is undisputed that the mortgage to secure the bonds was executed November 23, 1883, and that the loan by the bank was not made until the following May. By the general rule, the bondholders who relied upon the mortgage as security for their debts, which was a specific charge upon the property of the Bankers' & Merchants' Telegraph Company, are entitled to preference in the distribution of the proceeds. The claims of general creditors of a mortgagor are, in general, postponed to the mortgage, even when their debts were contracted prior to its execution. The bank seeks to raise an equity to preference in the case, although its debt was subsequent to the mortgage, by invoking the doctrine upon which courts of equity have acted in the administration of the assets of insolvent corporations,—that expenses incurred by receivers in the management and preservation of the property which is the subject of the receivership may, by order of the court, be made a primary charge, and displace the priority of lien which, in ordinary cases, attaches to a mortgage security existing at the time of the insolvency. The courts have assumed to go still further, and to adjudge priority of payment of debts contracted by a failing corporation within a few months prior to its adjudged insolvency, for labor, supplies, and necessary current expenses incurred in the struggle to keep itself alive. There is a sound equity which supports the doctrine that, when the nature of the property is such that the business to which it has been devoted cannot be discontinued without great probable loss, the court may authorize it to be continued by its officer and receiver pending the closing up of the affairs of the insolvent corporation. Expenses incurred by a receiver under such circumstances may be justly said to be expenses of preservation for the benefit of bondholders or other persons entitled to share in the final distribution, which ought to be first paid. But it is obvious that, with the best intentions, attempts by the court to carry on the business of a railroad or of a telegraph company through its receiver are hazardous, and we think courts may well pause before extending the application of the principle to which we have adverted.

The petitioner in this case is a banking institution, and it loaned its money upon what at the time was ample security, and, as is to be inferred, in the ordinary course of banking business. It had record notice of the mortgage, by the records in this state. Its security, as it has turned out, was inadequate, but by the payment made on the loan, and sale of the bonds taken as security, it has realized on its debt nearly as large a percentage as any of the unsecured creditors of the company whose debts were outstanding at the time of the appointment of the receiver, who received receivers' certificates. The latter received only 69 per cent of their claims. The bondholders

and general creditors received nothing. The bank neither applied for nor received receivers' certificates. But the claim is that when it made the loan the Bankers' & Merchants' Telegraph Company was in pressing need of money to meet its current expenses, and that it was used by the company in paying debts of a character for which receivers' certificates were authorized to be issued by the judgment in the De Haven suit of January 6, 1885. It is also suggested that it was deceived by the assurances of the officers of the company when the loan was made. There is no foundation for the charge of fraud; and, moreover, if any fraud was committed by the company in securing the loan, the bondholders received no benefit, and their rights are not affected. The bank is not in the position of a certificate holder, and only the holders of receivers' certificates were, under the judgment in the De Haven suit, entitled to a preference over the bondholders. The right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is *strictissimi juris*.

Assuming that the bank is entitled to be subrogated to the claims of the persons paid out of the loan, such claims are not entitled to preference out of the proceeds over the claims of the bondholders, because they were not represented by receivers' certificates, and it was only claims so represented which, under the judgment in the De Haven suit, were entitled to preference. The bank has no equity to call upon those who held receivers' certificates, and were paid a part of their claims, to contribute to make the bank equal with them. They secured the proper evidence of their right to participate in the distribution, and the bank neglected to do so. The bank is entitled to no dispensation to give it a standing which it has not acquired. But we think the claim of the bank may properly be denied on the broad ground that a party loaning money to an embarrassed corporation, subsequently adjudged to be insolvent, and taking security therefor, is not in a position which entitles him, in equity, to be adjudged to have a lien on mortgaged property of the corporation, or its proceeds, in preference to bondholders under a mortgage existing when the loan was made, and that it is immaterial for what purpose the loan was made, or how the money received thereon was applied, provided the bondholders were not parties to the transaction. The recent cases, we think, support this view. *Penn. v. Calhoun*, 121 U. S. 251, 30 L. ed. 915; *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538; *Re Regent's Canal Ironworks Co.* L. R. 3 Ch. Div. 411.

The bank presents another and different claim upon which it bases its right to priority of payment out of the fund. It asserts that it acquired a legal lien on the property and lines of the Bankers' & Merchants' Telegraph Company in the states of Massachusetts and Rhode Island by the levy of its attachments in those states May 5, 1885; and it claims that these attachments were prior to the mortgage to the Farmers' Loan & Trust Company, by reason of the fact that it was not recorded in either of those states at the time of the levy of

the attachments. The further claim is made that, under the statutes and decisions in Massachusetts and Rhode Island, attachments levied before the record of a mortgage acquire priority. We are of opinion that the bank can take nothing by its attachments. When they were issued, the property levied upon was in the possession of the receivers in the De Haven suit, who were then engaged in operating the entire lines of the company, including the lines in Massachusetts and Rhode Island, and this was known to the bank when it caused its attachments to be issued. The issuing of the attachments was a contempt of the process of the court. The judgment in the De Haven suit, entered January 6, 1885, by its terms vested the whole property of the company, wheresoever situate, in the receivers appointed thereby, and enjoined all persons from interfering with them in the discharge of their duties. It moreover provided for the issuing of receivers' certificates as a first lien on all the property of the company. The bank, when it caused the attachments to be levied, had full notice of the judgment, having six weeks prior to that time been served with a copy. The bank was a citizen of this state, and amenable to the jurisdiction of its courts. The act of the bank was a clear violation of the injunction, and tended, moreover, to thwart the scheme formulated in the judgment in respect to receivers' certificates. We are of opinion that the bank cannot be heard, in a court of equity engaged in the administration of the proceeds of the mortgaged property, to assert an alleged lien having its origin in a violation of the injunction and judgment of the court. It is not material to consider whether, under the laws of Massachusetts and Rhode Island, the attachments created a lien prior to the mortgage. The bank was bound to submit to the injunction, and an attachment which might ripen into a judgment upon which the sale of the property levied upon could be made was an interference with the receivership, contrary to the spirit and intent of the judgment of January 6, 1885. Upon the whole case, we think the bank failed to show any right to relief, and the orders appealed from should be affirmed.

All concur.

Hugh O'REILLY *et al.*, *Appls.*,

NEW YORK ELEVATED RAILROAD
COMPANY *et al.*, *Respts.*

(148 N. Y. 347.)

An injunction will not be granted in favor of an abutting owner against the maintenance of an elevated railroad in a street in front of his property interfering with easements in the street appurtenant to his property without making compensation therefor, where he is unable to show any actual damage to his property or loss suffered by reason of the presence and operation of the railroad, because on account of it the value of his property has increased greatly and in proportion to the

NOTE.—For injury by elevated railroad to abutting owner's easements in streets, see note to *Egerer v. New York C. & H. R. Co.* (N. Y.) 14 L. R. A. 381. 31 L. R. A.

general increase of values of property in the vicinity.

(February 18, 1896.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of a special term for New York County entered upon the report of a referee dismissing the complaint in a proceeding to enjoin the operation of defendant's railroads until they had made compensation to plaintiffs for easements which they had appropriated. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward W. S. Johnston, for appellants:

Proof by the plaintiffs of an absolute money loss by reason of the acts of the defendants in cases of this character is not necessary in order to secure injunctive relief.

Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; *Rochester Lantern Co. v. Stiles & P. Press Co.* 135 N. Y. 209; *Comer v. Mackey*, 73 Hun, 238; *Maitland v. Manhattan R. Co.* 9 Misc. 616; *Wilson v. New York Elev. R. Co.* 9 Misc. 657; *Smith v. Rochester*, 88 Hun, 614; *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Poughkeepsie Gas Co. v. Citizens' Gas Co.* 89 N. Y. 497; *Knox v. Metropolitan Elev. R. Co.* 58 Hun, 518, 128 N. Y. 625; *Ellicottville & G. V. Pl. Road Co. v. Buffalo & P. R. Co.* 20 Barb. 644; *Wartman v. Swindell*, 54 N. J. L. 589, 18 L. R. A. 44; *Seneca Road Co. v. Auburn & R. R. Co.* 5 Hill, 175; *The Six Carpenters' Case*, 8 Coke, 146a; *Wheelock v. Noonan*, 108 N. Y. 183; *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538; *Dunsbach v. Hollister*, 49 Hun, 352; *Schuyler v. Curtis*, 40 N. Y. S. R. 289; *Wright v. Syracuse, B. & N. Y. R. Co.* 49 Hun, 445; *Gifford v. Babies' Hospital*, 17 N. Y. S. R. 886; *Christie v. Shankey*, 12 N. Y. S. R. 658; *Foster v. Buffalo*, 64 How. Pr. 127; *Caro v. Metropolitan Elev. R. Co.* 14 Jones & S. 138; *Kelk v. Pearson*, L. R. 6 Ch. 809; *Evell v. Greenwood*, 26 Iowa, 377; *Goodson v. Richardson*, L. R. 9 Ch. 221; *Dance v. Goldingham*, L. R. 8 Ch. 902; *Jacomb v. Knight*, 3 De G. J. & S. 538; *Wells v. Attenborough*, 24 L. T. N. S. 312; *Brudley v. Pharr*, 45 La. Ann. 426, 19 L. R. A. 647; *Hart v. Buckner*, 54 Fed. Rep. 925, 2 U. S. App. 488.

An injunction should have been granted.

Blumenthal v. New York Elev. R. Co. 42 N. Y. S. R. 683; *Glover v. Manhattan R. Co.* 19 Jones & S. 1; *Eno v. Metropolitan Elev. R. Co.* 24 Jones & S. 318; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424; *Hawley v. Cramer*, 4 Cow. 718; *Matthews v. Delaware & H. Canal Co.* 20 Hun, 437; *Corning v. Troy Iron & N. Factory*, 39 Barb. 311, 40 N. Y. 191; *Hanty v. Waterson*, 39 W. Va. 214; *Gale v. Gale*, 15 N. Y. S. R. 644; 1 Story, Eq. Jur. §§ 64, 709; *Miller v. McCan*, 7 Paige, 541; *Taylor v. Taylor*, 43 N. Y. 578; *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260; *Sutherland v. Rose*, 47 Barb. 144; *Lynch v. Third Ave. R. Co.* 128 N. Y. 681; *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 95; *Crump v. Ingersoll*, 47 Minn. 179.

At least it should unless the defendants within a reasonable time acquired the title to these easements appropriated by them for the plaintiffs.

Smith v. Rochester, 88 Hun, 614; *Goldsmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Eq. 180, 169; *Foster v. Buffalo*, 64 How. Pr. 127, 182; *Cornwall v. Sachs*, 69 Hun, 288; *Tallman v. Metropolitan Elev. R. Co.* 121 N. Y. 125, 8 L. R. A. 173; *Mackey v. Scottish Widows' Fund Assur. Soc.* 10 Ir. Eq. Rep. 114; *Stokes v. City Offices Co.* 2 Hem. & M. 650; *Blumenthal v. New York Elev. R. Co. supra*; *Stroub v. Manhattan R. Co.* 27 Jones & S. 505; *McElroy v. Kansas City*, 21 Fed. Rep. 257; Code Civ. Proc. §§ 3359, 3369, 3371, 3378; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 149, 13 L. R. A. 788; *Pond v. Metropolitan Elev. R. Co.* 112 N. Y. 186; *Williams v. Brooklyn Elev. R. Co.* 126 N. Y. 100; *Blumenthal v. New York Elev. R. Co.* 137 N. Y. 559.

An injunction is necessary to prevent a multiplicity of actions, and to prevent a continuing trespass, which is threatened by the trespassers to be of a perpetual nature, and which will result in the destruction of the plaintiffs' substantial rights of property.

High, Inj. §§ 852, 860; *Williams v. New York C. R. Co.* 16 N. Y. 111, 69 Am. Dec. 651; *Johnson v. Rochester*, 13 Hun, 285; *Mohawk & H. R. Co. v. Archer*, 6 Paige, 83; *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 81 N. Y. 91; *Crooker v. Bragg*, 10 Wend. 260, 25 Am. Dec. 555; *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 132, 13 L. R. A. 788; *Baron v. Korn*, 51 Hun, 401; *Pappenheim v. Metropolitan Elev. R. Co.* 128 N. Y. 436, 13 L. R. A. 401; *Henderson v. New York C. R. Co.* 78 N. Y. 434; *Ireland v. Metropolitan Elev. R. Co.* 20 Jones & S. 451; *Mudge v. Salisbury*, 110 N. Y. 418; *Clowes v. Staffordshire Potteries Waterworks Co. L. R.* 8 Ch. 125; *Walters v. McElroy*, 151 Pa. 549; *Newaygo Mfg. Co. v. Chicago & W. M. R. Co.* 64 Mich. 114; *Wilson v. Mineral Point*, 39 Wis. 160; *Messenger v. Manhattan R. Co.* 129 N. Y. 502.

Messrs. Julien T. Davies and Reuben Leslie Maynard, for respondents:

An equity court is not compelled to issue an injunction which would afflict the defendants with irreparable loss and occasion the public immeasurable inconvenience, solely upon proof of a mere technical trespass which has not resulted in substantial pecuniary damage to the plaintiff.

Neuman v. Metropolitan Elev. R. Co. 118 N. Y. 618, 7 L. R. A. 289; *Bohm v. Metropolitan Elev. R. Co.* 129 N. Y. 576, 14 L. R. A. 344; *Shepard v. Manhattan R. Co.* 117 N. Y. 442, 131 N. Y. 215; *Lynch v. Metropolitan Elev. R. Co.* 129 N. Y. 274, 15 L. R. A. 287; *McGean v. Metropolitan Elev. R. Co.* 133 N. Y. 9; *Arnold v. Angell*, 62 N. Y. 508; *Brush v. Manhattan R. Co.* 44 N. Y. S. R. 111; *Bookman v. New York Elev. R. Co.* 147 N. Y. 304; *Gray v. Manhattan R. Co.* 128 N. Y. 499; *Brush v. Manhattan R. Co.* 26 Abb. N. C. 73; *Purdy v. Manhattan Elev. R. Co.* 36 N. Y. S. R. 45; *Becker v. Metropolitan Elev. R. Co.* 131 N. Y. 509.

The chief and absolutely indispensable condition to equitable relief in any case where the invasion is fully completed at the time of the commencement of the action is proof of substantial injury.

Doyle v. Metropolitan Elev. R. Co. 136 N. Y. 505; *People v. Canal Board*, 55 N. Y. 390; *Genet* 31 L. R. A.

v. Delaware & H. Canal Co. 123 N. Y. 505; *Gray v. Manhattan R. Co.* 128 N. Y. 499; *Moore v. Brooklyn City R. Co.* 108 N. Y. 98; *Morgan v. Binghamton*, 102 N. Y. 500; *Bookman v. New York Elev. R. Co.* 147 N. Y. 304; 3 Pom. Eq. Jur. 1338, 1347; 1 High, Inj. 8d ed. p. 9.

Others are proof that the trespass complained of is a continuous one; that the plaintiff has no adequate remedy at law; and that a multiplicity of suits will necessarily result if the injunctive relief be not granted.

Troy & B. R. Co. v. Boston, H. T. & W. R. Co. 26 N. Y. 107; *Wheelock v. Noonan*, 108 N. Y. 178; *Williams v. New York C. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Murdock v. Prospect Park & C. I. R. Co.* 73 N. Y. 579; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567.

Benefits, both special and general, conferred by the maintenance and operation of the defendants' railroad, shall be offset against the discomforts and detriment occasioned to the abutting property.

Neuman v. Metropolitan Elev. R. Co. 118 N. Y. 618, 7 L. R. A. 289; *Bohm v. Metropolitan Elev. R. Co.* 129 N. Y. 576, 14 L. R. A. 344; *Bookman v. New York Elev. R. Co.* 137 N. Y. 302; *Sutro v. Manhattan R. Co.* 137 N. Y. 592.

Equity will not interfere by injunction where the injury is not irreparable.

Cockey v. Carroll, 4 Md. Ch. 344; *Atty. Gen. v. Gee*, L. R. 10 Eq. 136; *Snell, Eq. § 562*; *Sargent v. George*, 56 Vt. 627; *MacLaury v. Hart*, 121 N. Y. 636; *People v. Canal Board*, 55 N. Y. 397; *Morgan v. Binghamton*, 102 N. Y. 504; *Genet v. Delaware & H. Canal Co.* 122 N. Y. 505; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 8 L. R. A. 175.

Gray, J., delivered the opinion of the court:

This is one of the many actions which have been brought against the elevated railway companies in New York city, in which the complainants seek the equitable interference of the court, to restrain the defendants from operating their railway in front of their premises. The demand for this equitable relief, in the present case, relates to property upon Ninth avenue and proceeds upon allegations of interference by the defendants with the plaintiffs' enjoyment of the easements of light, air, and access appurtenant to their abutting property. The complaint charges that by reason of the unlawful and injurious acts of the defendants the rental value of the premises has been depreciated, to the extent of \$1,000 a year, since the construction of the road, and that the market value thereof has been diminished not less than \$10,000; wherefore judgment is asked for past damages at the rate of \$1,000 a year and that, if the defendants be permitted to continue the operation of their road through Ninth avenue, in front of their premises, it shall be upon condition that they pay for the value of the rights and easements taken, at least, the sum of \$10,000, as adequate compensation therefor. The case comes to us upon the judgment roll and without the evidence.

The referee before whom the trial was had found all the facts in favor of the plaintiffs, which related to the discomfort and annoyance incidental to the operation of the defendants' road in the deprivation of the beneficial

use and enjoyment of the easements of light, air, and access; but he also found it to be the fact that a general benefit had been produced by the presence of the railway, in which the plaintiff's property participated, and that the fee value of their property had increased since the construction of the road and was of greater value, to the extent of at least \$8,000, than at any time prior to the construction of the railway. He found that "there has been no disparity between the rate of increase in value experienced by the property in question and other property in the vicinity of the line of the elevated road, as would justify the conclusion that the property in question had failed to share in the general increase of values which is shown to have taken place in respect of all real estate in that vicinity." Finding that the plaintiffs had failed to show that the fee or rental value of the premises had been diminished by the acts of the defendants, he found the value of the easements taken, or interfered with, to be the sum of six cents, or nominal merely. His legal conclusions were also favorable to the plaintiffs, to the extent that he found that their right to an unimpaired enjoyment of the easements was a substantial right of property and that the authority of the defendants to construct and operate their railway did not exempt them from the same measure of liability for damages as would attend a totally unauthorized erection and operation of such a structure. He even found that, even though no diminution in the money value of the premises was shown, equity may forbid the continuance by the defendants of their interference with the appurtenant easements. His determination, however, was that, though the plaintiffs had shown title to the property in question and to the easements of light, air, and access appurtenant thereto, and though the defendants had appropriated such easements without the sanction of the plaintiffs and without having made compensation therefor, yet, as the plaintiffs had failed to show that any substantial loss had resulted to them, or that other than nominal damages had been suffered, and because it appeared that to grant the equitable relief prayed for would involve serious public inconvenience, judgment should be directed dismissing the complaint; "but without prejudice to the right of the plaintiffs to bring such action as they may hereafter be advised, based upon facts not inconsistent with those herein adjudged."

Thus, equitable relief by way of injunction was refused to the plaintiffs in the court below, upon the ground that, notwithstanding the defendants had interfered with the easements in the street which were appurtenant to the abutting property and, to the extent of that interference, were quasi trespassers upon the plaintiffs' rights, nevertheless, as the benefits resulting to the property from the presence and operation of the elevated railway had greatly enhanced its value, and in equal measure with other property in the vicinity, off of the line of the railroad, the trespass was but technical and only nominal damages of six cents should be allowed.

The contention of the appellants is that proof of a monetary damage is not necessary, and that the court may not, and must not, re-

fuse an injunction, where substantial rights of property are invaded; even if the damage to those property rights cannot be measured by a money standard. We cannot approve of that proposition, as applicable to the present case, without being in conflict with the authority of our previous decisions, as well as with what I believe to be the sound equitable principle. However plausible the argument which is advanced and which rests upon the general notion that the right to the injunction is not to be determined by the extent of the damage, I think that, where the gist of the action is an actual damage suffered by property, it must be proved as a fact in the case; or else the court is at liberty to disregard the mere technical trespass and to refuse its writ of injunction. It is true that the discretion of a court of equity is not to be arbitrarily exercised, and that it should be regulated upon grounds that make it judicial; but there is neither a feature in this case which appeals to the conscience of a court of equity, nor one which compels the application of the equitable principle of interference. There are, of course, the facts that the defendants have come into the street, and that they have appropriated certain easements appurtenant to the abutting property, without making compensation therefor, or offering to do so; but the trespass (to use a term now somewhat commonly applied to these invasions of easements) was merely technically such and caused no actual damage.

Equitable relief by way of injunction in cases of trespass may often depend for its award upon the nature of the particular case. In such cases the court must look into them to see if a strong case of actual and irreparable mischief is presented and if the circumstances justify equitable interference. In *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484, Chancellor Kent considered at some length the practice of granting injunctions in trespass, and reached conclusions which are valuable enough to be referred to here. Adverting to the sufficiency, in ordinary cases, of the common-law remedy by action, he says: "I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless." He declares this to be the English doctrine, in conformity with which the court had proceeded, and he says: "I do not know a case in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass." He sums up the results of the decisions in England and in this state as follows: "These cases all show that, in respect to acts of trespass committed upon land, even by persons in a public trust, under color of law, the court has not interfered by injunction unless where the trespass was permanent as well as grievous, or went to destroy the value of the property to the owner. It is not sufficient that the act be simply *per se* a trespass, but it must be a case of mischief and of irreparable ruin to the property in the

character in which it has been enjoyed." In *Kerlin v. West*, 4 N. J. Eq. 449, the chancellor of New Jersey, citing *Jerome v. Ross*, observed: "I am satisfied that the court of chancery should not interfere in a case of naked trespass, where there is a full remedy at law." In *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 123, Danforth, J., observed that trespass alone will not authorize the interference of a court of equity, and quotes from Chancellor Kent's opinion in *Jerome v. Ross*, *supra*, upon the proposition that where damages are nominal, the court should not assume cognizance of the trespass and lay the interdict of an injunction. In all the cases which have come before the court in the course of this elevated railway litigation, the complainants, where they have been awarded judgment in their favor, have recovered upon the theory that the defendants' acts were causing an injury through an invasion of certain property rights in the street and, because the trespass was a continuing one, the court interfered to restrain it, in order to prevent irreparable injury and a multiplicity of suits. The action has always been regarded as one for the recovery of damages to the complainant's property, however equitable in its form. Allegations of damage are not necessary, in the sense that the amount which the plaintiff should recover enters into the determination of the right to the equitable relief; but they are necessary in order that the court may determine whether, as alleged and shown, they are of such substance as to warrant the equitable intervention of the court. *Gray v. Manhattan R. Co.* 128 N. Y. 499; *Shepard v. Manhattan R. Co.* 131 N. Y. 215. In the former case it was said in the opinion, upon the question of the materiality of the damage: "Unless the court had found it to be substantial, it could, in the exercise of its discretion, have withheld the injunction and left the plaintiff to his remedy at law. An equity court is not bound to issue an injunction when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right." A number of authorities might be adduced in support of that proposition; but it is too evident to require it to be done. In *Hunter v. Manhattan R. Co.* 141 N. Y. 281, it was observed: "The question for the tribunal in each case is, whether by the construction and operation of the elevated railroad, there has been an intrusion upon the complainant's property rights, to his actual prejudice and damage." In *Doyle v. Metropolitan Elev. R. Co.* 136 N. Y. 505, it was said: "The proof of damages was an indispensable element of the plaintiff's case, and it cannot be supposed that a court of equity would entertain jurisdiction to restrain a trespass that was not shown to have produced any damage or loss to the plaintiff." Quite recently, in *Bookman v. New York Elev. R. Co.* 147 N. Y. 298, it was held that the decree recovered by the plaintiffs was erroneous, in view of the fact that the finding that the plaintiffs' property was injured by the railroad over and above all benefits conferred was wholly unsupported by the proof. The theory adopted in that case by the court in its decision was, practically, that if benefits only are shown to have been caused as the result of the

construction and operation of the elevated railway, the complainants are without right to equitable relief, as well as not entitled to any award of damages.

In this class of litigation, in which the court has been engaged for a number of years, it not only has never been assumed that a complainant against the elevated railway companies might recover a judgment for equitable relief by way of injunction, upon the mere basis of the unlawful intrusion by the elevated railway companies upon his easements in the street, without proof of actual damage sustained; but it has been frequently held, as shown by the cases above referred to, that there must be proof of a substantial damage to the plaintiff's property to warrant the granting of the equitable relief demanded. It is perfectly true that the defendants are quasi trespassers with respect to the plaintiffs' easements in the street in front of their property. But, so far from the trespass being shown to be destructive of the value of their estate, or to have inflicted an irreparable injury, the proof is that the value of the property has been greatly enhanced and that it has shared equally in the general rise of value. Therefore, the only ground for the claim of the plaintiffs, that they are entitled to equitable relief, is in the mere fact that the defendants have invaded their rights in the public street, without their consent and without having first condemned the same by an exercise of the right of eminent domain. It must be borne in mind, however, that the defendants, in occupying the street with their structure and in operating a railroad thereupon, were carrying out the provisions of their charter and were subserving the public interest and convenience, as all corporations of a public, or quasi public, nature are presumed to do. I do not mean to say, because they are in the street by authority of law, that that protects them against the consequences of their acts, when in invasion of those private rights which are secured to property owners. But it seems to me to be perfectly clear that the court, when appealed to by the property owners to enjoin the operation by the corporation of its franchises, upon the ground that certain easements have been invaded, will consider the fact that the corporation is there for the public convenience and is executing a quasi public work, and, if it finds that no injury is in truth inflicted and that the property owner has suffered no actual damage, it may and should refuse to grant the relief prayed for. A court of equity has a certain latitude in the exercise of its great power, and under no authority or rule with which I am acquainted is it compelled to grant an injunction in a case like the present one, which belongs to a peculiar class and is governed by a doctrine of recent growth in the courts. The court recognizes the fact that the defendants had the right to appropriate the street easements by condemnation proceedings and, hence, when appealed to, to enjoin them from operating their franchises, it looks into the question of the substantial nature of the damage alleged to have been done to the property, or of the loss suffered by the owner. If it is found to be such, then the court proceeds in the matter as though the proceeding was

one to condemn to the defendants' uses the property appropriated, and, having ascertained the value of the property, it suspends the decree, which it finds the plaintiff is entitled to, to restrain the continuance of the defendants' acts for a sufficient period within which to permit the defendants to acquire the right to appropriate the easements through a conveyance, as a condition of avoiding the enforcement of the decree. The proceedings by which the court ascertains and fixes the damages done to the abutting property in the deprivation of easements are, in fact, but a substitute for condemnation proceedings. If the plaintiffs fail to establish that substantial injury had been inflicted upon their property, a decree enjoining the operation of the railroad would be unwarranted. One of the very grounds, and a main one, upon which equity proceeds in granting relief, by way of injunction against the unlawful acts of the defendants, would have been wanting if no actual and irreparable damage were shown.

I have not overlooked the many authorities to which the appellants' counsel has called attention; but I think it quite unnecessary to review them. There may be some embarrassment in reconciling all that has been decided in the courts, with respect to the practice of granting injunctions in trespass. But that embarrassment seems to arise from the difficulty of applying the principle of equitable interference to the differing circumstances of the cases. The case of *Corning v. Troy Iron & N. Factory*, 40 N. Y. 191, relied upon by the appellants, was an action to obtain a perpetual injunction, restraining the defendant from diverting the waters of a stream along the lands of the plaintiffs, and the question being as to the legal rights of the parties, it was held that the defendant had acquired no right to divert the water. The dispute, in fact, was over the title to the stream and whether the defendant had acquired any rights as against the plaintiffs and their grantors. There Judge Woodruff in his opinion observed: "If it was clear that the restoration of the water was of no value to them, the case would not call for equitable interference. We cannot, however, say that the case so stands upon the evidence." So the case of *Smith v. Rochester*, 38 Hun, 612, was one of an action brought to restrain the diversion of the waters of a lake by a municipal corporation; by which plaintiff's riparian rights upon a stream were violated. The defendant, acting in pursuance of an act of the legislature, for the purpose of supplying its citizens with water, was drawing off the waters of the lake

through an iron pipe. Without commenting upon the opinion which prevailed in that case, it is sufficient to observe that the circumstances were not such as to make it an authority in point here. It may also be repeated, as a pertinent observation, in connection with that and other cases, that the defendants here were in the street by direct authority of law; although, with respect to private rights in the street not taken by eminent domain, they may have been quasi trespassers. In other words, the defendants were rightfully and lawfully in the public street; but, in so far as they had failed to make compensation for any damages suffered by abutting property owners, they were at fault and therefore liable in an action at law to respond in damages to the abutting owner; or were subject, in an equitable action, to be enjoined with respect to the operation of their franchises, unless compensation was made to the abutting owner for the ascertained damages.

The suggestion by the appellants' counsel that a reason exists for the granting of an injunction, even in the absence of any proof of damage to the property measured by a monetary standard, in the fact that the continued tortious acts will eventually give to the defendants title to the property rights which they have wrongfully appropriated, is met, in this case, by the form of the decree. It is "without prejudice to the right of the plaintiffs to bring such action as they may hereafter be advised, based upon facts not inconsistent with those herein adjudged." This leaves it entirely open to them in the future, and before the defendants could acquire any adverse rights, if they are able to prove any actual damage or loss, to commence an action against the defendants and to obtain such relief at law or in equity as the case shall warrant.

Without continuing further the discussion, it is sufficient to say, in conclusion, that we do not feel compelled by authority, nor upon principle, to hold that the court must grant relief by way of injunction in a case where the plaintiffs are unable to show any actual damage to their property, or loss suffered, by reason of the defendants' acts, and in the face of the fact that, by reason of the presence and operation of the elevated railroad in the street, the value of their property has greatly increased, and that it has shared equally with all the property in the vicinity in the general increase of values which has taken place.

The judgment should be affirmed, with costs.

All concur.

CALIFORNIA SUPREME COURT (In Banc).

Jesse HUNTER, *Appt.*,
r.

Jane Elizabeth HUNTER, *Respnt.*

(.....Cal.....)

1. A decree of divorce in favor of a wife, rendered without service on the husband

NOTE—As to presumptions flowing from marriage ceremony, see note to *Meggison v. Meggison* (Or.) 14 L. R. A. 540.

31 L. R. A.

and when his whereabouts were unknown, does not estop her from alleging subsequently that he was dead at a time before the divorce was granted.

2. Affidavits stating that at the time of marriage the affiant was the wife of another man do not estop her from subsequently denying that fact and explaining that the affidavits were made upon the strength of a rumor.

3. The presumption in favor of the

legality of a marriage regularly solemnized will prevail over the presumption of the continuance of the life of a former husband who has been absent and unheard of for less than seven years.

(February 15, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in favor of defendant in an action brought to annul a marriage. *Affirmed.*

The facts are stated in the opinion.

Messrs. Knight, Simpson, & Harpham for appellant.

Mr. S. A. W. Carver, for respondent:

The burden of proof was on the plaintiff throughout the whole case.

A marriage entered into by a minor fifteen years of age against the consent of the parents, and which was renounced within ten days thereafter, was not valid.

Lyndon v. Lyndon, 69 Ill. 43; *Robertson v. Cole*, 12 Tex. 356; *Moot v. Moot*, 37 Hun, 288.

The circumstance of the second marriage gives rise to a collateral presumption that the death occurred prior to that marriage.

Johnson v. Johnson, 114 Ill. 616, 55 Am. Rep. 888; Bishop, Mar. & Div. §§ 452-456; 1 Greenl. Ev. § 41.

When a marriage is shown in fact, the law raises a strong presumption in favor of its legality, and the burden is with the party objecting to its validity to prove that it is not valid.

Bishop, Mar. & Div. §§ 457, 458; 1 Greenl. Ev. §§ 39-35; *King v. Twynning*, 2 Barn. & Ald. 386; *Yates v. Houston*, 3 Tex. 449; *Dixon v. People*, 18 Mich. 84; *Senser v. Bower*, 1 Penr. & W. 450; *Hull v. Rawls*, 27 Miss. 471; *Chapman v. Cooper*, 5 Rich. L. 452; *Boulden v. McIntyre*, 119 Ind. 574; *Le Brun v. Le Brun*, 55 Md. 496; *Carroll v. Carroll*, 20 Tex. 731; *Lockhart v. White*, 18 Tex. 102; *Kelly v. Dreit*, 12 Allen, 107, 90 Am. Dec. 188.

The record and decree in the divorce proceedings are lacking in several of the essentials to an estoppel. As an estoppel *in pais* it is wholly insufficient.

Boggs v. Merced Min. Co. 14 Cal. 368.

As *res judicata* it could only work an estoppel, in any case, as between the same parties and upon the same subject-matter.

Freem. Judgm. 159.

So far as the decree of divorce is considered as a judgment *in rem*, it is binding on the whole world only in the sense that it fixes the status of the parties thereafter as being one of divorcement and release from the marriage bonds.

2 Bishop, Mar. Div. & Sep. ¶ 187; *Williams v. Williams*, 68 Wis. 58, 53 Am. Rep. 253; *Boulden v. McIntire*, 119 Ind. 574; *Holmes v. Holmes*, 4 Lans. 888; *Elliott v. Wohlforn*, 55 Cal. 384.

A putative may be converted into a true marriage by the impediment ceasing to exist.

1 Bishop, Mar. Div. & Sep. ed. 1891, §§ 345, 955, 961, 970, 975; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245; *State v. Worthingham*, 28 Minn. 528; *Cole v. Cole*, 5 Sneed, 57, 70 Am. Dec. 275; *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Rose v. Clark*, 8 Paige, 31 L. R. A.

574; *Donnelly v. Donnelly*, 8 B. Mon. 118; *Teter v. Teter*, 88 Ind. 494; *Smith v. Smith*, 1 Tex. 621, 46 Am. Dec. 121; *Yates v. Houston*, 3 Tex. 438; *Lee v. Smith*, 18 Tex. 145.

*On petition for rehearing.**

The fact that the plaintiff and defendant had lived together as husband and wife for twenty-two years, until this rumor as to Milam's being alive was heard, supposing in good faith that they were husband and wife, as both parties concede, would greatly weaken the force of such rumor as evidence, as well as the force of such declarations as admissions.

Le Brun v. Le Brun, 55 Md. 496; *Johnson v. Johnson*, 114 Ill. 615, 55 Am. Rep. 888; *Gerlach v. Turner*, 89 Cal. 446.

Such declarations are at most only admissions of defendant inconsistent with her present position, and could only be used by plaintiff by way of impeachment of defendant's testimony in case she should take the stand herself on the trial and testify differently, or possibly in rebuttal of such testimony.

Mechem v. McKay, 37 Cal. 154; *Johnson v. Powers*, 65 Cal. 179.

The mere declarations or admissions of one of the parties to the marriage are not sufficient to annul or dissolve it.

Le Brun v. Le Brun, *supra*; *Gaines v. Relf*, 58 U. S. 12 How. 472, 13 L. ed. 1071; *Harman v. M'Leland*, 16 La. 28; *Montgomery v. Montgomery*, 3 Barb. Ch. 132; *Clayton v. Wardell*, 5 Barb. 214; *Jones v. Jones*, 48 Md. 391, 30 Am. Rep. 466; *Cope v. Cope*, 5 Car. & P. 604; *Myatt v. Myatt*, 44 Ill. 473; *Richardson v. Richardson*, 30 Am. Dec. 544, note; Cal. Civ. Code, § 130; 2 Bishop, Mar. & Div. § 294.

While decrees of divorce are in general terms called judgments *in rem*, yet, by all authorities who have closely considered the question they are declared to be only quasi *in rem*, like attachment and other similar suits.

Brown, Jur. § 59a, p. 168, note 1, §§ 70, 75; *Woodruff v. Taylor*, 20 Vt. 73; *Lord v. Chadbourne*, 42 Me. 443, 66 Am. Dec. 290; *Waples*, Proceedings in Rem, § 598; *Burien v. Shannon*, 3 Gray. 387; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Gouraud v. Gouraud*, 3 Redf. 262.

As against strangers to the suit, a decree of divorce is not evidence of the marriage of the parties to it.

Freem. Judgm. § 154, p. 281; *Fox v. Fox*, 25 Cal. 588.

The presumption in favor of the validity of an actual ceremonial marriage is "one of the strongest known to law."

Schmisseur v. Beatrie, 147 Ill. 210.

The presumption of the validity of the marriage is so much stronger than that of the continued life of Milam, that upon the consummation of said marriage in July, 1862, it immediately overcame the presumption of life, and gave rise to the presumption of Milam's death prior thereto.

The occurrence of the second marriage also brings into existence the presumption that the parties to it are innocent of the crime of bigamy or of adultery, which is a much stronger presumption than that of continued life, even

*This case was decided in department on August 3, 1895. Petition for rehearing was then filed, after which the opinion published herewith was handed down.

though the other party has been absent or unheard of much less than the statutory period of seven years. The effect is that there is at once induced the presumption of the prior death of Milam.

Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 888; *Myatt v. Myatt*, 44 Ill. 478; *Hull v. Rawls*, 27 Miss. 471; *Yates v. Houston*, 8 Tex. 433; *Lockhart v. White*, 18 Tex. 102; *King v. Tuynning*, 2 Barn. & Ald. 386; *Kelly v. Drew*, 12 Allen. 107, 90 Am. Dec. 138; *Spears v. Burton*, 31 Miss. 547; *Greensborough v. Underhill*, 12 Vt. 604; *Dixon v. People*, 18 Mich. 84; *Jackson, Van Buskirk v. Claw*, 18 Johns. 346; *Chapman v. Cooper*, 5 Rich. L. 452; *Canady v. George*, 6 Rich. Eq. 103; 1 Bishop, Mar. Div. & Sep. ed. 1891, §§ 949-955.

The fact of the marriage between plaintiff and defendant in 1862 gave rise to a fourth presumption of fact which strongly supports the validity of the present marriage, to wit, the presumption that Milam had previously obtained a divorce.

Carroll v. Carroll, 20 Tex. 781; *Hull v. Rawls*, *supra*; *Coal Run Coal Co. v. Jones* (Ill.) 8 N. E. 866; *Boulden v. McIntire*, 119 Ind. 574; *Schmisseur v. Beattie*, *supra*; *Blanchard v. Lambert*, 43 Iowa, 228, 22 Am. Rep. 245.

The occurrence of a second marriage has in every case been held to have the effect of pressing forward the date of presumptive death, locating it prior to such second marriage.

Davie v. Briggs, 97 U. S. 627, 24 L. ed. 1086; 14 Am. & Eng. Enc. Law, pp. 521, 522.

Cohabitation after the impediment ceased to exist makes valid the second marriage.

Cartwright v. McGown, 121 Ill. 888; *White v. White*, 82 Cal. 427, 7 L. R.A. 799; *United States v. Hays*, 20 Fed. Rep. 710; *Jackson, Van Buskirk v. Claw*, and *Carroll v. Carroll*, *supra*.

The rule as to condonation applies to nullity as well as divorce suits.

1 Bishop, Mar. Div. & Sep. §§ 545, 795, 1757; 2 Bishop, Mar. Div. & Sep. §§ 282, 808; *Shelford, Mar. & Div.* 182, 365; 1 *Fraser, Dom. Rel.* 709; *Stewart, Mar. & Div.* § 108; *O'Dea v. O'Dea*, 31 Hun. 441; *Miller v. Miller*, 83 Cal. 355; Cal. Code, chap. 2, title 1, pt. 3, div. 1, *Divorce*.

Temple, J., delivered the opinion of the court:

The action was brought to annul a marriage between the parties, entered into on the 3d day of July, 1862, upon the ground that defendant had another husband, to wit, Joseph Milam. It is now conceded that defendant was married to Joseph Milam in February, 1858, when defendant was but fifteen years of age; that she lived with Milam as his wife for ten days, when she was taken away by her parents, and went to Salt Lake. It does not appear how long she was absent from San Bernardino, but it could not have been a very long time, for she testified that she lived at San Bernardino, after her marriage to Milam, about four and a half years, when she married plaintiff. Only about that period elapsed between her first and second marriages. She testified that Milam left a few days after her marriage to him, and she had heard nothing of him since. Plaintiff and defendant lived together as husband and wife at Los Angeles for about twenty-two years,

-31 L. R. A.

when, as defendant testified, she was told by her nephew, who lived in Arizona, that he had met a brother of Joseph Milam, who said Joseph Milam was living at Walla Walla. This is all she has ever heard in regard to Milam since he left San Bernardino. She then commenced an action against Joseph Milam to secure a divorce. In her verified complaint, filed December 21, 1888, she describes herself as Jane Elizabeth Milam, and states that plaintiff and defendant were married in February, 1858, and ever since have been, and now are, husband and wife, and that defendant resides out of the state of California. On the same day she made and presented to the court her affidavit to procure the publication of summons, in which she stated that defendant resides out of the state, that his last residence within the state was in Pajaro, in Santa Cruz county; that through knowledge derived from his brother she believes he resides at Walla Walla, in Washington territory. Such proceedings were had in the action that on the 29th day of March, 1894, a decree was entered dissolving the marriage between Joseph Milam and the defendant, plaintiff in that action. Certain findings were also filed, and purport to constitute part of the judgment roll, but, as there were no issues to try, and judgment was entered on default, express findings were unauthorized, and add nothing to the necessary adjudication. Subsequently defendant commenced an action against the plaintiff to have her marriage with him declared void on the same ground on which plaintiff now seeks relief, to wit, that at the time of her marriage with him her first husband, Joseph Milam, was living, and she had not been divorced from him. The complaint in that suit was also verified. The action was finally dismissed by her before it came to judgment. Two of plaintiff's brothers testified that at the time the parties to this action were married they heard travelers say the man defendant married was still living there (San Bernardino). It is, however, pretty certain that he was not then living at San Bernardino. This is all the evidence contained in the record upon this subject.

It is contended, first, that the judgment in the divorce suit is conclusive upon defendant that she was divorced from Milam; that is, that Milam was then alive, and that until the decree was entered she was his wife. But this adjudication as such did not bind Milam. He was not served with summons, and was without the state, and the action was therefore strictly *in rem*. "No sovereignty," says Story, Conf. L. § 539, "can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. The *res* before the court was the status of the plaintiff in the divorce suit. No service of summons being had, it was not an action *inter partes*, but a proceeding affecting only the status of the wife. "It did not establish, but recognized and presupposed, the relation of husband and wife as previously existing." *Burlen v. Shannon*, 3 Gray, 387. It was conclusive against all the world that the plaintiff in that suit was no longer the wife of Joseph Milam, and it was an adjudication of nothing else. No one would claim that Milam would be estopped by the decree to deny that

he had ever been married to defendant, or, had he remarried and had children, that the decree would be evidence of their bastardy. Milam may have been previously divorced, and in such case there would be two valid decrees, which, on the theory that they constituted an adjudication of marriage at the time of the divorce, conclusive against the world, would contradict each other, and yet both be binding on all the world. See, on this point, *Gill v. Read*, 5 R. I. 843, 78 Am. Dec. 73; *Gouraud v. Gouraud*, 3 Redf. 262; Freem. Judgm. 154. But since the court had jurisdiction to declare the status of Mrs. Milam as affected by an assumed marriage with Joseph Milam, and did adjudge that she was no longer the wife of Joseph Milam, it would follow that he could no longer be her husband. He was thus affected by the judgment as he would have been by the death of his wife, and this resulted simply from the fact that the status of his wife was changed. So far, and no further, the judgment bound him and all the world. That being so, it must follow that as an adjudication it bound her no further. Had she borne children to Hunter, the judgment would have estopped neither such children nor her to deny that she was the wife of Milam when she married Hunter.

It is further contended that her affidavits are conclusive evidence against her. Three times she stated under oath that she was the wife of Milam when she was married to Hunter. This is very strong testimony against her, but is only strong evidence. It is not an estoppel. She went upon the stand as a witness for herself, and explained that she made those affidavits upon the strength of a rumor she heard. This was all she had heard. The court found in her favor, and must have believed her statement. The statements made by plaintiff's brother do not show that Milam had been heard from, and if defendant's testimony was true, such statements must have been unfounded. The court could well find that there was no authentic information to the effect that Milam was alive.

But it is said the marriage of the parties to this suit took place only about four and a half years after the marriage to Milam, and it will be presumed that Milam was alive, in the absence of proof to the contrary. There was no proof tending to show that Milam was dead, or that his chance for life was below the average; therefore it is contended the court should have found that he was alive. This presumption of the continuance of life is, however, overcome by another. It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years: or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement perhaps would be that the burden is cast upon the party asserting guilt or immorality to prove the negative,—that the first marriage had not

ended before the second marriage. A few cases will best illustrate the rule. *King v. Treynning*, 2 Barn. & Ald. 386, was a question as to a settlement, which depended upon the validity of a second marriage of Mary Burns. She was a pauper, and married about twelve months after her husband had enlisted as a soldier in foreign service. The second marriage was held good. The court said: "The law presumes the continuance of life, but it also presumes against the commission of crimes, and that even in civil cases, until the contrary is proved." This was the question in *Rex v. Harborne*, 2 Ad. & El. 540. It was said that there was no absolute presumption, but that it was a question for the jury to determine under the circumstances of the case, and a verdict convicting a defendant of bigamy was upheld on proof that the husband was alive twenty-five days before the second marriage. See also *Reg. v. Lumley*, L. R. 1 C. C. 196. *Murray v. Murray*, 6 Or. 17, involved the legitimacy of the children of a second marriage. It was held that the presumption of innocence should be preferred, but the presumption was not absolute, and the question would depend upon the special circumstances of the case. In *Lockhart v. White*, 18 Tex. 102, Mrs. Waggoner had been separated from her husband about five years. One witness had heard of him since the separation. The court said: "There is no evidence that Waggoner had been heard of within twelve months (though that exact time is not necessary to raise a favorable presumption) prior to the marriage with Allsbrooks, and under the rule established in the above case the continuance of the life of Waggoner will not be presumed. The second marriage was consequently lawful and valid." It was also said that the presumption of the continuance of life was weaker, and must yield to the presumption of innocence. *Sharp v. Johnson*, 22 Ark. 79, was a case involving a question of heirship depending upon legitimacy. This depended upon the validity of a marriage. The court refused an instruction to the effect that the former wife, if alive within five years before the last marriage, was presumed to be still alive. The ruling was affirmed, and the court quoted from Mathews on Presumptive Evidence: "A charge of an act of immorality, or of disobedience of a positive law, will not be received unless supported by direct evidence. Circumstances showing probability merely are not enough; the fact averred must be conclusively proved." *Klein v. Laudman*, 29 Mo. 259, was an action of slander, and a similar ruling was made. *Spears v. Burton*, 31 Miss. 547, involved the question of legitimacy, and it was held that the presumption of continuance of life would not establish a crime, even in a civil case. To the same effect is *Greensborough v. Underhill*, 12 Vt. 604. The question in that case was as to settlement. *Schmisseur v. Beatrice*, 147 Ill. 310, was a case involving the question of legitimacy. It was proved that an absent husband was alive at the time of the marriage, and the court held that in favor of this second marriage it would presume that the absent party had obtained a divorce, and that the burden of proving that such divorce had not been obtained was on the party alleging the invalidity of the second. It is

said that a contrary doctrine is established in *People v. Stokes*, 71 Cal. 263. This precise point was not there discussed, although it was raised. The court contented itself with asserting the general proposition, which no one disputes, that the presumption of life continues for seven years. The fact that there were conflicting presumptions must have escaped the attention of the court, otherwise the case is in conflict with all the cases upon the subject and with all the text books. We cannot hold that this long line of decisions, in which there is no break, has been overruled in a case in which the point was not discussed.

The court found for the defendant upon all points, notwithstanding the fact that owing to her former statements under oath her testimony was justly subject to grave suspicion. If her explanation of the former affidavits was true,

I think it sufficient. We cannot reverse the judgment for insufficiency of the evidence.

As the appeal from the judgment was taken too late, we cannot consider the objections to the allowance of alimony. A new trial is a re-examination of an issue of fact in the same court after a trial. The allowance of alimony is an incident to an action for a divorce, and, although the determination as to its allowance may involve a controversy as to facts, such determination is not the trial of an issue in the case. It may be before or after trial.

The appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

We concur: **McFarland, J.; Van Fleet, J.; Harrison, J.; Garoutte, J.; Henshaw, J.**

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Robert H. McCUTCHEON *et al.*, *Appts.*,
v.

MERZ CAPSULE COMPANY.

(71 Fed. Rep. 787.)

1. **A sale of the entire manufacturing plant, including patents, processes, and goodwill,** of a corporation, with an agreement that it would never again engage in the same business, made in consideration of stock in a new corporation, without intending to wind up the affairs of the former, but with the object of continuing its corporate life and activity, to be exercised through the other corporation,—is *ultra vires* and void.
2. **The consent of stockholders cannot legalize** or vitalize a void illegal contract by which a corporation attempts to transfer all its property to another company in consideration of shares in the latter.
3. **Affirmative relief in equity against an illegal contract** by a corporation to transfer its entire plant and business to another company, and a conveyance in pursuance thereof, may be given to the extent of an injunction against interference with the title or possession of the original corporation, where, before actually surrendering the possession of its property or receiving all the consideration, it repudiated the whole scheme and tendered back all that it had ever received, and has kept the tender good.

(January 7, 1896.)

A PPEAL by defendants from a decree of the Circuit Court of the United States for the Eastern District of Michigan in favor of complainant in a proceeding brought to enjoin defendants from interfering with property in possession of complainants. *Affirmed.*

Before Taft and Lurton, Circuit Judges, and Hammond, District Judge.

Statement by **Lurton, J.:**

Two corporations and two partnerships, sev-

NOTE.—For similar case, see *Byrne v. Schuyler Electric Mfg. Co.* (Conn.) 28 L. R. A. 304.

31 L. R. A.

erally engaged in the manufacture and sale of hard, empty, gelatine capsules, entered into an agreement, dated November 29, 1893, for the combination and consolidation of their several properties and business interests. The plan by which this was to be accomplished is fully set out in the agreement here following:

"This agreement was made on the 29th day of November, 1893, between the National Capsule Company, a corporation organized under the laws of the state of New Jersey, and doing business at Indianapolis, Indiana; the Merz Capsule Company, a corporation organized under the laws of the state of Michigan, and doing business at Detroit, Michigan; J. E. Warren and James Wilkie, copartners doing business at Detroit, Michigan, as the Warren Capsule Company; and John A. Grogan and W. H. Warren, copartners doing business at Detroit, Michigan, as the Michigan Capsule Company.—Witnesseth: (1) That said parties agree to organize a corporation for the manufacture and sale of hard, empty, gelatine capsules. The main office and point of shipment of the goods manufactured by said company to be at Detroit, Michigan. The capital stock to be \$70,000, allotted among the parties hereto as follows: \$20,000 each to be allotted to the National Capsule Company, the Merz Capsule Company, and jointly to the parties doing business as the Warren Capsule Company, and \$10,000 to be allotted jointly to the parties doing business as the Michigan Capsule Company. Three quarters of the stock allotted to each of the said parties shall be issued at the time of the organization of the company. The remaining one quarter of each allotment shall be held as treasury stock of the new company until the several parties shall demonstrate that the present capacity of their respective plants is as follows: The National Capsule Company, at least twenty gross of completed capsules per day; the Warren Capsule Company, at least twenty gross of completed capsules per day; the Michigan Capsule Company, at least ten gross of completed capsules per day. The capacity of each plant to be de-

terminated by the average amount produced during a test of five consecutive days of ten hours each, to be had in the presence of representatives of each party, and under ordinary conditions of manufacture. Such test to be had within three months from the date of the said organization of said corporation, unless said test shall be prevented by reason of injury or destruction of the plant by the elements, or for other good and valid reasons, in which case a reasonable time in addition shall be allowed to restore the plant to a proper working condition. In case any of the parties above named shall fail to demonstrate that the capacity of their plant is as above stated, the 25 per cent of stock retained by said corporation shall be forfeited by said party, and remain the property of the corporation. (2) The parties hereby agree to sell and convey to said corporation, upon its organization, free and clear from all encumbrances, their respective plants operated by them in the manufacture of hard, empty, gelatine capsules, including all real estate owned and used by them for such purpose, together with all machinery and appliances of every kind pertaining thereto, stock in trade, goodwill, all patentable devices, labels, trademarks, trade secrets (except processes for treating gelatine), now owned by said parties, and used in connection with the business of manufacturing hard, empty gelatine capsules, and in payment therefor (except for manufactured stock or boxes or raw materials) to receive from said corporation mortgage bonds to the amount of the appraised value of the property thus conveyed to said corporation. Said bonds to bear interest at 8 per cent per annum, payable five years from the date of issue, and only sufficient amount of bonds to be issued to cover the value of the property conveyed to said corporation by all of the parties hereto. Said bonds to be secured by mortgage covering all of the property of every kind belonging to said corporation. The value of the property conveyed to said corporation by the respective parties shall be determined in the following manner: If all of the parties hereto are unable to agree upon the value of the property conveyed by each, the value of the real estate now owned by each party in Detroit shall be appraised by three disinterested competent persons, one to be chosen by the National Capsule Company, and one by the other three parties, and the two so chosen to select a third. The decision of said appraisers, or the majority of them, to be final. The value of the real estate now owned by the National Capsule Company in Indianapolis to be appraised by three appraisers to be chosen in a similar manner, whose decision or that of a majority of them, is to be final. The machinery and appliances of every kind, including box-making machinery, to be appraised by three disinterested and competent appraisers at the price at which it can be duplicated in open market; and, in estimating the value thereof, only such machinery and appliances shall be considered as are practical in the manufacture of empty capsules, and now used by the parties hereto in the conduct of their business. The appraisers to be chosen as follows: The National Capsule Company to select an appraiser in Indianapolis, the other parties to

select an appraiser from Detroit, and the two so chosen to select a competent expert machinist from a city outside of the two cities above named; the decision of such appraisers, or that of a majority of them to be final. (3) The parties hereto agree that each shall receive, in payment for the manufactured stock, boxes, and raw material conveyed to said corporation, notes of said corporation payable six months from the date of delivery of the property, and all marketable manufactured and unmanufactured stock of completed empty capsules to be paid for at thirty cents per thousand; partially manufactured goods, and all other material as can be readily utilized at appraised value, and raw material, to be appraised at market value. (4) All expenses of appraisal and organization of the new company shall be borne by the new company. (5) Each of the parties hereto agree, from the date hereof, not to make, sign, or accept any contract whatsoever for the future sale or delivery of any hard, empty capsules, or any other contract whatsoever, except ordinary contracts for immediate sale and delivery. All old existing contracts with drug jobbers are to be completed by the new company, provided such are not for over fifty gross of capsules. (6) It is also agreed that none of the parties hereto shall hereafter engage in the manufacture or sale of empty gelatine capsules in any manner whatsoever. In witness whereof the parties hereto have set their hands and seals, and have affixed the seals of the various corporations, by the hands of their respective officers thereunto duly authorized, the day and year above written. All patents, procured or pending, owned by parties hereto, shall be assigned to the new company, with the sole provision that there shall be a reversion to the present owner thereof in case of dissolution or failure, or sale of assets under the mortgage, or retirement from active business of the new corporation. The word 'dissolution' shall, however, not be construed to apply to a nominal or formal reorganization or merger of the new company with any other corporation, person, or persons."

The steps taken in pursuance of this scheme were these: First. The agents of the parties organized a new corporation under the general law of New Jersey, called the United States Capsule Company. The capital stock of this new company was subscribed and allotted as follows: \$20,000 par value to each of the two contributing corporations; \$20,000 to one of the partnerships, and \$10,000 to the other; single shares being allotted to such members of the contracting corporations as were essential to qualify them for becoming directors. Second. The property owned and operated by each of the parties in making and selling hard, empty gelatine capsules was valued by appraisers as provided in the agreement, and conveyances and bills of sale executed to the United States Capsule Company. The instrument of sale executed by the appellee, the Merz Capsule Company, bears date December 21, 1893, and recites a consideration of \$15,000. "and other good and valuable considerations." In point of fact, this part of the transaction is yet incomplete. No mortgage has been made by the United States Capsule Company, and

no bonds have been executed for the appraised value of this property, as contemplated by the agreement, though the United States Capsule Company did give to the Merz Capsule Company a certificate reciting that the latter company was to receive bonds to the amount of the appraised value of its property when the mortgage should be made and the bonds executed.

On the same day that the above-mentioned deed was made and delivered, the Merz Capsule Company accepted a lease upon its premises, machinery, plant, etc., in consideration of a nominal rent, the lease to terminate January 15, 1894, and thereafter continued in the use and occupation of its property, operating the plant for the purpose of working up stock on hand not included in the sale. While thus remaining in the actual possession of its premises and manufacturing plant, the Merz Capsule Company determined to withdraw from its engagements and contracts with the other parties to the agreement; being advised, as the original bill alleges, that the contract then entered upon, and the conveyance in furtherance thereof, were unlawful, and in excess of its corporate powers. The motive which led to this repentance is not of great importance, though the evidence seems to make it pretty clear that disappointment in obtaining the control of the new business led to serious doubt as to the validity of the arrangement. This determination was notified to the officers and directors of the new corporation, the stock certificates tendered back, and a complete rescission demanded. This tender was refused, and a rescission denied. Having also given public notice of the invalidity of the instrument under which the United States Capsule Company asserted title and right of possession to its manufacturing plant, the Merz Capsule Company resumed its ordinary course of business as an independent manufacturing corporation. On the 22d of January, 1894, while thus in full and peaceable possession of its premises, and the use of its machinery and appliances, the defendants are shown to have made an entry upon those premises, through the officers, agents, and servants of the United States Capsule Company, under circumstances of considerable aggravation, for the purpose of removing the machinery and stock of the said Merz Company, and did actually tear down a part of such machinery, and remove a part thereof from the premises, and were only prevented from completely dismantling the factory by an exertion of force. In consequence of this alleged trespass, and because, as further alleged, like trespasses were threatened and feared, under color of the instrument conveying title to the United States Capsule Company, the Merz Capsule Company filed its original bill in the circuit court for Wayne county, Mich., against the United States Capsule Company as a corporation of the state of New Jersey, and Robert H. McCutcheon, its president; the National Capsule Company, another corporation of the state of New Jersey; J. E. Warren and James Wilkie, copartners under the name and style of the Warren Capsule Company; and John A. Grogan and William H. Warren, copartners under the name and style of the Michigan Capsule Company.

31 L. R. A.

This bill, after setting out the several contracts, conveyances, etc., referred to, and charging that the object and purpose of the combination were to advance the price of empty capsules by suppressing competition and creating a monopoly, as a ground for equitable relief set out the trespass before mentioned, and charged that for the purpose of compelling complainants to stand by and carry out the plan and scheme set out in the agreement of November, 1893, the defendants threatened still other and further trespasses and interference with complainant's business. It alleged that the machinery and appliances used in its business were of "peculiar character and make," and very difficult to replace, and that, if defendants were suffered to take and remove same, its business would be stopped indefinitely, and irreparably ruined, and that its remedy through a court of law was inadequate. It also insisted that to completely relieve complainants against the oppressive and unlawful trespasses, done and threatened, under color of the several agreements and conveyances mentioned, the same should be canceled, and defendants enjoined from interfering in any way with the possession of its property and premises. A temporary injunction was granted as prayed. Thereupon the suit was removed from the United States circuit court upon petition of defendants. After the removal the said United States Capsule Company answered and filed a cross bill setting up the said several agreements, contracts, and conveyances as valid and legal instruments, and praying that they might be so decreed, and that it be placed in full and peaceable occupation of all the property, premises, plant, and machinery thereby transferred to it, and that the same, in all regards, be specifically enforced and performed. Upon full proof, and by final decree (67 Fed. Rep. 414), the circuit court perpetually restrained the United States Capsule Company from the commission of further trespass as prayed, and declared the several agreements *ultra vires* and illegal under the law of Michigan. The further decree of the court was "that neither the defendant the United States Capsule Company, nor any other of the defendants in the original bill of complaint in this cause, has any title, right, claim, or demand whatsoever in, to, or upon the property of the complainant, the Merz Capsule Company, described in the bill of complaint, and the title thereto is quieted in the said Merz Capsule Company, free from any claims of the defendants in said original bill, or of any of them." The court declined to order an account of damages sustained by complainant, and for this purpose remitted it to a court of law. The cross bill of the United States Capsule Company was also dismissed, as stating no case entitling it to specific performance. From this decree the United States Capsule Company and its codefendants to the original bill have appealed, and assigned as error so much of the decree as gave to the Merz Capsule Company the relief mentioned, and the United States Capsule Company has also assigned error upon the dismissal of its cross bill.

Messrs. Russell & Campbell, for appellants:

The consolidation of the four companies was

not in violation of any rule of the common law or of the act of the United States of July 2, 1890, commonly called the Sherman law.

Re Corning, 51 Fed. Rep. 205; *Re Greene*, 52 Fed. Rep. 111; *United States v. Trans-Missouri Freight Assn.* 58 Fed. Rep. 58, 24 L. R. A. 73, 4 Inters. Com. Rep. 443.

Before a combination or consolidation can be declared void under the principles above referred to, there must be established, first, an intent to monopolize and control trade, and, second, an actual accomplishment of that fact by the combination. Intent alone is not sufficient.

Re Corning, 51 Fed. Rep. 210; *Re Greene*, 52 Fed. Rep. 113.

There must be a monopoly in fact, which substantially controls trade and dictates prices and production; otherwise the agreement is valid.

Re Corning, *supra*; *Re Terrell*, 51 Fed. Rep. 213; *Re Greene*, 52 Fed. Rep. 104; *United States v. Nelson*, 52 Fed. Rep. 646; *United States v. Trans-Missouri Freight Assn.* 58 Fed. Rep. 440; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & C. Co.* 55 Fed. Rep. 851; *Dolph v. Troy Laundry Mach. Co.* 28 Fed. Rep. 553; *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353.

The true purpose of the consolidation was to combine the best features of the various patents and processes of the several parties, so as to provide a superior article at a reduced cost and to stop the ruinous competition that existed between them, so as to obtain a reasonable price. This was a reasonable and lawful purpose.

Beal v. Chase, 31 Mich. 531.

The intention of the parties was that all of the plans should continue in operation, and that the individuals who formerly owned them should continue to operate them. In order to successfully carry on the business, the processes and patents conveyed to the new company for a separate and distinct consideration must be used for its exclusive benefit. Under these circumstances it not only is reasonable that the several individuals should bind themselves not to engage elsewhere in the same business, but such conduct on their part would wholly destroy the value of the processes of manufacture and goodwill sold to the company for a good and adequate consideration.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 67, 22 L. ed. 318; *Beal v. Chase*, 31 Mich. 490; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Jarvis v. Peck*, 10 Paige, 118; *Re Greene*, 52 Fed. Rep. 118; *United States v. Trans-Missouri Freight Assn.* 58 Fed. Rep. 451; *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598 [1892] A. C. 25; *Nordenfjelt v. Maxim Nordenfjelt Guns & A. Co.* [1894] A. C. 535.

Contracts in restraint of trade are divisible, and if excessive are void only for the excess.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 67, 22 L. ed. 318; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153.

The right to contract and to do business is one of the sacred rights guaranteed by the 31 L. R. A.

Constitutions both of the United States and the state of Michigan.

Kuhn v. Detroit, 70 Mich. 534; *Fick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220.

The Michigan act is unconstitutional upon the ground that it is not of general application.

Cooley, Const. Lim. 6th ed. 484; *Kuhn v. Detroit*, 70 Mich. 534; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104; *Park v. Detroit Free Press Co.* 72 Mich. 567, 1 L. R. A. 599.

The transaction was consummated; and if any question exists, it is simply that of the right of the complainant corporation to hold the stock which it received. The decision of that question cannot affect in any way the validity of the conveyance which was actually made by the corporation.

Such action on the part of the complainant would not render illegal an actual conveyance of its property which it, as a corporation, had the power to make.

Holmes & G. Mfg. Co. v. Holmes & W. Metal Co. 127 N. Y. 260.

A corporation, with the assent of all its stockholders, has ample power to sell its property and receive in payment stock of another corporation.

1 Beach. Corp. § 259; 2 Cook, Stock & Stockholders, §§ 667, 668; *State, Bradford, v. Western Irrig. Canal Co.* 40 Kan. 96; *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252; *Farmers' Loan & T. Co. v. Toledo & S. H. R. Co.* 54 Fed. Rep. 759, 6 U. S. App. 469.

If the court should find the entire transaction illegal either upon the ground that it was in violation of the state statute or that the action of the complainant was *ultra vires*, the complainant would not be entitled to any relief in a court of equity.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. 145 U. S. 393, 36 L. ed. 748; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457.

Mr. Edwin F. Conely, for appellee:

The Merz Capsule Company was incapable of entering into the arrangement which forms the basis of defendant's claims.

A corporation has no implied power to purchase shares of the capital stock of another corporation.

1 Cook, Stock & Stockholders, 3d ed. § 315; 1 Thomp. Corp. §§ 1102 *et seq.*; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33.

The combination itself is unlawful, and the complainant justified in repudiating it.

The Case of Monopolies, 11 Coke, 84; Cook, Stock & Stockholders, 3d ed. chap. 29, § 503a; Spelling, Trusts & Monopolies, chap. 1, § 4, chap. 5, §§ 49-61; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Crawford v. Wick*, 18 Ohio St. 190; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 28 Am. Rep. 190; *India Bagging Assn. v. Koch*, 14 La. Ann. 164; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *Pacific Factor Co. v. Adler*, 90 Cal. 110; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 861; *State, Atty. Gen., v. Standard Oil Co.* 49 Ohio St. 187, 15 L. R. A. 145; *Texas Stand-*

ard Oil Co. v. Adoue, 83 Tex. 650, 15 L. R. A. 598; *People v. Sheldon*, 139 N. Y. 251, 23 L. R. A. 221 (1893).

Courts will not regard mere forms; nor will they permit any subterfuge to defeat public justice, or to thwart their efforts to protect public interest.

Spelling, Trusts & Monopolies, § 57; *Craft v. McConoughy*, *supra*.

In the case of an agreement resulting in an actual monopoly or the essential tendency of which is to suppress competition, the extent of space or duration of time within which it is designed to operate is unimportant.

Spelling, Trusts & Monopolies, § 60; *Texas Standard Oil Co. v. Adoue*, *supra*; *Western Wooden-ware Assn. v. Starkey*, 34 Mich. 76, 11 L. R. A. 503.

There is no provision to be found in the Constitution of the United States or in the Constitution of the state of Michigan, directly or indirectly inhibiting class legislation.

Corporations are classified, and special statutes relating to each particular class are adopted, without question.

Cooley, Const. Lim. p. 390; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696.

Lurton, Circuit Judge, delivered the opinion of the court:

The solution of this case depends upon the validity of the agreement of November, 1893, and the subsequent contracts and conveyances made in furtherance thereof. The appeal perfected, and the errors assigned, involve, not only the propriety of the decree granting any relief to the complainant, but the decree dismissing the cross bill of the United States Capsule Company. The object of that cross bill was to have the agreement of November 29, 1893, and all the proceedings taken and conveyances made in pursuance thereof, decreed to be valid, and specifically enforced, by placing the United States Capsule Company in full possession and control of all the property of the Merz Capsule Company, and by enjoining the latter corporation from interfering with the possession or use of same by the cross complainant. These several agreements, contracts, and conveyances are but parts of one plan, and must be read and construed together. The validity of the instrument passing title to the property of the Merz Capsule Company depends upon the objects and purposes of the conveyance. Having been made in express furtherance of the combination scheme inaugurated November 29, 1893, its validity must depend upon the legality of that agreement. Both the original and cross complainant, in their pleadings, have distinctly recognized this, and sought relief upon that basis. The invalidity of this agreement and conveyance has been urged upon several grounds: First, it has been said that the scheme embodied in the agreement for a combination is illegal, as tending to create a common-law monopoly. Much of the evidence found in a very large record has been addressed to this aspect of the question, and appellee earnestly insists that the evidence establishes the fact that the sole object and purpose of the two corporations and two firms, in undertaking to bring about a consolidation of their several manufacturing interests, were to advance and

control prices, through a monopoly of the business of making empty gelatine capsules. Second, it has been also insisted that the whole scheme involved the creation of an unlawful combination or trust, within the prohibition of the Michigan statute on that subject. Mich. Laws 1889, Act No. 225, § 3; 3 How. Anno. Stat. § 9354j. Finally, it is urged that whether the combination plan, and the instruments in furtherance thereof, be illegal, as tending to a monopoly, or as a combination unlawful under the Michigan antitrust statute, it is null and void, as to the Merz Capsule Company, as in excess of its corporate powers under the law and policy of Michigan in respect of its domestic corporations.

We have no difficulty in assenting to this latter position, and therefore find it unnecessary to express an opinion upon either of the first two propositions, although they involve, and have elicited, a learned discussion concerning monopolies, competition, restraint of trade, and like problems of political economy. The general rule is that, without express authority, a corporation cannot invest its funds in the stock of another corporation. *Morawetz, Priv. Corp. § 431*; *Cook, Stock & Stockholders*, § 815; *Marbury v. Kentucky Union Land Co.* 10 C. C. A. 393-401, 62 Fed. Rep. 335, 22 U. S. App. 267; *Buckeye Marble & F. Co. v. Harvey*, 92 Tenn. 115-118, 18 L. R. A. 252; *Talmage v. Pell*, 7 N. Y. 328; *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 57; *People, Peabody, v. Chicago Gas Trust Co.* 130 Ill. 268-284, 8 L. R. A. 497. To this rule there are certain exceptions, due in part to strong implication from the powers expressly granted, or to the objects and purposes for which stock had been acquired. Thus, under the rule that the implied powers of a corporation are only such as are necessary to the exercise of its corporate franchises, it has been held that, where a debt was collected in the stock of another company, it was a valid transaction, under the implied authority to collect its debts in the most efficient way. *Talmage v. Pell*, *supra*; *Hove v. Boston Carpet Co.* 16 Gray, 493; *Hodges v. New England Screw Co.* 1 R. I. 312-347, 53 Am. Dec. 624. So in *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393-405, 66 Am. Dec. 490, it was held that, for the purpose of retiring from business, it was competent for a manufacturing corporation to sell the whole property of the corporation, taking payment in the shares of a new corporation, to be distributed among the stockholders of the old company. Confessedly, the act under which the Merz Capsule Company was organized confers no express authority under which it would be authorized to invest capital stock in the shares of another corporation. Neither can it be insisted that there is any legislative permission whatever in the statutory law of Michigan which confers any such power upon the corporations of that state. That the facts of this case do not bring it within any well-recognized exception to the general rule inhibiting such investments is to us a most obvious proposition. By the agreement of November 29, 1893, which we are asked to sanction and specifically enforce, the Merz Capsule Company contracted, not only to sell

its entire manufacturing plant, including patents, processes, and goodwill, to the new corporation, when organized, but that it would never again engage in the same business. If its purpose had been in good faith to wind up its affairs, and distribute the price to be paid among its stockholders, or to convert the same into money for purposes of distribution, the transaction might be supported under the authorities heretofore cited, although payment was to be received in the stock and bonds of the new company. The implied power to wind up its business and to make a sale of its property would probably authorize a sale for stock in another corporation. *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 252. But here there was no purpose to wind up, and abandon the field. The avowed object was to continue corporate life and activity through the instrumentality of another corporation. There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. Forbidden to exercise the very functions for which the breath of corporate life had been breathed into it by the state, there would remain standing only the shell of a corporation, retaining corporate existence only for the purpose of controlling and directing the new corporation, in which was invested its corporate capital, and to receive and distribute its aliquot proportion of those earnings as dividends among its own shareholders. The effect of this action of the appellee was to divest itself of the power to exercise the essential and vital element of its franchise, by a renunciation of the right to engage directly and individually in the very business which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred. The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy. *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *People v. North River Sugar Ref. Co.* 121 N. Y. 582-625, 9 L. R. A. 38; *Mallory v. Hanau Oil Works*, 86 Tenn. 598.

The evils incident to such a perversion of corporate capital and stifling of corporate franchises are further aggravated by the peculiar circumstances attendant upon the combination scheme now under consideration. In the execution of this plan, a New Jersey charter of incorporation was secured, though it was never contemplated to carry on business in that state. The active functions of the Michigan corporation, it was contemplated, would be exercised alone under color of this foreign "tramp corporation." This substitution of a New Jersey charter and corporation was not 81 L. R. A.

without purpose. The Michigan statutes, under which the Merz Capsule Company had been organized, provided for a stockholders' liability for labor debts. It also required public reports, at stated intervals, showing the character of the corporation business, such as amount of its capital stock, amount of debts and assets, and a list of stockholders. All of these provisions are eminently calculated to bring about prudent and conservative conduct of corporate business, and to advise the public, in some degree, as to the solvency of the corporation with which they may have dealings. The New Jersey corporation law contains none of these features, and in no way undertakes to safeguard either the shareholders or the public. These differences in the law and policy of the two states was, on the evidence of appellants themselves, a determining feature in procuring a New Jersey charter under which to thereafter carry on the enlarged and combined business. Another remarkable feature deserves comment. This New Jersey corporation, under color of which the combining corporations and firms were to carry on business, contemplated no capital stock other than that contributed by the promoters of the scheme. This was, as mentioned in the second paragraph of the agreement, to consist of "their respective plants, operated by them in the manufacture of hard, empty gelatine capsules, including all real estate owned and used by them for such purpose, together with all machinery and appliances of every kind pertaining thereto, stock in trade, good will, all patentable devices, labels, trademarks, trade secrets (except processes for treating gelatine)." The sellers themselves were to appraise this property through one appraiser selected by the National Capsule Company, one selected by the three other promoters, and a third selected by the two thus appointed. When the value was thus fixed by the sellers, the so-called buyer was to make a mortgage upon the whole of this property, and issue bonds bearing 8 per cent interest, to be divided among the contributors in proportion to their several contributions. The capital stock of the corporation was also to be divided, in agreed proportions, among the parties organizing and controlling this new instrumentality for carrying on business. Having thus secured their contributions to the capital stock against any possible hazards of the business, by taking a mortgage to secure themselves against loss, and having also provided for the management and control of the business, by the practically free distribution of the stock in proportions agreed upon, the corporation was launched upon the business public without a dollar of capital responsible for its general engagements. As a plan for doing business, with the chance of loss reduced to a minimum, it is quite as unique as the instance reported in the case of *Morroe v. Nashville Iron & S. & C. Co.* 87 Tenn. 262, 3 L. R. A. 37. Nothing, it seems to us, need be added to justify the conclusion that the agreement of November 29, 1893, as to the Merz Capsule Company, and the subsequent conveyance and bill of sale to the United States Capsule Company made in furtherance of that agreement, are inoperative, null, and void, as in excess of its corporate powers.

Being *ultra vires*, the consent of its stockholders cannot legalize or vitalize the transaction.

The final objection urged by appellants is that if the agreement between the Merz Capsule Company and its associates is subject to the objection that it was unauthorized by its organic law, and contrary to the public policy of Michigan, the objection cannot be urged by that corporation as a ground for affirmative relief in a court of equity. Undoubtedly, if the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, and has not been repudiated by the defendant, neither a court of law nor equity will lend its active assistance to the recovery of property or money paid on such a contract, or aid in bringing about its surrender or cancellation. The doctrine of the courts applicable was stated very aptly by Mr. Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 407, 36 L. ed. 754, when he said: "The general rule in equity, as at law, is *in pari delicto, potior est conditio defendentis*; and therefore neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 355, 20 L. ed. 453, 456; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; *Story, Eq. Jur.* § 298. While an unlawful contract; the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law, and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose."

But this rule by which the defense of *pari delicto criminis* is sanctioned by courts, as stated by Lord Truro in *Benyon v. Nettlefold*, 3 Macn. & G. 102, and approved by Lord Selborne in *Ayerst v. Jenkins*, L. R. 16 Eq. 283; is rested "on the ground of public policy, namely, that those who violate the law must not apply to the law for protection." But, in the case last cited, Lord Selborne notices a very obvious limitation by saying: "When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy."

The contract in the case at bar between the parties *in pari delicto* is, in a large degree, still executory. Though a deed and bill of sale had been executed and delivered in furtherance of the original agreement, possession has not been surrendered, and the bonds to be delivered in payment have neither been delivered nor executed. The conveyee under the deed has indeed applied to this court, through its cross bill, for the specific performance of the agreement, by being placed in possession under the deed, and for an accounting with the appellee. There is an obvious distinction

between the attitude of a complainant asking relief against an unexecuted agreement, illegal for reasons not appearing upon its face, and where it is sought to recover back money or property paid upon a contract fully executed. The cases stating this distinction are referred to and commented upon by Lord Cottenham in *Simpson v. Lord Howden*, 3 Myl. & C. 99 *et seq.*; by Lord Selborne in *Ayerst v. Jenkins*, L. R. 16 Eq. 275; and Justice Gray in *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 749. In *Whaley v. Norton*, 1 Vern. 483, the master of the rolls said "that there would be a difference in these cases between a contract executed and executory, and that this court would extend relief as to things executory, which, if done, it may be might stand." The case of *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted, and he be desirous of rescinding it, provided the contract was not one *malum in se*.

The specific performance sought under the cross bill has rendered necessary the expression of a definite opinion as to the validity of the contract thus set up by the United States Capsule Company. In view of this opinion, necessitating an affirmance of the decree, so far as it dismissed the cross bill, ought we to stop at this point, and decline to grant any part of the relief sought by the appellee? The Merz Capsule Company does not seek to recover back either property or money paid or delivered under its agreement or deed. Before actually surrendering possession of its premises, machinery, and appliances, or transferring its patents and processes, it repudiated the whole scheme, and tendered back all that it had ever received, and has kept that tender good. But it has neither lost possession, nor received the bond payment it was entitled to receive. Having given notice of its purpose to go no further in an illegal scheme, it remained in the peaceable possession of its property; and in the ordinary conduct of its business. Without resorting to legal proceedings, the United States Capsule Company sought to obtain possession of the property of the recalcitrant grantor, and, when prevented by force from accomplishing its unlawful object, avowed its purpose by a repetition of the trespass to obtain a possession which it could not secure by a resort to legal procedure. The effect of a continuance of these unlawful methods to obtain possession, as shown by pleadings and proof, would be most injurious to the business of the complainant, and the remedy at law inadequate. Under all these circumstances, to hold that the complainant is estopped to rely upon the illegality of the agreement and conveyance to which it was a party would be to effectuate an unexecuted, unlawful object, and aid in the defeat of a legal prohibition. The door of this court should not be closed against one seeking to extricate himself from an unlawful connection, provided relief is sought without delay, and before the contract is executed, or other persons have irrevocably acted in reliance upon its supposed legality.

The decree of the court declaring the illegality of the agreement of November 29, 1893, and of the deed of December, 1893, and restraining the appellants from interfering with

the title or possession of appellee under color thereof, should be, and accordingly is, *affirmed*.

MINNESOTA SUPREME COURT.

August HEIDEL and Wife, *Appts.*,
v.

Henry BENEDICT, *Respt.*, and Henry HABIGHORST, Assignee, etc., of Heidelberg.

(.....Minn.....)

***1. Blocks in the platted and laid-out part of an incorporated city** were generally subdivided on the plat into lots of various sizes, but one block was not thus subdivided. The property was city or urban in character. *Held*, that the owner of a part of the undivided block was entitled to hold as a homestead only a

*Headnotes by MITCHELL, J.

tract equal in area to the average size of platted lots in that part of the city.

2. An attachment is discharged as to an assignee in a general assignment for the benefit of creditors by an amendment to the complaint and affidavit for attachment, made after the execution of the assignment, substituting an entirely different and distinct cause of action for the one set up in the original complaint and affidavit.

3. The determination of a motion is not res judicata, so as to prevent the parties from drawing the same matters in question again in an action.

(May 24, 1895.)

NOTE.—Right to amend affidavit for attachment.

In many states the statutes expressly provide for amendment of the affidavit.

Decisions in such states are of little value upon the general question of the right to amend. In states where there is no statute upon the subject the decisions are not entirely harmonious. The decisions based on statutes will be first stated that their proper influence on the general question may be seen.

Statutes permitting amendments.

The statutes are not all alike. Some authorize amendments to the fullest extent while others confine them to mere matters of form.

In Alabama, since December, 1887, when the Code became operative, an affidavit for an attachment may be amended in matters of substance as well as in matters of form. *Robinson v. Holt*, 85 Ala. 596; *Richards v. Bestor*, 90 Ala. 352.

An affidavit may be amended so as to allege that plaintiff, whose correct name was originally given, is a corporation. *Rosenberg v. Clafin Co.* 95 Ala. 249.

The affidavit may be amended so as to state that defendant is a married woman doing business by consent of her husband, although it formerly stated that defendant was a corporation, where the entity of defendant is not questioned. *Ex parte Nicrosi*, 103 Ala. 104.

The Arkansas statute provides that the affidavit may be amended so as to embrace any grounds of attachment that may exist up to and until final judgment upon the same. *Rogers v. Cooper*, 33 Ark. 406.

Under the Arkansas statute the power to amend is the same in attachment suits as in others. *Allen v. Clayton*, 11 Fed. Rep. 73.

An allegation as to the amount of the debt sued for may be corrected by amendment at any time. *Sannoner v. Jacobson*, 47 Ark. 31.

An affidavit may be amended after appeal from a justice of the peace to the circuit court if the amendment contains no cause for attachment not existing at the commencement of the suit. *Sherill v. Bench*, 37 Ark. 560.

An affidavit by an agent may be amended so as to state that his principal was absent from the county, which fact, by statute, was necessary to give the 81 L. R. A.

agent authority to make the affidavit. *Nolen v. Royston*, 36 Ark. 581.

The Colorado statute provides that no writ of attachment shall be dissolved in any case for any error or defect in the affidavit if at the request of plaintiff such defective paper may be amended or new paper substituted therefor, and the suit shall proceed as if such defective paper had been originally sufficient.

An affidavit in attachment may be amended by affixing the jurat when that has been omitted. *Skinner v. Beehoar*, 2 Colo. 383.

Under the Georgia act of 1889 permitting amendments an affidavit for attachment which states that defendant is about to remove without the limits of the state may be amended by adding the words "and county". *Brumby v. Rickoff*, 94 Ga. 429.

The Illinois statute provides that no attachment shall be quashed on account of any insufficiency in the original affidavit if some one shall cause a sufficient affidavit to be filed. *Campbell v. Whetstone*, 4 Ill. 381; *Kruse v. Wilson*, 79 Ill. 233.

But it had previously been held that an amendment of the affidavit will not help the previous illegal proceedings. The affidavit, being the foundation of the proceedings, must be framed agreeably to the provisions of the statute, otherwise there is no jurisdiction. *Clark v. Roberts*, 1 Ill. 222.

Under the Illinois statute an affidavit insufficiently stating nonresidence on information and belief may be amended, but if the affidavit is so defective that it will not be regarded as an affidavit in the case it will be void and not subject to amendment. *Booth v. Rees*, 26 Ill. 45.

If the attachment is in aid of a suit at law there is no error in allowing an amendment of the affidavit so as to show that fact, and thus avoid a motion to dismiss for want of a declaration. *Roberts v. Dunn*, 71 Ill. 46.

If the affidavit is not so defective as to be practically a nullity it may be amended so as to support the action. *Moore v. Mauck*, 79 Ill. 391.

If there is an attempt to comply with the requirements of the statute, though some are omitted and others are defective, the affidavit may be amended so that it will uphold the proceedings. *Hogue v. Corbit*, 156 Ill. 540.

Under the Illinois statute an amended affidavit

A PPEAL by plaintiffs and by intervener Habighorst from an order of the District Court for Ramsey County denying motion for a new trial after judgment denying a portion of the relief demanded by complainants in a proceeding to establish a homestead claim to certain property which had been attached for a debt; the plaintiffs appealing from so much of the decision as refused to recognize the homestead claim to the entire property, and the assignee appealing from so much as recognized the validity of the attachment. *Affirmed on plaintiffs' appeal, and reversed on defendant's.*

The facts sufficiently appear in the opinion. *Messrs. T. R. Palmer and Lewis E. Jones*, for appellants:

The plaintiffs are entitled to the entire tract described in the complaint, because the land is not within the "laid-out or platted portion of the city."

Smith's Estate, 51 Minn. 816; *Baldwin v. Robinson*, 39 Minn. 244; *Mintzer v. St. Paul Trust Co.* 45 Minn. 323; *Lundberg v. Sharvey*, 46 Minn. 350.

The assignment by August Heidel was made and must be carried into effect under and pur-

suant to the insolvent law of 1881. It operated *ipso facto* to vacate the Benedict attachment.

The insolvent law makes it the duty of the assignor to prevent any creditor obtaining a preference by attachment or other legal process.

Rollins v. Rice (Minn.) 62 N. W. 325; *Yanish v. Pioneer Fuel Co.* (Minn.) 62 N. W. 387; *Smith v. Bean*, 46 Minn. 138; *Stahl v. Mitchell*, 41 Minn. 325.

When an assignment is made under the statute, the rights of creditors rest, and they can compel the assignee to exercise the powers which the law expressly, or by implication, confers upon him as they can restrain him if he attempts to exercise powers which the law does not confer upon him.

Schooler v. Hutchins, 66 Tex. 324; *Sanborn v. Norton*, 59 Tex. 308.

While an assignment pursuant to chapter 41, Gen. Stat. 1878, will not *ipso facto* vacate attachments, the assignee has full power to follow and secure any property fraudulently disposed of or concealed by the assignor, and to set aside any liens and recover any property acquired by creditors by fraud.

may be filed which will defeat a motion to strike the papers from the files and quash the writ. *Bailey v. Valley Nat. Bank*, 127 Ill. 332.

The Iowa statute permits the amendment of a defective affidavit for attachment. *Graves v. Cole*, 1 G. Greene, 405; *Bunn v. Pritchard*, 6 Iowa, 56.

A defective affidavit may be amended in substance as well as in form. *Langworthy v. Waters*, 11 Iowa, 432; *Shaffer v. Sundwall*, 33 Iowa, 579.

If the defect is amended the plaintiff will not be prejudiced by the defect. *Wadsworth v. Cheney*, 13 Iowa, 576.

If through inadvertence the signature of the affiant and that of the officer to the jurat were omitted, though the affidavit was actually sworn to, the omission may be cured by amendment. *Stout v. Folger*, 34 Iowa, 71, 11 Am. Rep. 138.

Under the Kentucky statute an amendment may be made so as not to affect the lien if it contains only such matters as existed at the time the suit was brought. *Allen v. Brown*, 4 Met. (Ky.) 342; *Overruling Pool v. Webster*, 3 Met. (Ky.) 282.

But in *Cabell v. Patterson*, 17 Ky. L. Rep. 836, it is said if the affidavit was defective, and required amendment the plaintiff has only such lien as he acquired by amending the grounds of attachment.

Under the Michigan statute the attachment will not be quashed for defects in the affidavit if, when objection is made, the plaintiff shall file such affidavit as is required by law. *Drew v. Dequindre*, 2 Dougl. (Mich.) 98.

A statute permitting the filing of a new affidavit to correct defects in the former one does not permit the filing of an affidavit after judgment to supply the place of one which was no affidavit because not properly executed as against one who had purchased the property from the attachment debtor. *Greenvault v. Farmers' & Mechanics' Bank*, 2 Dougl. (Mich.) 498.

If a statute gives the court discretion to permit the filing of an affidavit at any time before the order of dismissal is entered for failure to file it, it is not an abuse of discretion to refuse to permit it to be filed after the property has been sold under execution on judgment in the suit. *Savidge v. Ottawa Circuit Judge* (Mich.) 63 N. W. 295.

By the Missouri statute the insufficiency of the affidavit will not require dissolution of the attachment if plaintiff will file a good and sufficient affidavit in such time and manner as the court may

direct. *Henderson v. Drace*, 30 Mo. 358; *Hackney v. Williams*, 3 Mo. 455.

The Missouri statute is broad enough to cover every possible defect in the affidavit. *Claffin v. Hoover*, 20 Mo. App. 314.

An affidavit which is defective in a matter which is amendable is not void, and such defects cannot be availed of on collateral attack. *Avery v. Good*, 114 Mo. 294.

If the affidavit is not signed and the jurat is neither signed nor attested by seal, the affidavit is a nullity and cannot be amended so as to confer jurisdiction. *Third Nat. Bank v. Garton*, 40 Mo. App. 113.

An affidavit signed by an agent may be amended so as to show the fact of agency. *Kirksville Sav. Bank v. Spangler*, 50 Mo. App. 172.

An incorrect statement of defendant's name in the affidavit may be corrected by amendment. *Middleton v. Frame*, 21 Mo. 412.

Under the Missouri statute the attachment is not to be dissolved when the affidavit is adjudged insufficient if the plaintiff files a good and sufficient affidavit, and the amended affidavit may embrace the same or other grounds of attachment. *Musgrove v. Mott*, 90 Mo. 107.

Under the Missouri landlord and tenant act the court cannot dismiss the proceeding if the landlord offers to file an amended affidavit and the right of amendment exists when the affidavit specifies any of the statutory grounds for issuing the writ, however defectively stated. But the power to amend cannot be invoked where there is nothing conferring jurisdiction. *Norton v. Flake*, 36 Mo. App. 698.

But if the clerk of court swears to the affidavit before his own deputy the proceeding will be a nullity and cannot afford ground for an amendment since there is nothing to amend. *Owens v. Johns*, 59 Mo. 89.

Under the Montana code affidavits in attachment may be amended. *Newell v. Whitwell*, 16 Mont. 243.

An affidavit in the language of the statute may be amended so as to set out the special facts relied on to support the judgment. *Joseph v. Mady Clothing Co.* 13 Mont. 195.

An amendment may be allowed to show that a receiver at whose instance the attachment suit was brought had been duly authorized by the court to bring the suit. *Muth v. Erwin*, 14 Mont. 227.

Merrill v. Ressler, 37 Minn. 82; *Farmers' Loan & T. Co. v. Minneapolis Engine & M. Works*, 35 Minn. 543; *Chamberlain v. O'Brien*, 46 Minn. 80; *Dow v. Sulphin*, 47 Minn. 479.

The attachment, knowingly procured upon a fictitious and false claim, must be fraudulent and void as to creditors and assignees for their benefit.

Unless expressly authorized by statute the affidavit for attachment cannot be amended in substance.

Drake, *Attachm.* 7th ed. §§ 87, 113, and cases cited; *Crew v. McClung*, 4 G. Greene, 153; *Hall v. Brazelton*, 40 Ala. 406, 46 Ala. 350; *Hickman v. Gest*, Sneed (Ky.) 297.

And if the statute provides only for an amendment of defects of form, amendments of substance will not be permitted.

Drake, *Attachm.* 7th ed. § 113 and cases cited; *John V. Farwell Co. v. Wright*, 38 Neb. 445; *Brookmire v. Rosa*, 34 Neb. 227.

An affidavit cannot be amended and give retroactive jurisdiction.

Murphy v. Montandon, 2 Idaho, 1048; *Tanner & D. Engine Co. v. Hall*, 22 Fla. 391; *Roulhac v. Rigby*, 7 Fla. 336.

Where a person has in good faith made a mistake in the amount of indebtedness to secure which the attachment is issued, it is within the power of the court to permit an amendment to be made, and plaintiff should not lose his whole lien because of the inadvertent error. *Newell v. Whitwell*, *supra*.

Under a statute permitting amendments to defective affidavits an affidavit may be amended by adding a new ground of attachment,—as, that the debt was fraudulently contracted. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211.

The result of the above decisions would seem to be that if what purports to be an affidavit is so defective that in fact it is not an affidavit there is nothing to amend and no aid can be derived from the statute permitting amendments. The only course is to begin anew and the lien will then date from the proper commencement of the proceedings with a proper affidavit.

General statute of amendments.

Some of the states have no separate statute permitting amendments of attachment affidavits but the courts permit an amendment of such papers under a general statute of amendments.

The general statute of amendments does not authorize the filing of a substituted affidavit in attachment proceedings. *Howard v. Pratt* (Mich.) cited in 22 Fed. Rep. 62.

An amendment of an affidavit may be allowed after the affidavit has been adjudged insufficient so as to connect the grounds of attachment by "and" instead of "or" under a statute which permits amendments of pleadings to make them definite and certain and makes the affidavit the plea in attachment cases. *Salmon v. Mills*, 49 Fed. Rep. 333, 4 U. S. App. 101.

An amendment may be permitted for the insertion of the Christian names of the plaintiffs although the statute does not expressly provide for amendment in attachment cases. *Barber v. Smith*, 41 Mich. 138.

But if no statute permits amendment of attachment affidavits an amendment permitting the insertion of "not" before "resided" in an affidavit stating that defendant had resided in the state for one month preceding this date cannot be permitted, but the whole proceeding will be void. *Freer v. White*, 91 Mich. 74.

An amendment may be allowed in matters which
L. R. A.

The general provisions of §§ 124, 127, chapter 66, Gen. Stat. 1878, for amendments in ordinary actions, have no application to a provisional remedy or proceeding collateral to the main action.

McDonald v. Hewitt, No. 31, 136, Dist. Ct.; *Freer v. White*, 91 Mich. 74; *Hale v. Chandler*, 3 Mich. 531; *Winters v. Pearson*, 72 Cal. 553; *Slaughter v. Berans*, 1 Pinney, 348.

Whatever exceptions there may be to the general rule concerning amendments as between the parties to the suit, they are never permitted to affect the intermediate rights of third persons.

Waples, *Attachm.* 105, and cases cited; *Freeman v. Creech*, 112 Mass. 180; *Haven v. Snour*, 14 Pick. 33; *Wood v. Denny*, 7 Gray, 540; *Young v. Broadbent*, 23 Iowa, 539; *Swift v. Crocker*, 21 Pick. 241; *Brown v. McCluskey*, 26 Ga. 577; *Cohen v. Manco*, 28 Ga. 27; *Fairfield v. Baldwin*, 12 Pick. 388; *Lutterloh v. McIlhenny Co.* 74 Tex. 73; *Flechner v. Dickerson*, 65 Ala. 129; *Whitney v. Brunette*, 15 Wis. 67.

The lien of an attachment obtained on grounds known to be false by the attachment creditors when they made their affidavits will

are not of substance, as, if plaintiff is a partnership and its firm name alone is given in the affidavit, an amendment may be allowed so as to give the individual names of the partners. *Emerson v. Detroit Steel & S. Co.* 100 Mich. 127.

Under a general statute of amendments an affidavit for attachment may be amended by leave of court so as to include the venue, even after a motion to quash the proceedings is filed because of that particular defect. *Struthers v. McDowell*, 5 Neb. 491; *Rudolf v. McDonald*, 6 Neb. 163.

An affidavit may be amended so as to correct the description of affiant by changing from plaintiff to agent for plaintiff. *Moline, M. & S. Co. v. Curtis*, 38 Neb. 520.

But no new cause of attachment which existed when the action was commenced can be brought in by amendment. *Brookmire v. Rosa*, 34 Neb. 227.

Nor can an amendment be permitted to state that defendant is a nonresident. *Clarke Bkg. Co. v. Wright*, 37 Neb. 382.

If at the time the writ issued plaintiff did not own the cause of action on which the attachment was based an amendment is not proper to permit plaintiff to show that he had purchased it since the commencement of the action. *John V. Farwell Co. v. Wright*, 38 Neb. 445.

If the attachment proceeding is ancillary to the action defects in the affidavit may be amended. *Branch v. Frank*, 81 N. C. 180.

A defect in failing to state how the debt was due and that defendant could not after due diligence be found in the state may be cured by amendment. *Sheldon v. Kivett*, 110 N. C. 408; *Cook v. New York Corundum Co.* 114 N. C. 617.

An amendment may be allowed so as to change the designation of defendant from his initials to his full Christian name. *Hall v. Thorburn*, Phill. L. 158.

A plaintiff has a right to amend his affidavit as to mere matters of form. *Palmer v. Bosher*, 71 N. C. 291. But the court says it is of the opinion that if the affidavit was insufficient in matters of substance it could not be amended.

However, a later case decided that an amendment affecting the substance of an affidavit in an attachment proceeding may be allowed. *Cushing v. Styron*, 104 N. C. 388.

The court may permit the amendment of an affidavit although it is wholly insufficient. *Brown*

be postponed to the lien of subsequent attachments obtained by other creditors in good faith on the same property.

Kollette v. Seibel, 7 Tex. Civ. App. 260; *Bateman Bros. v. Ramsey*, 74 Tex. 589; *McKenty v. Gladwin*, 10 Cal. 227; *Smith v. Gettlinger*, 3 Ga. 140; *Fairfield v. Baldwin*, 12 Pick. 383; *Peirce v. Partridge*, 3 Met. 34; *Crocker v. Atwood*, 144 Mass. 589; *Globe Milling Co. v. Boynton*, 87 Wis. 619.

Mr. Ambrose Tighe, for respondent:

Under a common-law assignment, the diligent creditor reaps the fruit of his diligence. He has rights as well as the insolvent and the other creditors, and he can be ousted of his advantage only in favor of those who by the terms of an assignment are required to surrender all their rights to the future acquisitions of the insolvent in order to share in his assigned estate.

Greaves v. Neal, 57 Fed. Rep. 820.

Defects in the affidavit for an attachment, and irregularities in the proceedings which would prove fatal on error or appeal, do not render the judgment void, and it cannot be

collaterally impeached on account of such defects and irregularities.

Tilton v. Coffield, 93 U. S. 163, 23 L. ed. 858; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 931; *Erstein v. Rothschild*, 22 Fed. Rep. 61; *Mattheis v. Denmore*, 109 U. S. 216, 27 L. ed. 912; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211; *Kruss v. Wilson*, 79 Ill. 233; *Moore v. Mauck*, 79 Ill. 391; *Martin v. Hall*, 70 Ala. 421; *Van Fleet*, Collateral Attack, § 257; *Allen v. Brown*, 4 Met. (Ky.) 342; *Brown v. Guthrie*, 39 Hun, 29; *Carr v. Van Hoesen*, 26 Hun, 316; *Re Grinnold*, 13 Barb. 412.

An affidavit for attachment can be amended, and even a subsequent attaching creditor cannot complain.

Furman v. Walter, 13 How. Pr. 348.

Mitchell, J., delivered the opinion of the court:

Action to determine adverse claims to real property. The contest is triangular, and grows out of the following state of facts: The plaintiff owned 227½ feet by 120 feet in the southeasterly corner of block 13 in Dayton's

v. Hawkins, 65 N. C. 645; *Penniman v. Daniel*, 93 N. C. 332.

But if the grounds assigned in the original affidavit were legally sufficient, but are falsified upon the hearing of a motion to dismiss, the plaintiff will not be permitted to assign other grounds of attachment for the purpose of keeping the lien intact. *Devries v. Summit*, 86 N. C. 126.

What is matter of substance and matter of form.

Under a statute permitting amendment of defects of form an amendment cannot be allowed to supply the omitted allegation that the attachment is not "sued out for the purpose of vexing or harassing the defendant," such allegation being a matter of substance. *Hall v. Brazelton*, 40 Ala. 406, 46 Ala. 359.

The affidavit may be amended so as to state the names of the individuals composing the partnership plaintiff or defendant, which names were omitted in the original. *Sims v. Jacobson*, 51 Ala. 186.

That affiant is the agent or attorney of the plaintiff may be shown by amendment. *Paulhaus v. Leber*, 54 Ala. 91.

If the statute prescribing the affidavit does not require it to be signed, the omission of the signature is not a matter of substance but may be supplied by amendment in open court. *Watts v. Womack*, 44 Ala. 605.

An affidavit for attachment which states that defendants "are or will be justly indebted" may be amended by striking out the words "or will be." *Tommey v. Gamble*, 66 Ala. 469.

The failure of the clerk to certify the affidavit is a defect of form and amendable before or during the trial. *Hyde v. Adams*, 80 Ala. 111.

Omission of subscription may be supplied by amendment. *West Tennessee Agri. & M. Asso. v. Madison*, 9 Lea, 407.

The clerk's failure to attest that the affidavit had been sworn to may be cured by amendment. *Wiley v. Bennett*, 9 Bart. 581.

A defective affidavit may be amended. *Maples v. Tunis*, 11 Humph. 108, 53 Am. Dec. 779.

But if the statute authorizes amendments as to defects in form amendment as to defects in substance cannot be allowed, although the attachment proceeding is merely ancillary. *Watt v. Carnes*, 4 Heisk. 532; *Lillard v. Carter*, 7 Heisk. 604.

The matters of substance are the existence of the

debt, its amount, and that it is justly owing from defendant to the plaintiff, that some one of the causes for which an attachment may issue exists, and a negation of a purpose to vex or harass the defendant. All else than this is mere matter of form. *Sims v. Jacobson*, 51 Ala. 186.

In an attachment suit by a landlord matters of substance are that the advancements were in necessary implements or provisions to make a crop or in money to purchase them, that the tenant could not have procured them otherwise, that written obligation was taken, and that it was registered and the existence of one of the causes for attachment. *Flexner v. Dickerson*, 65 Ala. 129.

In an attachment suit by a landlord against a tenant the affidavit must state that the relation of landlord and tenant exists between the parties, and that the indebtedness is for rent or advances or both. The want of these averments cannot be remedied by amendment. *Staggers v. Washington*, 56 Ala. 225.

An affidavit in an attachment suit by a landlord against his tenant is fatally defective if it does not allege that the removal of the crops from the rented premises was without the landlord's consent. *Shield v. Dothard*, 59 Ala. 596.

The affidavit cannot be supplied after the issuance of the writ. *Wright v. Smith*, 66 Ala. 545.

Statute denying amendment.

Under a statute requiring a discharge of the attachment upon motion if it satisfactorily appears that the writ was improperly or irregularly issued, the affidavit cannot be amended upon such motion. *Winters v. Pearson*, 72 Cal. 563.

Rule in absence of statute.

There are some cases which seem to be firmly opposed to permitting any amendment of the affidavit.

In *Brown v. McCluskey*, 26 Ga. 577, the court in denying the right to amend says: "It is difficult to conceive how an oath when it is a necessary preliminary step can be changed so as to sustain a proceeding which is based upon it."

The omission of the signature cannot be supplied by amendment. *Cohen v. Manco*, 28 Ga. 27.

If the affidavit could be amended in one important respect it might also in another until its whole character was changed and the party affiant made to appear as presenting a state of facts different.

addition to St. Paul, upon which was situated a house in which he resided. This block was not subdivided into lots, but the blocks generally in the addition had been subdivided by plat into lots, varying in size from 35 to 55 feet in width, and from 95 to 170 feet in depth. The property in the addition is strictly urban in character. On November 24, 1893, the defendant Benedict commenced an action against the plaintiff in which a writ of attachment was issued and levied on the property in question. In both the complaint and affidavit for attachment the cause of action was stated to be upon account for goods sold and delivered by Benedict to Heidel. Within ten days after the levy of the attachment, Heidel made an assignment of all his non-exempt property to defendant Habighorst for the benefit of all his creditors. The question is raised whether this was a common-law assignment or an assignment under the insolvent law of 1881; but, as we view the case, this question is not material. After the execution of this assignment, Heidel made a motion to dissolve the attachment. Thereupon Benedict amended his complaint, setting up, in place of

the original cause of action, sixteen other separate causes of action, fourteen of which were promissory notes executed by Heidel to various parties, and by them transferred to Benedict, and the two others, respectively, for money loaned and for goods sold to Heidel, by other parties who had assigned the claims to Benedict. Benedict also made a motion for leave to amend his affidavit for attachment, so that the statement of his causes of action would conform to his amended complaint. When the motions came on for hearing, the court denied Heidel's motion to dissolve the attachment, but allowed Benedict's motion to amend his affidavit. Heidel then commenced this action, his contention being that the entire tract was exempt as his homestead, and hence was not subject to attachment, and did not pass by his assignment for the benefit of creditors. Both of the defendants denied that the whole tract was thus exempt, but, as against each other, Benedict claimed that his attachment constituted a lien on the non-exempt part of the tract prior and paramount to the assignment for the benefit of creditors, while Habighorst claimed

from those actually sworn to. *Halley v. Jackson*, 48 Md. 254.

In the absence of express statutory authority an affidavit cannot be amended so as to substitute a corporation as plaintiff in place of the individuals who compose it. *C. H. Fargo & Co. v. Cutshaw*, 12 Ind. App. 392.

An affidavit on which a foreign attachment is grounded can be helped neither by a supplemental nor an amended affidavit. *Jacobs v. Tichenor*, 27 W. N. C. 35.

A supplemental affidavit will not be received when the original proves to be insufficient. *Elldridge v. Robinson*, 4 Serg. & R. 548.

Nor will an amendment be allowed. *Mylert v. White*, 1 W. N. C. 626.

Although in the Pennsylvania lower courts it has been held that an affidavit may be amended. *Brock v. Brock*, 17 Phila. 156; *McCulley v. Chisholm*, 19 Phila. 337.

An affidavit for attachment cannot be amended. *Marx v. Abramson*, 53 Tex. 264; *Slaughter v. Bevans*, 1 Pinney, 348.

The statutory remedy by attachment, being summary in character and onerous in its effects, has by all courts and in all times been restricted by the most guarded rules of construction. The right to amend does not exist unless it be given by the statute of attachment or by some other statute *in part materia*. *Sydnor v. Chambers*, Dall. Dec. (Tex.) 601.

In the absence of a statute authorizing it a court has not power to allow the amendment of an affidavit for an attachment. *Flexner v. Dickerson*, 65 Ala. 129; *Bennett v. Zabriski*, 2 N. M. 7.

That statement is not, however, supported by all the authorities. Of course if a statute attempts to regulate the matter and permits amendments in some cases while failing to provide for others, the proper rule of construction would probably be that in the latter class of cases amendments could not be permitted. But in the entire absence of any statute on the subject, a large number of cases permit amendments in matters of form when the attachment is jurisdictional, and permit all kinds of amendments when the attachment is ancillary.

Amendment of the affidavit in attachment so as to add the necessary allegation that the demand is upon contract, express or implied, or upon judgment, may be allowed in a circuit court of the United States, although, under the statutes of the

state in which the court is held, the state court would have no power to allow it, since in the United States courts the attachment is not jurisdictional but is merely incidental to the suit, jurisdiction of which must have been acquired by personal service of process. *Erstein v. Rothschild*, 22 Fed. Rep. 61.

Since the jurisdiction of the court in cases arising in New York before the Code depended upon the facts set up in the affidavits, the sufficiency of such affidavits was necessarily a jurisdictional question; and if they failed to state facts necessary to confer jurisdiction the defect could not be supplied by amendment. But under the Code attachment is not an original process and the attachment may issue whenever it is made to appear that the facts exist for which the Code permits an attachment to issue. And under the Code the affidavits are proceedings in an action within the meaning of the section which authorizes the court, in furtherance of justice, to amend any pleading or proceeding by inserting material allegations therein. *Furman v. Walter*, 13 How. Pr. 348.

In *Donnell v. Byern*, 80 Mo. 332, the court says, where a defendant is personally served with process or voluntarily appears, the proceedings, however defective the affidavit, will be valid and the rights acquired thereby will not depend for their validity upon the attachment but upon the judgment which will bind the attached property as well as the other property of defendant.

An amendment may be allowed to supply defects in the original affidavits and show facts authorizing the attachment. As where the omission is to make a formal computation of receipts for the period covered by the demand and deduct the expenses therefrom so as to show the exact amount demanded. *Sulzbacher v. Cawthra*, 14 Misc. 545.

A mistake in the name of the plaintiff is not a jurisdictional defect, but may be corrected by amendment at any time. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

The court may permit the correction of clerical errors, as of the insertion of a false date by the clerk, at any time. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

There are many cases in which the original affidavit may be amended, such as mere clerical errors and certain defects in form. *Crim v. Harmon*, 38 W. Va. 596.

that, as to the assignment, the attachment was discharged—First, by force of the assignment itself, as being made under the insolvent law of 1881; and, second, because of the amendment of the complaint and affidavit for attachment substituting entirely different causes of action after the rights of creditors under the assignment had intervened. The trial court held that Heidel was only entitled, as a homestead, to the dwelling and the land on which it was situated, not exceeding in size the average sized lots in Dayton's addition; and that upon the remainder of the tract Benedict's attachment constituted a subsisting lien, paramount of Habighorst's interest under the assignment. Both Heidel and Habighorst appealed.

1. We are of opinion that the decision of the court as to the extent of Heidel's homestead exemption was correct. The tract was within the laid-out or platted portion of an incorporated city. It was strictly urban in character, —a fact which distinguishes the case from that of *Re Smith's Estate*, 51 Minn. 316, relied on by plaintiff's counsel. It is almost impossible

to construe the crude provisions of our homestead law without sometimes resorting to what might seem to be judicial legislation, and it is almost equally difficult to build up a line of decisions that will always be strictly logically consistent with each other; but the conclusion arrived at by the trial court is the only equitable and reasonable one under the facts of this case. It is not to be presumed that the legislature intended that where a part of the platted portion of an incorporated city, strictly urban in character, was not subdivided into lots on the plat, a party might claim an exemption to the extent of acres; while his neighbor across the street, residing on a block of exactly the same kind of property, but subdivided on the plat into lots, could only claim 2,000 or 3,000 square feet.

2. Assuming that, as between the parties to the action, the amendments to Benedict's complaint and affidavit for attachment were permissible, yet we are of opinion that the effect of them was to discharge the attachment as to the intervening rights of Habighorst, and the creditors whom he represents under the as-

An error of the justice in inserting the date on which the affidavit bears teste may be corrected by amendment. *State v. Moran*, 43 N. J. L. 49.

An amendment may be allowed to insert the name of one of the plaintiffs set forth in the declaration which was omitted from the affidavit. *Shaw v. Brown*, 42 Miss. 309.

That the grounds of attachment set out in the affidavit are stated in the disjunctive is a matter subject to amendment. *Bishop Bros. v. Fennerty*, 46 Miss. 570.

The jurat may be amended by permitting the officer before whom the oath was taken to subscribe his name thereto. *Boisseau v. Kahn*, 62 Miss. 757.

A claim in the affidavit for a part of the demand which is not due is a defect as to which an amendment may be allowed so as to expunge that part. *Dalsheimer v. McDaniel*, 60 Miss. 339.

If the grounds for attachment stated in the affidavit are those for the case of a debt which is due, and not those for a case where the debt is not due, which is the true state of case in suit, the court should permit an amendment to properly state the facts. *Baker Wire Co. v. Kingman*, 44 Kan. 270.

The affidavit may be amended so as to state formally and definitely what is already stated therein informally and indefinitely. *Burton v. Robinson*, 5 Kan. 287; *Wells, F. & Co. v. Danford*, 28 Kan. 487.

In *Ferguson v. Smith*, 10 Kan. 397, the court says if the affidavit is not sufficiently definite and certain the defendants should so state in their motion to dissolve so as to give the plaintiff opportunity to amend.

If an affidavit for attachment was made by a person who was in fact agent for plaintiff, but who failed to show that fact in the affidavit, the omission may be supplied by amendment. *Tracy v. Gunn*, 29 Kan. 509.

If the affidavit is voidable but not wholly void because sworn to before the attorney of the plaintiff who was a notary public, the court may permit an amended affidavit properly executed to be filed. *Swearingen v. Howser*, 37 Kan. 126.

If the affidavit is informal only the court may, upon motion, require it to be made formal. *Robinson v. Burton*, 5 Kan. 298.

A second opportunity to amend may be refused when ample time and opportunity have already 31 L. R. A.

been given in which to make the amendment. *Ibid.*

The court should only permit such amendments as do not change the cause of action, and therefore if the proceedings are instituted and the case fully tried under one section of the statute the court should not allow an amendment which will base the action upon another section. *Jaffray v. Wolfe*, 1 Okla. 312.

A statutory requirement that the certificate of the secretary of state should be annexed to the jurat of a commissioner of another state before whom an affidavit is made may be complied with by amendment. *Lawton v. Kiel*, 51 Barb. 30.

But if the affidavit was insufficient to give jurisdiction it cannot be amended so as to confer it.

Substantial defects in affidavits which are jurisdictional in the proceedings are not amendable. *Tanner & D. Engine Co. v. Hall*, 23 Fla. 391.

If the defect in the affidavit is such that the court acquires no jurisdiction it will not be aided by a subsequent amendment, although a good cause for attachment is then stated. *Pope v. Hibernia Ins. Co.*, 24 Ohio St. 481.

If no oath was in fact taken to the affidavit there is nothing which is the subject of amendment, but an attempted amendment will be a new affidavit, and unless filed in time it is of no effect in the suit. *Carlisle v. Gunn*, 68 Miss. 243.

If the attachment was issued without an affidavit the affidavit cannot be supplied by amendment. *McReynolds v. Neal*, 8 Humph. 12.

An affidavit which wholly omits to state the grounds of the cause of action is not sufficient to give jurisdiction, and cannot be remedied by amendment. *Zeregal v. Benoist*, 33 How. Pr. 129.

That the oath was properly taken to the affidavit cannot be shown by amendment. *Cosner v. Smith*, 36 W. Va. 788.

Additional affidavits.

The New York statutes provide for the use of affidavits upon motion to dissolve the attachment. Under it supporting affidavits may be filed in case affidavits are used in opposition, but not otherwise.

If a motion to vacate is made upon the papers on which the warrant is granted additional affidavits cannot be put in in support of the attachment. *Trow's Print. & B. Co. v. Hart*, 60 How. Pr. 190; *Appleton v. Speer*, 25 Jones & S. 119; *Steuben*

signment. The amendment, it will be observed, is not of matters of mere form, or of the manner of stating the same cause of action, but is a substitution of entirely different causes of action, having no connection with that set up in the original complaint and affidavit. The extent of the right of amendment as against the defendant in an action is not necessarily by any means the extent of the right of amendment as against third parties who have acquired intervening rights in the attached property. The intervening rights of third parties are quite as sacred as the plaintiff's right of amendment as against the defendant debtor. The courts have likewise generally recognized subsequent attaching creditors as occupying in this regard a more favored position than voluntary purchasers, so that some amendments which would be allowed against the latter would be held to discharge the attachment as to the former; and it seems to us that the rights of creditors under a general assignment for their benefit are quite as great as those of attaching creditors. The authorities seem to be practically all one way on this question, and we have found no case that goes anywhere near so far as to hold that, as against creditors, a plaintiff may amend by substituting an entirely different and distinct cause of

action for the one stated in his original complaint and affidavit. That this cannot be done would seem on principle to be self-evident. Creditors under this assignment are entitled to all the surplus that is left after satisfying the liens upon the property existing at the date of the assignment. When this assignment was made, the claim upon which the property had been attached was wholly fictitious and unfounded. Hence no recovery could have been had upon it, and the creditors under the assignment would have secured the property unencumbered. But by this amendment, made after the right of creditors had intervened, it is sought to secure a lien, paramount to these rights, for other debts which had not been sued on at all at the date of the assignment. With one exception, all the cases cited by counsel for Benedict relate to the right of amendment as between the parties to the action, and hence are not in point. The only case where the rights of a third party had intervened is *Tilton v. Coffield*, 93 U. S. 163, 23 L. ed. 858. But in that case the indebtedness stated in the original affidavit and declaration was upon account for goods sold and delivered, while in the amended affidavit and declaration it was upon a note for the same amount given to balance the same account set forth in the

County Bank v. Alberger, 75 N. Y. 185, Reversing 55 How. Pr. 481.

On a hearing of a motion to discharge an attachment issued upon an insufficient affidavit, it is not competent for plaintiff, in the absence of leave to amend or a motion for such leave, to supplement the affidavit by new affidavits. *Garner v. White*, 23 Ohio St. 192.

A defective affidavit cannot be supplemented by a subsequent affidavit. *United States Baking Co. v. Bachman*, 38 W. Va. 84.

The filing of a supplemental affidavit presents a different case from an amendment proper of the original affidavit. *Crim v. Harmon*, 38 W. Va. 596.

Right to amend as against third person.

HEIDEL v. BENEDICT makes a distinction which has not been fully developed by the decisions. The question of amending as against the original defendant is quite different from that of amending as against a subsequent attaching creditor or other third person. There are cases which hold that third persons cannot attack the proceedings in the attachment suit. If such doctrine is adopted it would eliminate the necessity of determining the question of the right to amend as against them. That class of cases does not involve the question of amendment, so such cases will not be collected here. Attention is, however, called to them and to the rule applied in them as stated in *Tilton v. Coffield*, 93 U. S. 163, 23 L. ed. 858, which held that purchasers *pendente lite* cannot attack in equity a judgment in an attachment proceeding, although the court permitted an amendment of the affidavit so as to include a promissory note which had not been originally included in the action, if the amendment does not contravene any local statute or rule of local law.

Some cases permit amendments as against third persons.

A defective signature to the affidavit may be corrected as against a subsequent attaching creditor. *Fortenheilm v. Claflin*, 47 Ark. 49.

The jurat of the officer who administered the oath to the affiant may be added by amendment as against a subsequent attaching creditor. *Ibid.*

31 L. R. A.

Where the statutes permit an amendment of affidavits for attachment an affidavit made on belief only may be amended as against the second attaching, so as to positively allege the facts supporting the attachment. *Sannoner v. Jacobson*, 47 Ark. 31.

An affidavit for attachment which fails to definitely state the nature of the demand may be amended as against an intervening creditor under the provisions of the Colorado statutes as to amendments. *Leppel v. Beck*, 2 Colo. App. 390.

An affidavit which does not state that plaintiff had a just demand against defendants, nor the amount due, is so far subject to amendment that in case judgment is entered on it the judgment will not be void so as to be subject to collateral attack. *Burnett v. McCluey*, 92 Mo. 230.

Amendments by leave of court adding additional items of indebtedness are conclusive as against a surety on a bond given for a release of the property. *Chapman v. Stuckey*, 22 Ill. App. 81.

The amendment of the original affidavit without the objection of the principal defendant is not a matter to which the garnishee can make objection. *Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

Other cases refuse to recognize the right to amend as against third persons.

An affidavit which sets forth no cause for attachment cannot, as against subsequent attachment creditors, be amended so as to give the court jurisdiction over the property, although the statute provides for the amendment of informal or insufficient affidavits. *Mentzer v. Ellison* (Colo.) 43 Pac. 464.

If the affidavit on which a priority has been gained between creditors proves defective the court will not permit an amendment so as to save the priority. *Patterson v. The Guinare*, 2 Disney (Ohio) 505.

If the original affidavits are defective so as to require amendment, the amendment will be good as between plaintiff and defendant from the time of the commencement of the action, but as to intermediate attaching creditors it will be good only from the time the amendment is filed. *Hell v. Hall*, 2 Duv. 288.

H. P. F.

prior proceedings and representing the same debt; and the court places its decision expressly upon the ground that, while the description of the cause of action was changed, yet it was, in view of equity and in point of fact, substantially the same with that originally described. The court also calls attention to the distinction, already alluded to, between creditors and voluntary purchasers; saying that the parties in that case "are not subsequent attaching creditors, nor creditors at all; they are purchasers *lite pendente*." The authorities upon this question are cited in Waples, Attachm. § 145, and Drake, Attachm. §§ 282 *et seq.* Our conclusion is that the attachment was discharged as to the assignee, Habighorst, by the amendment referred to.

It appears that, before this action was commenced, the assignee had intervened in the suit between Benedict and Heidel, and made a motion to dissolve the attachment and that the court denied the motion. It is now claimed that, under this decision, the validity and priority of the attachment lien is *res judicata*. But it is well settled that the determination of a motion or summary application is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the more regular form of an action. Black, Judgm. § 691; *Kanne v. Minneapolis & St. L. R. Co.* 33 Minn. 419.

Upon the appeal of the plaintiff the order appealed from is affirmed, and upon the appeal of defendant Habighorst the order appealed from is reversed.

An application was subsequently made for

rehearing, in response to which, on June 4, 1895, the following opinion was handed down:

The application for a reargument is denied; but in doing so it is proper to say that possibly the statement in the opinion that "the determination of a motion or summary application is not *res judicata*, so as to prevent the parties from drawing the same matters in question in the more regular form of an action," may be too broad, and not universally true under our practice. It was not necessary to go that far in this case. The case of *Dwight v. St. John*, 25 N. Y. 203, relied on by counsel as qualified and limited by the subsequent case of *Riggs v. Pursell*, 74 N. Y. 370, only goes to the extent of holding that in the case of an order affecting a substantial right, and appealable when a full hearing has been had on a controverted question of fact, the decision of a point actually litigated upon the motion is an adjudication binding upon the parties, and conclusive to that extent. In the present case it appears from the memorandum of the trial judge that the only question which Habighorst, as intervenor, was permitted to litigate, was whether the assignment by Heidel to him for the benefit of creditors was under the insolvent law of 1881, and hence *ipso facto* worked a dissolution of the Benedict attachment. The court held that it was merely a common-law assignment, and therefore did not *ipso facto* dissolve the attachment; and this was the only question litigated or decided on the motion. Hence, under any rule, the questions decided by us were not *res judicata* by the order denying the motion.

MONTANA SUPREME COURT.

John H. LEYSON, Substituted for James A. Talbott, Admr., etc., of Andrew J. Davis, Deceased, *Appl.*,

v.

Andrew J. DAVIS, Jr., *et al.*, *Repts.*

(.....Mont.....)

1. A gift of shares of stock in a national bank may be made *causa mortis* by actual delivery as a gift without indorsement on the certificates or any assignment in writing or transfer on the books of the company, at least where there is no assignment or power of attorney on the back of the certificates and the by-laws require no blank for such purpose or anything except a transfer on the books of the bank.
2. A gift *causa mortis* is not limited to the event of the donor's failure to return from a trip on which he is about to start, by his statement that he wants the donee to have it if he does not come back or if anything happens, where this remark is made after an actual delivery, without qualification of the gift, and in response to encouraging words respecting his prospects of life.

NOTE.—For gift *causa mortis* sustained to the extent of transferring a large portion of the estate of a donor, see also *Page v. Lewis* (Va.) 18 L. R. A. 170, with note on the sufficiency of constructive delivery to sustain gift *causa mortis*, 31 L. R. A.

3. Certificates of stock in a bank are sufficiently delivered to sustain a gift *causa mortis* when handed to the donee by the donor with words indicating a gift in case of the donor's death, spoken on the eve of the latter's departure on a trip which was but a desperate fight for life, or to prolong the life which he felt that he must soon lose.
4. A statutory adoption of the common law of England, so far as applicable and of a general nature and not in conflict with special enactments, does not preclude the consideration of the expositions of the common law by judicial authorities of our own country in determining what the common law is.
5. A transfer on the books of a national bank is not necessary to give to a donee or purchaser an equitable title to the shares.
6. A gift of shares of stock *causa mortis* is not defeated by the subsequent use, without the donor's knowledge or consent, of a proxy executed by him before the gift was made, when it is filled out by the donee and the voting upon it is done under his direction.
7. Testimony that a decedent had declared his intention to give stock standing in his name to another person is admissible in support of a claim that it was given to him.
8. Testimony that a person controlled and directed the voting of stock standing in the name of another is admissible in sup-

port of a claim by the former that it was given to him.

9. A new trial will not be granted where it is apparent that the result of another would probably be the same.

(November 25, 1895.)

APPEAL by plaintiff from a judgment of the District Court for Silver Bow County in favor of defendants in a proceeding brought to recover stock alleged to belong to plaintiff's intestate and to be in the possession of defendant Davis and to compel a transfer of it upon the books of defendant bank. *Affirmed.*

Statement by **Hunt, J. :**

The appellant, as special administrator of the estate of Andrew J. Davis, deceased, sued to recover 950 shares of the capital stock of defendant bank, alleged by him to belong to the estate of said deceased, and claimed by said defendant Andrew J. Davis, Jr., under a *donatio causa mortis*. The material allegations of the complaint are: Appellant was and is the duly qualified and acting administrator of said estate. That the defendant was and is a national bank duly organized and existing under the laws of the United States, and that said decedent at the time of his death was the owner of said 950 shares of the capital stock of the said defendant bank, which he had never indorsed, transferred, conveyed, or otherwise disposed of, and that said shares of stock at the time of the death of said decedent stood, and still stand, upon the books of said bank, in his name, and that each of said certificates of stock contains the following provision: "Transferable only by him or his attorney on the books of this bank, on the surrender of this certificate." That, prior to the commencement of this action, appellant presented to the officers of said bank a duly certified copy of his letters of administration, and demanded that said stock be transferred to him, as such administrator, upon the books of said bank, which was refused. That the said defendant Andrew J. Davis, Jr., was and is the cashier and one of the directors of said bank, has possession of said certificates of stock, and claims some right or title thereto, or interest therein. That his claim thereto has no foundation in law or equity. That he refuses to surrender or deliver up said shares of stock, although demand has been made, and that said claim and possession of said certificates of stock cast a cloud upon appellant's title as such administrator, and prevent him from obtaining a transfer of said stock upon the books of said bank. It also alleges that the entire capital stock of said bank consists, of 1,000 shares, and that said bank is an established institution, with a large and increasing business. The prayer is that the claim of said defendant Andrew J. Davis, Jr., be declared void; that he be compelled to deliver up said certificates of stock; and that defendant bank be required to transfer the same upon its books, and issue new certificates therefor to this appellant as such administrator.

To this complaint the defendants made separate answers. The said defendant Andrew J. Davis, Jr., denies that said shares of stock, or any of them, or the certificates representing the same, or any thereof, were or are the property of said decedent, left by him at the time of his death; denies that said decedent was the owner of the whole or any of said stock or certificates, or that he never transferred, conveyed, or otherwise disposed of the same; and avers that said defendant is the owner and in possession of said shares of stock and the certificates thereof, and was such owner and in possession at the time of the death of said decedent. He denies that his claim to the said shares of stock and the certificates thereof is without merit or foundation in law or equity, or that his claim to said stock, or possession of said certificates, casts any cloud upon appellant's title, or that he ever had or has any title thereto. He admits that he is, and for several years last past has been, cashier of said defendant bank, but denies that he now is, or has been at any time since the death of said decedent, a director thereof. The answer, for affirmative matter, substantially avers that said defendant Andrew J. Davis, Jr., was a nephew of said decedent; was cashier of said bank for several years before decedent's death, and for some time before said death he had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, said decedent was, and had been for some months, seriously and dangerously ill, and suffering from the disease and ailment of which he afterwards died; that he was then about seventy years of age, and preparing to travel to the Pacific coast for his health; that on the 27th or 28th day of December, 1889, at Butte City, in the county of Silver Bow and state of Montana, said decedent, being seriously and dangerously ill, and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind, and in view and apprehension and expectation of his death, gave to said defendant as a gift the shares of stock and certificates thereof described in the complaint, and at the same time delivered said certificates of stock to defendant as a gift, and that defendant then and there received and accepted the same, and that thereafter, on the 11th day of March, 1890, said decedent died of said disease and ailment of which he was suffering at the time he made said gift and the delivery of said stock and certificates thereof to defendant, and he has ever since said gift and delivery held in his possession, claimed as his own, said shares of stock and the certificates thereof, and now so holds and claims the same, and is entitled to have said stock transferred upon the books of defendant bank, but that said bank and the directors refused, and still refuse, to permit said transfer to be made until the rights of said parties to said stock and shares are determined by the court. The prayer is that said defendant Andrew J. Davis, Jr., be adjudged the owner of said stock and certificates thereof; that said appellant, as such administrator, and said estate, have no right or interest therein; and that said defendant bank be requested to make the proper transfers upon its books.

To this complaint the defendants made separate answers. The said defendant Andrew J. Davis, Jr., denies that said shares of stock, or any of them, or the certificates representing the same, or any thereof, were or are the property of said decedent, left by him at the time of his death; denies that said decedent was the owner of the whole or any of said stock or certificates, or that he never transferred, conveyed, or otherwise disposed of the same; and avers that said defendant is the owner and in possession of said shares of stock and the certificates thereof, and was such owner and in possession at the time of the death of said decedent. He denies that his claim to the said shares of stock and the certificates thereof is without merit or foundation in law or equity, or that his claim to said stock, or possession of said certificates, casts any cloud upon appellant's title, or that he ever had or has any title thereto. He admits that he is, and for several years last past has been, cashier of said defendant bank, but denies that he now is, or has been at any time since the death of said decedent, a director thereof. The answer, for affirmative matter, substantially avers that said defendant Andrew J. Davis, Jr., was a nephew of said decedent; was cashier of said bank for several years before decedent's death, and for some time before said death he had managed and attended to all the business of said bank; that in the latter part of the month of December, 1889, said decedent was, and had been for some months, seriously and dangerously ill, and suffering from the disease and ailment of which he afterwards died; that he was then about seventy years of age, and preparing to travel to the Pacific coast for his health; that on the 27th or 28th day of December, 1889, at Butte City, in the county of Silver Bow and state of Montana, said decedent, being seriously and dangerously ill, and suffering from the disease and ailment of which he afterwards died, but being of sound and disposing mind, and in view and apprehension and expectation of his death, gave to said defendant as a gift the shares of stock and certificates thereof described in the complaint, and at the same time delivered said certificates of stock to defendant as a gift, and that defendant then and there received and accepted the same, and that thereafter, on the 11th day of March, 1890, said decedent died of said disease and ailment of which he was suffering at the time he made said gift and the delivery of said stock and certificates thereof to defendant, and he has ever since said gift and delivery held in his possession, claimed as his own, said shares of stock and the certificates thereof, and now so holds and claims the same, and is entitled to have said stock transferred upon the books of defendant bank, but that said bank and the directors refused, and still refuse, to permit said transfer to be made until the rights of said parties to said stock and shares are determined by the court. The prayer is that said defendant Andrew J. Davis, Jr., be adjudged the owner of said stock and certificates thereof; that said appellant, as such administrator, and said estate, have no right or interest therein; and that said defendant bank be requested to make the proper transfers upon its books.

The separate answer of defendant bank, in substance, says that it has no interest in the controversy; that it has heretofore refused, and now refuses, to make any transfers of said stock upon its books, although requested by appellant and said Andrew J. Davis, Jr., to do so; and that it is ready to make such transfers, or whatever else the court may order it to do in the premises.

To the separate answer of the said defendant Andrew J. Davis, Jr., appellant filed his replication, which is substantially as follows: He denies the serious or dangerous illness of the said decedent, or that he died from any disease or ailment of which he was suffering at the time of the alleged gift, or in December, 1889, or that on account thereof the decedent was preparing to travel to the Pacific coast for his health; denies that on the 27th or 28th day of December, 1889, at Butte City, Mont., or at any other time or place, said decedent ever made the gift of said shares of stock, or certificates thereof, to said defendant Andrew J. Davis, Jr., or that he ever accepted or received the same, or held or retained possession thereof under any such gift, or that said decedent was of sound and disposing mind at the time of the alleged making of the same, or that he died on account of the disease or ailment of which he was suffering at the time of the alleged making thereof; and avers that the facts set forth in his complaint are true, and asks judgment according to the prayer of the same.

The case was tried to the court sitting without a jury. Upon the trial the following facts were adduced:

A. J. Davis, designated by counsel and witnesses throughout this case as Judge Davis, a resident of Butte in this state, and for many years prior to his death president of the First National Bank of that city, died March 11, 1890, leaving an estate, exclusive of 950 shares of the capital stock of said bank, now involved in this controversy, and other valuable assets, appraised in value at \$2,489,393. By accumulated profits and enhanced value during the twelve or fifteen years of the bank's existence, for nearly all of which time the deceased actively and personally controlled the bank's affairs, the value of this stock when this action was begun was admitted to be \$950,000. In the latter part of the year 1889 Judge Davis was in somewhat feeble health, and close to seventy years old. He had not been in perfect health for some time, and had on divers occasions told plaintiff herein, who was a close and old friend, that he was too old to recover from his ailment. It appeared, too, that he had been for some time trying to straighten up his affairs and fix up everything in the bank. In November of that year he joined Judge Hiram Knowles and Hon. W. W. Dixon in a trip to Tacoma and Victoria. While away he was very nervous, worrying over money affairs, was quite feeble and ill much of the time, suffering from insomnia and pain, and often took medicine. After one particularly bad night of suffering, Judge Davis wanted to return to Butte at once. So about December 1st the party came 81 L. R. A.

home, having been gone scarcely three weeks. Judge Davis' health declined. He was no better a day or two after his return than before he went to Puget sound. The insomnia continued, and the habit of taking medicine every day or two was kept up.

But his mind was perfectly clear, although he seems not to have resumed any activity in business generally, except to adjust some important and unfinished transactions, extending over seven or eight years, with this plaintiff, Talbott. The nature of this business was an accounting in mining matters in which Talbott and Judge Davis were jointly interested. It was Talbott's habit to go to the judge's rooms at night, and to proceed with the adjustment. The "figuring" connected with the settlement was done by Andrew J. Davis, Jr., principal defendant in this suit. The settlement included many items of account, and occupied three or four hours of every evening, commencing about December 19, and continuing until about the 27th, when Judge Davis executed a deed to Talbott, and thus finally concluded their business affairs. If the deceased showed fatigue occasionally, as he did, during the settlement, the matter was continued until the next evening. When all was about wound up, and upon the evening before the deed to Talbott was executed,—say December 27,—the judge said to Andrew J. Davis (who was always call Andy, and whom we will likewise, for convenience, call Andy), "When you come down to-morrow, fetch my box down," and at the same time he told Talbott to come too.

Certain other material testimony appropriately finds place at this point: Judge Davis was a bachelor living with a private family in Butte. He is described by certain witnesses as a very close man, sagacious, careful, and correct in business affairs; and by Judge Knowles, United States district judge for Montana, decedent's successor as president of the bank (a very confidential and intimate friend, and for a long time his counsel), as a man of few friendships,—a remarkably reticent and secretive man about himself and his affairs.

But he spoke freely and often of his nephew and namesake, Andy. Not one, but numerous witnesses, several nonresidents, and others, prominent citizens of the state, testified to voluntary statements made by the decedent, that Andy was a good business man, was coming out all right, and would some day own the bank. For instance, to one friend he stated in the summer of 1889, that he "never intended the bank to go into his estate, that he always intended that for Andy, and that was what he expected to do with it." To another friend, in July, 1889, he said: I intend to make another trip to Europe, and before I go I intend to give the bank to Andy,—and afterwards said to the same friend that he wanted to call in all of his outside business, and that he had intended to give the bank to Andy. To another, that it was his intention to give the bank to Andy, in due course of time. And again, in speaking of a new bank building which was being erected in the summer of 1889,

the decedent remarked: "As the bank belongs to Andy, you will put in a set of rooms, bathroom, and everything complete." To others he remarked that the bank would be Andy's. To still another friend and former employee, in speaking of business generally, he said the bank was "Andy's, and he considered it Andy's, and wanted it so considered; . . . that he was not giving him much,—\$100,000, and what it earned." To an old business acquaintance he said in 1888 that "he hoped that Andy's sickness [at the time Andy was sick, and at some springs away from Butte] would not amount to anything, because he wanted him to be well before taking charge of the bank, because he intended to give him the bank, and wanted him to be a healthy man." To a national bank examiner, in August, 1889, when it was suggested that the responsibilities of being cashier of the bank were great for Andy, the decedent replied: "That will be all right, as Andy will some day get the bank, any way." And afterwards, in October, 1889, he repeated this conversation, saying that Andy should have it all when he was gone. To a banking friend from Omaha, whom he met in November on the steamboat going to Victoria, he said his health was very poor, and that he had started to take a trip to Japan, hoping to be improved by the sea voyage, but that he did not know whether he would be able to continue or not, as he was feeling very poorly; that he had built up the bank in Butte by his own personal efforts, and had made it the best bank in Montana, and had a great deal of pride in it, and had trained his nephew Andy to the business, so that he could take sole charge of the bank after his death, and when he got home he expected to give over control of the bank to him, and intended to give the stock of the bank owned by him to Andy, and that it was his intention that Andy should eventually be the manager of the bank; and that he would leave his stock in said bank to him. To the physician of Andy, likewise an old friend of decedent's when told that Andy's constitution was not strong enough to enable him to work in the bank from morning until night, he remarked: "Andy knows very well that that bank will belong to him some day." To another friend, who had had charge of his business in Butte for a number of years, he related the history of Andy's coming to Montana, and said that before Andy had come he had consulted Mr. Story, of the Chicago Times, about the boy, Andy; that Story had spoken well of him; that frequently, from the year 1884 up to nearly the time of his death, Judge Davis had spoken about Andy, said that he was getting along nicely, and that he wanted the bank to remain in the Davis family, and in the Davis name, and under Davis management, even after his death, and that he expected the bank to fall to Andy when he died.

The decedent had brought Andy to Montana when a boy, years before, and put him to work in the bank, where the young man's industry and business capacity had so impressed themselves upon his uncle that he

made him the cashier about 1887. The evidence is that he loved his nephew Andy, and regarded him as a father would a son. "He was the only person," said Judge Knowles, "that I ever knew Judge Davis to exhibit any particular warmth or affection towards." He was solicitous of Andy's health. When he was sick he watched him, consulted physicians about him, and "he seemed to feel differently towards Andy than to any one else that was around him."

But to resume the interview at the decedent's room on the night following the one when the box was brought down: Talbott, the plaintiff herein, was there in obedience to the judge's request. Andy came in later. Judge Davis soon came up from downstairs, and joined them. Talbott was the only witness who could testify to the facts constituting the alleged gift. Talbott was a friend of the deceased and of Andy. He had been intimately acquainted in business, and other ways of life, with Judge Davis, for eighteen or twenty years; was an officer of the bank before and after decedent's death, and interested more or less in certain business ventures in which Andy was interested. This is Talbott's account: The three sat about a little table or desk in the middle of the room. Upon this desk were pen and ink. The decedent had the key and unlocked the box,—an ordinary black tin box. He pulled the papers out altogether, and put them on the table. He looked around for a while, and finally said: "Where is all of this? This isn't all. There is something that is not here." "It appeared" said Talbott, "that he got them all pulled out together, and did not get them all." Andy said that he guessed they were all there, and, after figuring the number of bank-stock certificates, he told his uncle they were all there. "Well, now," said the judge, "there is fifty shares in the directors' hands." Thereupon he enumerated the directors, and it appeared as if one (Hauser) had never executed any paper to show how he held the stock evidently standing in his (Hauser's) name. The judge then told Andy to write to Hauser, and see that he signed a contract, and to do it right away. Both the judge and Andy found the stock all right then, and the 950 shares were accounted for in several (4) certificates. Andy, after counting the stock up, and showing his uncle what there was of it, passed the certificates over to Judge Davis. The judge took them, and passed them back to Andy, saying: "I have always intended that for you; you take that," or, as the witness said, in response to another question by his counsel, asking him what Judge Davis said. "I have always intended that for you, and I want you to take it." Andy took the stock, and put it in his pocket. The witness Talbott described his feelings as follows: "Well, Andy took it, and I sat there, and it was a kind of a surprise to me. I didn't expect anything of that kind. I didn't know what he did. I supposed he had his business or maybe he would fix his business, in a different way; but he did that, and he said. 'I always intended to do that, and now I will do it.'" Talbott and Andy then

commenced talking to Judge Davis, and telling him that they did not think he was so ill as he might think. To this the decedent replied: "Well, I am an old man, and there is no telling. I can't stand what I used to stand. I don't think I can get over this disease. I can't stand it. I am too old. I can't expect it." The witness Talbott, when asked what Judge Davis said in reference to his expectation of recovery or not, answered that the judge said: "You might think it, but I don't. I only hope it will be so, but I don't think it." Thereupon Andy and Talbott told him that they thought he would recover if he would go down there (meaning the Puget sound country), and give his business up, and not be bothered about it, but the judge said he "didn't think it;" he was "going to try it, any way." "I will get ready, and go in the morning," said Judge Davis. The interview seems then to have terminated.

The certificates of stock had no written or printed assignments indorsed upon them, of any kind. The delivery was unaccompanied by any writing at the time. Andy took the box away with him to the bank, the four certificates of stock being in his pocket at the time they left Judge Davis' rooms. Upon the next day, in company with John A. Davis, his brother, the decedent left Butte for Tacoma, in the state of Washington.

On January 14, 1890, a trifle over a fortnight after the judge had gone west, the annual meeting of the stockholders of the bank was held. The minutes of the meeting show that at that meeting John E. Davis, a brother of the defendant, under a proxy signed by Judge Davis, represented and voted the stock in question, and Judge Davis was one of the directors, and president, chosen at that meeting. The proxy bears date December 24, 1889. It therefore antedates the interview just detailed as of December 27 or 28, 1889. The proxy is in the usual form, giving authority, "for me and in my name, to vote 950 shares of the stock of the First National Bank of Butte, owned by me, and standing in my name on the books of said bank, at the annual meeting of the stockholders thereof to be held for the election of directors on the 14th day of January, A. D. 1890, pursuant to law." John E. Davis testified that he voted the stock at that meeting under the proxy for Judge Davis for president; that the proxy was given to him by Andy at the bank, at the meeting of the stockholders; it was the first time he had ever seen it. The witness said that the body of the proxy was in the handwriting of Andy. As the witness's name was inserted in a different ink, the proxy was probably in blank when signed. Witness said that he had never had any conversation with Judge Davis in regard to this proxy, or any direction from him as to what officers and directors he should vote for under it; that he voted the way Andy told him, and after he voted he handed the proxy back to Andy. Judge Davis continued to be president of the bank until his death. So far as the testimony shows, he had no knowledge of said election of himself as

president, or of his holding said position, and never did any act as president of said bank from the time he handed the certificates to Andy.

In the early part of February, 1890, Judge Davis returned from his second trip to the west coast. He failed considerably in health during his absence. He talked very low to those whom he met upon his arrival, and was feeble and very ill. Judge Knowles and Andy went with him to his room that night. He said to Judge Knowles, "I want to see you to-morrow." The next day Judge Knowles called. He found Judge Davis's physical condition bad. Continuing, Judge Knowles said: "He had lost ground since I had seen him. . . . At this time when he went up to Tacoma, and some time before that, he was all the time trying to straighten up his affairs, as he claimed, and fix up everything in the bank. He would go into the bank, and take out the bills payable to the bank, and look over them and examine them all, and those he did not think were just right he wanted them fixed up. He wanted everything fixed up, he said. That was before he went to Tacoma, and afterwards. He did not state to me for what reason he wanted them fixed up. You must remember that Judge Davis was a remarkably reticent and secretive man about himself and his affairs. He was a very good talker about other people's affairs, but he was a very secretive man about his own affairs and about himself. . . . Well, he was accustomed to talk along the last about Andy, as he always called him,—his business capacity, and in a very characteristic way. He would pump me as to my opinion about him, and then he would compare him to himself. He would say, 'Now I was just a little fellow, just like Andy, and he will come out all right.' . . . As to his affection, I think that Andy is the only person that I ever knew Judge Davis to exhibit any particular warmth or affection towards. He was a man that had few friendships, and Andy was one of his particular favorites. If he was sick, he was always uneasy. He was sick in the bank here once. He had a room in the bank, and the judge would go in and look at him, and he would not say anything particular to him, but he would rush right off and see the doctor, and ask him about what he thought of Andy, and ask if he was very sick, or something of that kind; and he seemed to feel differently towards Andy than to any one else that was around him. . . . Judge Davis was quite sick, and I had gone in there and talked with him about his trip and his health, and he said, 'I wish to make some presents.' He went on and stated that he wanted to know if I thought he was sound enough in mind to make these presents, and he had a long talk about any probability about his going insane, and I went on and discussed with him what I had read upon these subjects of insanity and brain diseases. The conversation was probably an hour long, and in this conversation about the presents he first said that he wished to give \$10,000 to the Public Library of Butte. Andy wanted him to, and he understood that

Charlie Larabie had given \$10,000 and he wanted to give \$10,000 to meet that. Then he said there was a lady here whose husband had helped him considerably, and he wanted to make her a present, though he said he had paid him for everything he had done that he asked, but he wanted to make her a present. He said something about W. E. Wehrspau's little girl, but exactly what was said about that I don't remember. Then he said there were two persons in the states that he wanted to make presents to, and in this conversation he said, 'Andy is to have the bank,' or 'control the bank.' I don't know which now, or he might have said both. That was all that was said particularly about Andy in that conversation. That is as far as that matter is concerned. The balance of it led up to a legal matter. The interview was to be renewed. He was not to attend to any business, or go up to the bank, or anything of that kind; and in three days from that time I was to be there, and we would straighten up his affairs." This question was then asked Judge Knowles: "In this conversation with reference to Andy, did he say that he wanted to give the bank to Andy?" Judge Knowles answer was: "He did not. He said, 'Andy is to control the bank,' or 'to have the bank;' and I think he may have said both, because this conversation was fully an hour long, and I don't know but more." On the cross-examination of Judge Knowles the following testimony was given:

Q. This conversation that you refer to, in which he spoke of giving Mrs. Wehrspau's daughter something, and also to the library \$10,000, and also something to the lady here, and also that Andy was to have the bank, or to control the bank, was after his return from Tacoma, was it?

A. The last time; yes. It was his last trip to Tacoma.

Q. I believe you say that it was understood that you were to return within a few days, and fix up these matters for him?

A. No; it was not to fix up these gifts, exactly. The return was with a view of writing a will, and fixing everything in that way.

On his redirect examination, Judge Knowles continued as follows: "My object for returning then was to draw a will. That was the legal matter that came up. The other matter was my opinion as to his physical condition and capacity to make these presents that he was going to make." Thereupon the judge of the court asked Judge Knowles whether the statements made by Judge Davis to him concerning Andy and the bank were in the course of professional employment by Judge Davis. Judge Knowles replied that he did not consider it a professional matter, but a personal one, and that Judge Davis's consultation in relation to these gifts was in a friendly way. Judge Knowles states that he was anxious that Judge Davis should fix up his matters by a will at that time, and the conversation led finally up to that proposition; but Judge

Davis did not ask Judge Knowles about a will, or making any will, but he spoke to him about making these presents, and whether he (Judge Knowles) thought that he (the decedent) was mentally capable of making these gifts. At the expiration of three days, Judge Knowles called again. He found Judge Davis insane. His reason never returned to him, and he died of his ailment on March 11th thereafter.

Shortly after Judge Davis died, about April 19, 1890, on a hearing in reference to the inventory, or concerning the amount of property to come into his hands as special administrator of the estate of the deceased, the plaintiff herein, Talbott, was a witness. At that hearing Talbott, among other things, not material to be reiterated, testified substantially that Judge Davis gave Andy the stock; that the decedent looked the stock over, and gave it to Andy, and said he did not know whether he would ever come back or not,—there might be an accident on the railroad; that he (Talbott) and Andy told decedent they thought he would come back, and assured him that he would live ten or fifteen years; that decedent had said the train might jump the track and kill him, and "If I don't come back, or anything happens. I want you to have that." Upon the trial of this case Talbott was cross-examined concerning his former testimony:

Q. Is that your language? (As used on the former trial).

A. Well, that is about the sum and substance of it,—that he wanted him to have the stock.

Talbott further said upon this trial, upon cross-examination, that at the former hearing he had detailed, he thought, about what transpired, and that he had testified that Judge Davis was going to the coast, saying he was going down to see if it wouldn't do him good again; it was the best place he had found in all his travels. He said that, if he detailed anything different upon the trial of this cause from what he had said upon the first hearing, "it cannot be much different, because it is all in the same meaning,—the same idea. I cannot see where it would make any difference, particularly. I gave the language as near as I could,—to the best of my knowledge and judgment. On redirect examination, the witness was asked whether, on the former examination, he had stated everything. He replied:

No, sir; I didn't state everything.

Q. Have you, upon this examination, stated everything that occurred as well as you could remember?

A. I think so; everything that would be connected with the case. There were little things came up there,—talking about different things,—but nothing about that gift or anything.

Q. You stated in your former examination, as read to you, that Judge Davis said that something might happen to him,—the train might run off the track. How did he come to make that remark?

A. The reason was that we told him, you know, that we didn't think,—tried to brace him up and make him think that he was not so bad off; you know; and then it was that he said the train might jump the track, and he get killed in that way. He said, "You are taking chances all the time when you are on a train," or something to that effect. That was how that came about.

The witness then said that he had testified upon the first hearing without knowing that he was to be called upon, and without having given any particular thought to the matter. Thereupon this question was put to him by respondents' counsel:

If there is any difference in the statement that you gave in your testimony before and that you have given now, which would you say is correct?

A. Well, I think that the statement I gave to-day is as near correct as I could give it, then or any other time. I don't see how I could better it any. There might be a word here and there that would mean a little different; but at the same time it all means the same to me, when I come to put it all together.

Here was the recross-examination:

Q. There may be, you say,—have been,—some things transpired that you did not testify to on the former trial; but what facts you did testify to on the former trial are correct, are they not,—the facts?

A. Well, I should say that they were; yes, sir.

Q. While you might not have remembered some things that you testify to now, what you did testify to then is correct?

A. Yes, sir.

The by-laws of the bank are made part of the case. So far as material, they provide that the regular annual meetings of the stockholders for the election of directors should be held on the second Tuesday in January of each year. The directors-elect were required to meet for organization, upon notification given by the cashier, within one week from the time of their election, and should do no business whatever prior to qualifying by taking the oath of office, as required by law. The president was to hold his office for the current year, and was to be elected by the board of directors. By-laws Nos. 21, 22, and 23 provide as follows: "(21) The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors, by any stockholder who shall be liable, either as principal, debtor, or otherwise. (22) Transfers of stock shall not be suspended preparatory to the declaration of dividends, and, unless an agreement to the contrary shall be expressed in the assignments, dividends shall

31 L. R. A.

be paid to the stockholders in whose name the stock stands at the date of the declaration of the dividends. (23) Certificates of stock, signed by the president and cashier, shall be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only on the books of the bank."

It also appears that on December 9, 1889, the regular meeting of the stockholders was called to be held at the office of the bank on Tuesday, January 14, 1890. This call was signed by Andrew J. Davis, Jr., respondent herein, as cashier. Pursuant to this call a meeting was held, as the following extract of the minutes will show:

Present: Andrew J. Davis, by proxy to J. E. Davis, Hiram Knowles, and A. J. Davis, Jr. On motion, Hiram Knowles was chosen chairman, and Andrew J. Davis, Jr., secretary. On motion duly carried, it was resolved to proceed to the election of directors, and Hiram Knowles and John E. Davis were chosen judges of the election, who announced the following directors duly elected, receiving 970 votes each: Andrew J. Davis, Hiram Knowles, S. T. Hauser, W. W. Dixon, James A. Talbott, A. J. Davis, Jr. The meeting then adjourned.

Andrew J. Davis, Jr., Secretary.

Attest: Hiram Knowles, Chairman.

W. C. Darnold, a witness for the defendant, testified that he was well acquainted with the decedent, having been in his employ for three years; that, after the return of Judge Davis from Tacoma the last time, he was out of employment, and being unfriendly to Andy, he called upon Judge Davis himself, to solicit his friendly offices to obtain a situation, somewhere between the 1st and the 6th of February, 1890, and that Judge Davis then told him that he had given the bank stock to Andy, and had not any control over it, and that he could not do anything, but that when he got up he would help him; that at that time Judge Davis was very low, could only speak two or three words, and would keep quiet for a moment or two, and then speak again. Upon cross-examination Darnold said that nobody was paying him to remain in Butte, or to testify as he did; that he was out of employment at the time, and was living with Mr. J. R. Boyce, Jr.; that he had never mentioned to Mr. or Mrs. Boyce what he had heard Judge Davis say, and he had no recollection of having made any statement to the Boyces that his testimony in this case would be a "clincher." J. R. Boyce, Jr., referred to in the testimony of Darnold, was called on the part of the plaintiff, and testified in substance that Darnold was working for J. R. Boyce, Jr., & Co., as a bookkeeper, until about the 1st of March, 1890; that he had heard Darnold say that Judge Davis said in 1887 that he intended the bank for Andy; that about two weeks before the trial of this case he heard Darnold say that he would testify herein, and would be the last witness; and that, although he did not state what he was going to testify to, yet he had

given the witness to understand that all he (Darnold) knew about the case was what Judge Davis had told him in 1887. Mr. Boyce did not produce any books to verify his statement that Darnold left his employ about March 1, 1890, and his testimony concerning that point was from recollection, although the books were at Boyce's house at the time of the trial.

The court found the issues in favor of the defendant Andrew J. Davis, Jr., and rendered a decree in accordance with the prayer of his answer, adjudging him to be the owner of all the shares of stock described in the complaint, and the certificates thereof, and entitled to have the same transferred to him on the books of the bank; directing the First National Bank of Butte, defendant, to make such transfer, and to issue to said Andrew J. Davis new and proper certificates therefor.

A motion for new trial was made, based upon assigned errors in admitting evidence of decedent's estimate of Andy's business qualifications, and in admitting the testimony of John E. Davis that Andy directed him to cast the 950 shares of stock for the alleged donee for director, for the purpose of showing the exercise of dominion and control over the stock by Andy in the absence, and without the knowledge, of the decedent. Nearly all the other errors assigned are involved in the legal propositions discussed in the opinion. One ground, however, of motion for new trial, was newly discovered evidence. J. R. Boyce, Jr., who had been a witness, made an affidavit to the effect that Darnold had stated to him on or about July 1, 1894, that he had never had a conversation with Judge Davis on the subject of Andy's becoming the owner of the bank since 1886 or thereabouts, and that the conversation which Darnold had testified to as having occurred in February, 1890, was not true; that on July 11, 1894, Darnold asked the witness to go with him to see Mr. Stapleton, and that there, in the presence of Mr. Stapleton, Darnold said that his former statements on the trial of this case were not true. One John H. Curtis also filed an affidavit to the effect that about July 10, 1894, he had heard Darnold make a statement to Boyce that he (Darnold) had made a demand upon Mr. Davis, respondent, for \$10,000, which would enable him to go into business in Ohio, and that if Davis did not give it he intended to go to the attorneys and tell them that he misrepresented his statements on the witness stand. As counter affidavits, the respondent Andrew J. Davis filed the statements of W. I. Lippincott, Guy X. Piatt, and himself. It appears by these statements that there was a controversy pending between the bank and J. R. Boyce, Jr., in which Boyce claimed that Judge Davis, deceased, was a partner in business with him, and attributed a suit which had been brought by the bank against the firm of Jas. R. Boyce, Jr., & Co. to the enmity of respondent Davis. Respondent Davis himself stated in his affidavit: That he had caused an attachment to be levied in behalf of the bank on the stock and merchandise of said J. R. Boyce, Jr., & Co., and from that time Boyce had entertained unfriendly feelings towards him. That, since the trial of this suit in the district court, Boyce had solicited him to join in a scheme to buy up the claims against the firm of Boyce & Co., jointly with him, and together they would prove that A. J. Davis, the deceased, had been a partner in business with Boyce, and thus the amounts of said claims could be collected. Davis refused to enter into this arrangement. That on Friday, July 20, 1894, Boyce told Davis that he had evidence in his (Boyce's) pocket that would "upset his case;" that the other side wanted said evidence, but he would not let them have it if he (Davis) would agree to go in with him to buy up the claims of the creditors of said Boyce & Co., and then hold the Davis estate for them. That Boyce gave him until noon of the next day to decide what to do, giving him to understand that, if he did not go into the arrangement he proposed, he would use the evidence which he claimed to have against him. That upon the next day respondent Davis told him he would have nothing to do with the arrangement he proposed. Darnold himself filed no counter affidavit. It is unnecessary to recapitulate more fully the terms of the several affidavits used on motion for new trial. The affidavit of Mr. Wellcome was filed too late to be considered. The motion for new trial was overruled, and from the order overruling the same, and from the judgment, the plaintiff appeals.

Messrs. Toole & Wallace, Sanders & Sanders, and McConnell, Clayberg, & Gunn, for appellant:

In the civil law a *donatio mortis causa* is defined by Justinian to be "that which is made to meet the case of death."

Sanders' Institutes of Justinian, p. 147.

In Swinburne on Wills, page 22, we find one where the giver, not terrified with the fear of any present peril, but moved with a general consideration of man's mortality, giveth anything. Another when the giver, being moved with imminent danger, doth so give that straightway it is made his to whom it was given.

Roper repudiates that class, but in the light of the decision of the United States Supreme Court (*Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500), it must be taken as the correct one, inasmuch as it is decided there, and sustained by authorities, that a gift *mortis causa* is made upon conditions subsequent, not upon conditions precedent, whereas the third definition of Swinburne, approved by Roper, is clearly upon conditions precedent.

This kind of a gift is in derogation of the common-law procedure, and opposed to the statute of frauds regulating a testamentary disposition of property; hence, in order to be valid it must be accomplished strictly in accordance with the rules laid down regarding it.

Comer v. Comer, 120 Ill. 420; *Haus v. Palmer*, 21 Pa. 296; *Michener v. Dale*, 23 Pa. 59.

All that saves it from coming within the statute of frauds is that no control or dominion is left in the donor, and that the title passes out and into the donee. Should this not be

done, it would be in the nature of a testamentary disposition, and anything approaching a testamentary disposition, disguised under this form, is absolutely ineffectual.

Jones v. Selby, Prec. in Ch. 300 (1710); *Raymond v. Sellick*, 10 Conn. 480; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Headley v. Kirby*, 18 Pa. 326; *Walsh v. Sexton*, 55 Barb. 251; *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684; *Drew v. Hagerty*, 81 Me. 231, 3 L. R. A. 230; 3 Redf. Wills, 344, 348, 349.

The state of Montana has adopted the common law.

The common law in reference to pledges, gifts *inter vivos*, gifts *causa mortis*, and the like, is of a general nature, and as applicable here as it is in England.

We start, then, with the common law, as applied to gifts *causa mortis*, as the law of this state, without the change or modification, by any "special enactment."

In *Ward v. Turner*, 2 Ves. Sr. 431 (1752), there was an attempt to give South Sea annuities by a mere delivery of the receipt for them, issued by the company. This was held invalid as a gift.

In the case of *West v. West*, 9 Ir. L. Rep. 121, there was a gift by deed, but no transfer was made on the books of the company. The court was inclined to think that there was no gift.

A transfer on the books of the company is required to make a gift perfect.

Moore v. Moore, L. R. 18 Eq. 474, 43 L. J. Ch. 617, 22 Week. Rep. 729, 30 L. T. N. S. 752; *Dillon v. Coppin*, 4 Myl. & C. 647, 9 L. J. Ch. N. S. 87, 4 Jur. 427.

Schouler on Personal Property, ed. 1876, pp. 160, 161, says: "In view of the requirements of a transfer on the books of the company, the courts in England and some parts of this country are disinclined to sustain gifts of stock upon a mere delivery of the certificate to the donee without pursuing the other legal formalities of a transfer."

Moore v. Moore, *supra*; *Pennington v. Gittings*, 2 Gill & J. 208.

Nor according to the latest New Jersey decisions can there be a valid gift *causa mortis* of stock privileges, the price not being payable nor the stock issuable till after the donor's death.

Egerton v. Egerton, 17 N. J. Eq. 419.

But in New York a looser rule prevails.

Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313.

It is the English doctrine that, where one gives shares, the gift is not perfected until the transfer is made; and the death of the donor meantime prevents his donation from taking effect.

Lambert v. Overton, 13 Week. Rep. 227; *Pennington v. Gittings*, *supra*.

An absolute gift requires a renunciation by the donor, and an acquisition by the donee, of all interest in and title to the subject of the gift.

Curry v. Powers, 70 N. Y. 212, 26 Am. Rep. 577 (1877); *Beaver v. Beaver*, 117 N. Y. 411, 6 L. R. A. 403; *Michener v. Dale*, 23 Pa. 59.

At common law it is very clear, from the general current of authorities, that delivery is essential to give effect to a gift.

81 L. R. A.

Noble v. Smith, 2 Johns. 52; Bracton, De Acquirendo Rerum Dominio, lib. 2, fol. 156, 16a; *Flowers' Case*, Noy, 67; *Smith v. Smith*, Strange, 955; Jenkins, 109; 2 Bl. Com. 441.

The Maryland cases subsequent to *Pennington v. Gittings*, *supra*, of *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368 (1880), and *Baltimore Retort & Fire Brick Co. v. Mali*, 65 Md. 98, 57 Am. Rep. 304 (1885), continue the doctrine as there laid down.

In South Carolina to constitute a valid gift, either *inter vivos* or *causa mortis*, the donee must have an immediate right to the dominion of the chattel, in the latter case defeasible on the recovery of the donor.

Hall v. Howard, Rice, L. 310, 38 Am. Dec. 115 (1839).

So in Maine (*Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464 (1868)), and Massachusetts (*Morse v. Meaton*, 152 Mass. 5 (1890); *McWiltie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127 (1858)).

Actual delivery is necessary, and if it will not complete a gift *inter vivos* it will not create a gift *causa mortis*.

3 Pom. Eq. Jur. § 1149, note 3.

Delivery must be sufficient to pass title.

Gilmore v. Whitesides, Dud. Eq. 14, 81 Am. Dec. 563; *M'Dowell v. Murdock*, 1 Nott & M'C. 287, 9 Am. Dec. 684; *Chevallier v. Wilson*, 1 Tex. 161; *Dickeschied v. Exchange Bank*, 28 W. Va. 340; *Walker v. Creus*, 73 Ala. 412; *Pennington v. Gittings*, 2 Gill & J. 208; *Gartside v. Pahlman*, 45 Mo. App. 160; *Thornton, Gifts*, § 134; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500.

Stock not being capable of manual delivery, the rules provided for its transmutation must prevail, as it constitutes constructive delivery.

Love v. Francis, 63 Mich. 181; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9 (1882); *Flanders v. Blandy*, 45 Ohio St. 108 (1887); *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Connor v. Trairick*, 37 Ala. 289, 79 Am. Dec. 58; *Perry, Tr.* §§ 96-98; *Ward v. Turner*, 2 Ves. Sr. 431; *Dillon v. Coppin*, 4 Myl. & C. 647; *Moore v. Moore*, L. R. 18 Eq. 474; *Re Shield*, 53 L. T. N. S. 5; *Gason v. Rich*, L. R. 19 Ir. 391; *Lambert v. Overton*, 13 Week. Rep. 227; *Weale v. Olevy*, 17 Beav. 252; *Beech v. Kcep*, 18 Beav. 285.

In every valid gift a present title must vest in the donee, irrevocable in the ordinary case of a gift *inter vivos*, revocable only upon the recovery of the donor in gifts *causa mortis*.

Walsh's Appeal, 122 Pa. 177, 1 L. R. A. 535 (1888); *Smith's Estate*, 144 Pa. 428 (1891); *Com. v. Crompton*, 137 Pa. 138.

A delivery in terms which confers upon the donee power to control the fund only after the death of the donor, when by the instrument itself it is payable presently, is testamentary in character, and not as good as a gift.

Powell v. Hellicar, 26 Beav. 261; *Reddel v. Dobree*, 10 Sim. 244; *Furquharson v. Care*, 2 Colly. Ch. Cas. 356; *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464; *Bunn v. Markham*, 7 Taunt. 224; *Coleman v. Parker*, 114 Mass. 30; *Wing v. Merchant*, 57 Me. 888; *McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Michener v. Dale*, 23 Pa. 59; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500 (1882); *Thornton, Gifts*,

p. 105; *Trenholm v. Morgan*, 28 S. C. 268; *Gammon Theological Seminary v. Robbins*, 128 Ind. 85, 12 L. R. A. 506; *Nutt v. Morse*, 142 Mass. 1; *Bradley v. Hunt*, 5 Gill & J. 54, 23 Am. Dec. 599; *Halt v. Howard*, Rice, L. 310, 33 Am. Dec. 115; *M'Dowell v. Murdock*, 1 Nott & M'C. 237, 9 Am. Dec. 684; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781; *Walker v. Crews*, 73 Ala. 412; *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Connor v. Trawick*, 37 Ala. 289, 79 Am. Dec. 58; *Perry, Tr. §§ 96-98*; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398, 52 Am. Rep. 602; *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Rogers v. Rogers*, 58 Wis. 86, 40 Am. Rep. 756; *Loce v. Francis*, 63 Mich. 181; *Flanders v. Blandy*, 45 Ohio St. 108; *Re Campbell's Estate*, 7 Pa. 100, 47 Am. Dec. 503; *Walsh's Appeal*, 122 Pa. 177, 1 L. R. A. 535; *Linsenberg v. Gourley*, 56 Pa. 166, 94 Am. Dec. 51; *Smith v. Ferguson*, 90 Ind. 229, 46 Am. Rep. 216; *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577; *Daniel v. Smith*, 75 Cal. 548; *Giselman v. Starr*, 106 Cal. 651; *Sterling v. Wilkinson*, 83 Va. 791; *Mitchell v. Smith*, 4 De G. J. & S. 422.

A gift *causa mortis* of corporeal chattels cannot be founded on words of permission to take, or even a bestowal on condition of death, if unaccompanied by acts which go to divest the owner of control and dominion. Even a manifest intention requires actual delivery to give effect to the donor's purpose.

Schouler, Pers. Prop. ed. 1876, p. 156.

Possession, to render a gift valid, must be of such a character as to indicate an abandonment of dominion by the former owner, and its acquisition by the possessor.

Morse v. Weston, 152 Mass. 5; *Thornton, Gifts*, p. 112; *Devot v. Dye*, 123 Ind. 321, 7 L. R. A. 489; *Wadd v. Hazelton*, 137 N. Y. 215; *Re Crawford*, 113 N. Y. 560, 5 L. R. A. 71; *Dunbar v. Dunbar*, 80 Me. 152; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781; *Coleman v. Parker*, 114 Mass. 30; *Bunn v. Markham*, 7 Taunt. 224; *Hawkins v. Blenitt*, 2 Esp. 663; *Farquharson v. Care*, 2 Colly. Ch. Cas. 356; *Drew v. Hagerty*, 81 Me. 231, 3 L. R. A. 230; *Alger v. North End Sav. Bank*, 146 Mass. 418; *Sheegog v. Perkins*, 4 Baxt. 273; *Sterling v. Wilkinson*, 83 Va. 791; *Barnes v. People*, 25 Ill. App. 186; *Goulding v. Horbury*, 85 Me. 227; *Barnum v. Reed*, 136 Ill. 388.

The pleadings base the case upon a gift made while in *periculo mortis*. The proof shows it to be an attempted gift, dependent upon a journey to be made in the United States, with a view to improving his health.

Ridden v. Thrall, 125 N. Y. 572, 11 L. R. A. 684.

In order to constitute a gift *causa mortis* of a savings bank book or deposit, the book must be actually delivered to the donee with the intent to consummate the gift, otherwise it will not operate as such gift.

Tillinghast v. Wheaton, 8 R. I. 586, 94 Am. Dec. 126; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781; *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398, 52 Am. Rep. 602; 31 L. R. A.

Curtis v. Portland Sav. Bank, 77 Me. 151, 52 Am. Rep. 750; *Dunbar v. Dunbar*, 80 Me. 152; *Walsh's Appeal*, 122 Pa. 177, 1 L. R. A. 535; *Drew v. Hagerty*, 81 Me. 231, 3 L. R. A. 230, 10 Am. St. Rep. 257, note; *Matthews v. Warner*, 4 Ves. Jr. 187-196, note; *Leathers v. Greenacre*, 53 Me. 561; *Hatch v. Atkinson*, 56 Me. 326, 96 Am. Dec. 464; *Waynesburg College's Appeal*, 111 Pa. 190, 56 Am. Rep. 252; *Daniel v. Smith*, 75 Cal. 548; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Alger v. North End Sav. Bank*, 146 Mass. 418; *Michener v. Dale*, 23 Pa. 68; *Overton v. Sawyer*, 7 Jones, L. 6, 75 Am. Dec. 444; *Dole v. Lincoln*, 81 Me. 428; *Sheegog v. Perkins*, 4 Baxt. 273; *Crawford's Appeal*, 61 Pa. 52, 100 Am. Dec. 609; *Trough's Estate*, 75 Pa. 118; *Sterling v. Wilkinson*, 83 Va. 791; *Comer v. Comer*, 120 Ill. 420; *Barnes v. People*, 25 Ill. App. 186; 3 Redf. Wills, pp. 326, 327 (3).

The voting of the stock, together with the vote being cast for the decedent for director with Andy's consent, after the gift, defeats the gift.

3 Redf. Wills, 344 (14); *Mitchell v. Smith*, 10 L. T. N. S. 801; *Lumbert v. Overton*, 13 Week. Rep. 227; *Cosnehan v. Grice*, 15 Moore, P. C. C. 215; *Kekeuich v. Manning*, 1 DeG. M. & G. 176; *Grangiac v. Arden*, 10 Johns. 298; *Robinson v. Ring*, 72 Me. 140, 39 Am. Rep. 308; 2 Morse, Banks & Banking, p. 955, § 615; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819; *Goulding v. Horbury*, 85 Me. 227; *Barnum v. Reed*, 136 Ill. 388.

The donor is presumed to have intended the legitimate consequences of his act, i. e., to retain dominion and control of the stock. The law always in such case presumes knowledge of its requirements by both donor and donee.

Thornton, Gifts, § 230, note 2.

Such an alleged gift of an uncle to a nephew is executory in its nature, and a court of equity will not complete it.

Holmes v. Roper, 141 N. Y. 64; *Harris v. Clark*, 3 N. Y. 93, 51 Am. Dec. 352.

The holder of national bank stock upon the books of the company is liable, as a stockholder, to the full face value of the stock so held, and that Andy was not able to respond to such liability is alleged, and not denied.

Ball, Nat. Banks, 153-155, and cases cited.

And his administrator is still liable to the same extent the decedent would be if living.

U. S. Rev. Stat. § 5152.

The liability is directly to the creditors, and the remedy in their favor against such stockholder is exclusive.

Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 30 L. ed. 825; *Crook v. First Nat. Bank*, 83 Wis. 81.

Andy was cashier, and he could have made the transfers on the books of the bank if there had been a complete gift.

Morse, Banks & Banking, § 163.

There can be no gift in law, if one exercises dominion over the subject of the gift.

Dougherty v. Moore, 71 Md. 248.

Redelivery of the subject of the gift to the donor revokes the gift.

Wigle v. Wigle, 6 Watts, 522.

Until the assignment and power are executed the donor has not placed the donee in a con-

dition to demand the transfer which alone creates the rights and relieves the liabilities of the donor, and equity will not aid in doing or in creating or in establishing a trust in gifts.

Oererton v. Sawyer, 7 Jones, L. 6, 75 Am. Dec. 444; *Crawford's Appeal*, 61 Pa. 52, 100 Am. Dec. 609; *Bayley v. Bouleott*, 4 Russ. Ch. 345; *Glass v. Burt*, 8 Ont. Rep. 391; *Smith v. Dorsey*, 38 Ind. 451; *Houghton v. Houghton*, 34 Hun, 212; *Brownlee v. Fenwick*, 103 Mo. 420; *Anderson v. Scott*, 94 Mo. 637.

There was not sufficient cause to apprehend death to sustain a gift *causa mortis*.

Roberts v. Draper, 18 Ill. App. 167; *Keyl v. Westerhaus*, 42 Mo. App. 49; *Smith v. Dorsey*, *supra*; *Dezheimer v. Gautier*, 34 How. Pr. 472; *Gourley v. Linsensigler*, 51 Pa. 345; *Irish v. Nutting*, 47 Barb. 370.

Simply expecting to die sometime from the effects of the disease is not sufficient. The expectation must be of a near dissolution.

Farcher v. Saco & B. Sav. Inst. 78 Me. 470; *Craig v. Kittredge*, 46 N. H. 57; *Smith v. Smith*, 30 N. J. Eq. 564; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Thompson v. Thompson*, 12 Tex. 327; *French v. Raymond*, 39 Vt. 623.

Messrs. W. W. Dixon, Forbis & Forbis, and **M. Kirkpatrick**, for respondent Davis:

Declarations made long anterior, with other declarations from thence down to the time of the gift, are often of a very convincing character, and may tend to explain ambiguous language used at the time the gift was made.

Smith v. Maine, 25 Barb. 35; *Hunter v. Hunter*, 19 Barb. 631.

Such declarations of intent must be followed up by the proof of delivery, actual or constructive, or of declarations made afterwards that the gift had been made.

Larimore v. Wells, 29 Ohio St. 13; *Thornton*, Gifts, § 222; 2 Schouler, Pers. Prop. § 94.

The authorities on this subject are not altogether in harmony. According to one view a gift *causa mortis* takes effect only on condition precedent.

3 Pom. Eq. Jur. § 1146; *Story*, Eq. Jur. § 607, p. 618; 2 Bl. Com. 514, note; *Ward v. Turner*, 2 Ves. Sr. 431; *Keniston v. Seeca*, 54 N. H. 24; 2 Schouler, Pers. Prop. §§ 135, 138; 1 White & T. Lead. Cas. in Eq. pt. 2, p. 1220; *Thornton*, Gifts, § 21.

On the contrary, the Supreme Court of the United States, in the case of *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, defines a gift *causa mortis* as dependent upon conditions subsequent.

Whatever view may be taken of the subject, the facts in evidence constitute a valid gift *causa mortis* of the bank stock in question. All of the elements essential to such a gift are shown by the evidence to have been present in this case.

Whether the circumstances of expected death are sufficient is mainly a question of fact.

Ridden v. Thrall, 125 N. Y. 579, 11 L. R. A. 684; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Williams v. Guile*, 117 N. Y. 343, 6 L. R. A. 366; 2 Schouler, Pers. Prop. §§ 154, 156; *Nicholas v. Adams*, 2 Whart. 17; *Thornton*, Gifts, §§ 23, 25, 26, 30, 32-34; 1 *Story*, Eq. Jur. § 607; *Willard*, Eq. Jur. 553; 8 Am. & Eng. Enc. Law, p. 1346; *Roper*, Legacies, p. 3.

There is no limit placed by the adjudged 31 L. R. A.

cases upon the amount of such a gift, or the proportion of an estate which may be thus disposed of.

2 Schouler, Pers. Prop. §§ 144, 145; 8 Am. & Eng. Enc. Law, p. 1343; *Meach v. Meach*, 24 Vt. 591; *Thomas v. Lewis*, 89 Va. 1, 18 L. R. A. 170; 1 White & T. Lead. Cas. in Eq. pt. 2, p. 1251; *Field v. Shorb*, 99 Cal. 661.

By the law as it stands at the present day, all kinds of personal property, corporeal and incorporeal, may be the subject of a valid gift *causa mortis*.

2 Schouler, Pers. Prop. § 147; 8 Am. & Eng. Enc. Law, pp. 1348-1345; *Bradley v. Hunt*, 5 Gill & J. 23 Am. Dec. 600, note; *Thornton*, Gifts, §§ 271, 273, 274, 323; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328; *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 89; 2 Redf. Wills, p. 312; *Tillingham v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, 1 Dan. Neg. Inst. §§ 24, 24a; *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Hill v. Sterenson*, 63 Me. 364, 18 Am. Rep. 281; *Borneman v. Sidlinger*, 15 Me. 429, 33 Am. Dec. 626; *Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Westerlo v. De Witt*, 36 N. Y. 340, 98 Am. Dec. 517; *Conner v. Root*, 11 Colo. 183; *Vander v. Roach*, 73 Cal. 614; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Wing v. Merchant*, 57 Me. 383; *Bates v. Kempton*, 7 Gray, 382; *Hackney v. Vrooman*, 62 Barb. 650; *Penfield v. Thayer*, 2 E. D. Smith, 805; *Re Malone's Estate*, 13 Phila. 513.

The tendency of judicial opinion in this country is in favor of such gifts of stock.

2 Schouler, Pers. Prop. § 76; *Grover v. Grover*, 24 Pick. 261, 35 Am. Dec. 319; *Wing v. Merchant*, and *Bates v. Kempton*, *supra*; *Sessions v. Mosley*, 4 Cush. 87; *Snellgrove v. Baile*, 3 Atk. 214; *Briscoe v. Eckley*, 35 Mich. 112; *Stone v. Hackett*, 12 Gray, 227; *Allerton v. Lang*, 10 Bosw. 362; *Penfield v. Thayer*, *supra*; *Pom. Eq. Jur.* § 1148, note; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Walsh v. Sexton*, 55 Barb. 251; *Westerlo v. De Witt*, 36 N. Y. 345, 98 Am. Dec. 517; *Reed v. Cope land*, 50 Conn. 472, 47 Am. Rep. 663; *Com. v. Crompton*, 137 Pa. 138; *Pierce v. Boston Five Cents Sav. Bank*, *supra*; *Basket v. Hassell*, 107 U. S. 611, 27 L. ed. 503; *Cornell v. Cornell*, 12 Hun. 312; *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684; 1 Morawetz, Priv. Corp. § 197.

A gift of stock *donatio causa mortis* may be made by a mere delivery of the certificates to the donee.

Cook, Stock & Stockholders, § 308; 1 White & Tudor, Lead. Cas. in Eq. pt. 2, pp. 1250, 1251; 1 Spelling, Priv. Corp. § 520; *Lowell*, Transfers of Stock, § 43; 1 Morawetz, Priv. Corp. §§ 189, 192; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532; *Baldwin v. Canfield*, 26 Minn. 43.

The mere delivery of the pass-book with words of gift, without assignment in writing and without draft payable to the donee, is a sufficient transfer of the deposit as a gift *inter vivos* or *causa mortis*.

Pierce v. Boston Five Cents Sav. Bank, *supra*; *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750; 2 Schouler, Wills, § 172; *Thornton*, Gifts, §§ 329-332.

The delivery of negotiable notes payable to

order without indorsement may constitute a valid gift *causa mortis* or *inter vivos*.

Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 332, note; *Cushman v. Thayer Mfg. Jewelry Co.* 76 N. Y. 365, 32 Am. Rep. 315; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 331, 7 Am. Rep. 341; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

The donor, having parted with his certificates, had parted with his control over the stock until by a revocation he resumed it, and in this case there was no revocation.

Cushman v. Thayer Mfg. Jewelry Co., *supra*; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 83; *Cook, Stock & Stockholders*, § 403.

The conditions and intention of the donor at the time of making the gift must be considered, and this is especially true of a gift *causa mortis*.

De Vol v. Dye, 123 Ind. 321, 7 L. R. A. 439; *Thornton, Gifts*, §§ 145, 148, and cases cited.

Similar language to that used by the donor in the present case is found in many of the cases which have been upheld as good gifts *causa mortis*.

Snellgrove v. Baily, 3 Atk. 214; *Sessions v. Moseley*, 4 Cush. 87; *Gass v. Simpson*, 4 Coldw. 288; *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Williams v. Guile*, 117 N. Y. 343, 6 L. R. A. 366; *Curtis v. Portland Sav. Bank*, 77 Me. 151, 52 Am. Rep. 750; *Thomas v. Lewis*, 89 Va. 1, 18 L. R. A. 170; *Henschel v. Maurer*, 69 Wis. 576; *Crook v. First Nat. Bank*, 83 Wis. 31; *Goulding v. Horbury*, 85 Me. 227; *Caulfield v. Davenport*, 75 Hun. 541.

It has been even held in well-considered cases that the fact that the donor reserves to himself an interest in the subject of the gift will not invalidate it.

Love v. Francis, 63 Mich. 181; *Thornton, Gifts*, §§ 201, 205.

The position that gifts *causa mortis* are regarded with disfavor as against some rule of public policy, is not sustained by reason or authority.

Ellis v. Secor, 81 Mich. 185, 18 Am. Rep. 178; *Gibbs v. Carnahan*, 4 Misc. 564; *Levis v. Merritt*, 113 N. Y. 386; *Devol v. Dye*, 123 Ind. 321, 7 L. R. A. 439; *Thomas v. Lewis*, *supra*; *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621; *Cook v. Dowling*, 6 Misc. 271; *Brown v. Brown*, 18 Conn. 410, 46 Am. Dec. 328; *Thornton, Gifts*, §§ 15, 217-222, 224, 230, 236, 262; 2 Schouler, Wills, §§ 94, 101.

Where the rights of creditors are not affected, a gift stands upon the same footing as a sale, and the rights of the donee should be as fully and effectually protected as if acquired by purchase.

Grover v. Grover, 24 Pick. 261, 35 Am. Dec. 319; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 376; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500.

Mr. B. P. Carpenter also for respondents.

Hunt, J., delivered the opinion of the court:

As is often, perhaps generally, the case in suits where property is claimed as a *donatio causa mortis*, the court is not seriously

embarrassed by conflicts in the testimony. When the idea pervades the mind that death is certainly close at hand, and that it is a fitting time to act in relation to property affairs, with a view to their disposition in case of death, a reflecting sense of the occasion whereon they may act bids men seek the unobtrusive confidence and privacy of close friendships, trusted counsel, or strong ties of consanguinity. It therefore happens that our duty in judicially considering this case is not made so difficult by deciding which of various accounts of the transaction is true, as to correctly weigh what was said, and then to ascertain what are the correct legal principles to control, and apply them to the facts as they stand, without material contradiction or dispute. Now (1) what was the intention of Judge Davis? What is the evidence in point of fact? How strong is it, and of what weight? And (2) to what legal results must that evidence lead us?

Here was a rich old man, who felt that he and his wealth must soon be parted. With nearly seventy years of busy life behind him, his time to lay down its cares had come. Ill health and disease were in him, and he knew it. Premonitions of death, well-founded apprehensions that he was too old to recover, bade him adjust his business. With no family ties to make his life less within himself, reticent of speech concerning his own affairs, this old millionaire evinced but one genuine attachment in the ebb of his life. To his namesake and his nephew his heart went out in quiet, undemonstrative solicitude, as it did to no one else on earth. Business confidence, accompanied, no doubt, by a disposition, natural to one in Judge Davis's situation, yearning for some one in whom his affections might center, prompted him to select Andy, of all others, to uphold his name, and perpetuate the particular pride of his business career,—the First National Bank of Butte. "Andy will have the bank some day. Thus it will remain in the Davis family. Thus it will remain under Davis's management. I will let it form no part of my estate. Bring me my box, and let one trusted friend witness my contemplated act." There we observe method. There we find unreserved indications of a fixed plan to give the bank to Andy, and mark intelligent preparations to execute the plan. There, too, was the fast-declining health, and the expectation of death soon to come from disease already upon him. Alone in his bedroom with his nephew and friend, the mind of the decedent still bent on the plan already instituted. First, the exact verification of the number of certificates of shares. Then, without delay, with his own hand, a tradition of the certificates to his nephew. "I have always intended that for you and now I will do it." There was the act which proved the sincerity of the intention to give. There was the execution of the plan in view when the box was ordered brought down. There was the proof that the bank was not intended to be part of the estate, and there, withal, was the hovering apprehension of death moving the donor to execute his plan without delay. Andy took the stock and put

it in his pocket in his uncle's presence. There was an acceptance of the gift. The scene, at night; the delivery itself, upon the eve of departure to fight against the inevitable; the words; the enfeebled health and age of Judge Davis; the magnitude of the gift,—all naturally suggested to his two listeners that he anticipated death very soon. Straightway his nephew and friend, in a spirit of hopefulness and sympathy incident to such solemn occasions, told him they did not think him so ill. "The train may jump the track and kill me. . . . If I don't come back, or anything happens, I want you to have that. . . . I am an old man, and there is no telling. . . . I don't think I can get over this disease. I can't stand it. . . . I can't expect it. . . . I only hope it will be so, but I don't think it."

There were the serious words of a very sick man, who believed that death was close at hand. The last expressions were born of that hope which is in the mind of nearly every man until the last vital spark is extinguished. Then the departure for Tacoma. In that act we find an additional reason for the previous conduct of the donor. He was going away with, at most, a faint hope of recovery, and realized that he might never see Andy again. The opportunity was ripe for the execution of his long-announced plan. "Now, take it." He believed the bank was severed from any estate he might leave. Andy had the bank, he thought; and it would forever remain in the Davis name, and in the Davis management. The human object of his affection had been considered in the manner he had said he would regard him. All other material affairs might rest upon the possibility of future action. So far as Judge Davis was concerned, the purpose towards which his thoughts were directed was accomplished. He believed on that night that his plan was consummated.

The appellant would break the force of all these facts and circumstances by arguing that the testimony discloses an intention on the part of the decedent, when he died, to give Andy the bank stock. He urges that decedent knew the by-laws of the bank and the national banking laws, which said that no transfer of stock could be made, except by the assignment thereof and transfer upon the books, and that, if he intended to divest himself of his title, he would have used the pen and ink so close at hand. But the by-laws did not require any indorsement or assignment or power of attorney, in writing or otherwise, upon the certificates of the stock, or elsewhere, to transfer them, but only an assignment or transfer on the transfer book of the bank. There was no provision that even this assignment or transfer must be made by the stockholder or his attorney. The certificates stated on their face that the stock was transferable only by the holder or his attorney on the books of the bank on the surrender of the certificates. There was no assignment or power of attorney on the back of the certificates given to Andy. The by-laws required no blank for such a purpose. To make the transfer on the books of the bank

would have required the presence of the transfer books and a surrender of the certificates; but the books were not at hand. The mind of the donor was upon one essential feature, as alone indispensable to his purpose,—the actual surrender of the certificates themselves. Thus would he part with the representatives of his ownership. This, he thought, was the all and only important act of his intended gift. And this he did.

Next, as to the words spoken in the decedent's room. The appellant would do away with our view by quoting the testimony of Talbott, given on a former hearing. We agree with the learned counsel for the appellant that the statements of Talbott on the former hearing ought to be considered with those given upon the trial of this suit; but in considering them we bear in mind that there is no contention or insinuation by the appellant that Talbott has testified falsely. The lower court must have believed that, in his testimony, he tried to hold hard to the truth; and we shall treat his several statements as complementary of one another. The salient points are conspicuously and uniformly brought out,—namely, the actual and perilous sickness of Judge Davis, and the actual and manual delivery of the certificates to Andy by way of gift. The assurances were then made by Talbott and Andy to Judge Davis that he was not so ill as he thought himself. Thereupon Judge Davis, not wishing to dwell upon so painful a subject as death, and to parry further reference to his physical condition, expressed the possibility of being killed in a railroad accident, and added, "If I don't come back, or anything happens to me I want you to have that." Then followed the further statements by Judge Davis to the effect that he could not expect to recover from his disease. This must have been the exact situation at the interview, for Talbott expressly says the way that Judge Davis came to make the remark about the train jumping the track and killing him was because he and Andy tried to "brace him up, make him think he was not so bad off, you know," and after that remark Judge Davis said the train might jump the track. This statement of Talbott's, that the remarks of Judge Davis were not made until after the tradition of the certificates themselves, is of importance, and greatly strengthens our opinion that there were no qualifications to the gift, other than those inherent in all gifts *causa mortis*, and that the donor intended none other to be attached. It must never be forgotten that, just before the judge made any remarks, he had delivered the certificates, without any words of qualification, and this act properly aids us in interpreting the meaning of the donor in his subsequent words. Thornton, Gifts, p. 122. The stock certificates had been delivered. The intention of Judge Davis was executed. If Andy and Talbott had prepared to leave the room at once, would Judge Davis have said anything more about the gift? We think not. Or if, remaining, they had made no reference whatsoever, after the tradition, to his physical condition, is

it not reasonable to say that no other word would have been spoken on the subject of the gift by the donor himself? We think so. The very fact that the statements were not called out except by way of response to the remarks of Andy and Talbott, in the light of what Judge Davis had done before, makes them but explanations of the reason why the donor had given the certificates to his nephew at that particular time. This construction of the remarks of Judge Davis, after the certificates had been delivered, is not only consistent with the prior acts and statements of the donor at the moment of the delivery and gift itself, but is in strict accord with his intention, as manifested by repeated prior declarations to friends. But, if we are in error in that reasoning, let us follow the theory of appellant's counsel, and consider all the acts and the conversation together, as forming essential and inseparable parts of the acts of delivery. To proceed, then: Suppose the donor had said, at the time he handed the certificates over, "I always intended that for you. I want you to take it," and then added, "If I don't come back I want you to have that. I am an old man and cannot expect to recover,"—then appellant's argument that the condition of death while away at Tacoma was attached to the gift would have been of force, and a return might, *ipso facto*, have operated as a revocation of the gift. We here remark that we attach no significance to any fear on the decedent's part of being killed by a railroad accident. That idea is, in our judgment, incompatible with the evidence of every act and word and thought of the donor at the time of the delivery of the certificates. Death from his illness was the only current of his thoughts.

But the foregoing line of reasoning cannot be pursued without departure from appellant's theory, because it eliminates another and material part of the statement of the decedent, namely, the alternative condition, "or if anything happens, I want you to have that." Let us, therefore, take up this further qualification, and, by adding it on, we have these words: "I have always intended that for you, and I want you to take it. If I do not come back, or anything happens, I want you to have that. I am an old man, and cannot expect to recover." Considered with the act of delivery of the certificates, we find that the gift was not limited to the event of death on his trip, only, but comprehended death at any time in the near future.

Now, if we put the several whole sentences together, and connect them exactly with the delivery, we have this condition of testimony:

Judge Davis: "I have always intended that for you, now take it." The certificates are handed over.

Talbott: "You are not so bad off as you think."

Judge Davis: "I don't know whether I will ever come back or not. There may be an accident on the railroad. If I don't come back, or anything happens, I want you to have that. I am an old man, and there is no telling. I can't stand what I used to.

I don't think I can get over this disease. I can't stand it. I am too old. I can't expect it."

Talbott: "We think you will come back, and that you will live ten or fifteen years."

There we have one portion of the sentence, "If I don't come back, or anything happens," imposing conditions of death before a return from Tacoma, and the succeeding and last portion expressly without conditions whatsoever pertaining to the particular journey about to be begun. Here the argument of appellant must be that the qualification or limitation placed upon the first portion of the sentence governs the latter as well. If this be correct, we render the latter portion of the sentence, namely, the words, "or if anything happens I want you to have that," entirely superfluous and meaningless. They are ignored. But, if they were meaningless, why did the donor express them? Surely, if everything said is part of the gift, no construction can be accurate which would omit to give some effect to these latter words, as well as to all others. The only way to do so is to interpret the whole sentence by the light of all else done and said, before and afterwards. Doing this, the donor said: "Take this stock. I have always intended to give it to you, and now I will do it. I believe I am a dying man. I have but little hope of recovery. If I do not live to come back, or if I die soon, then this stock is absolutely yours."

We cannot say by which process of reasoning the district court was moved to adopt its primary conclusion that Judge Davis intended a gift *causa mortis*, at the interview on the night before his departure for Tacoma. The first view, in our opinion, is correct, and we adopt it; but both analysis of all that was said and done lead to the same logical deduction. Each is built upon the firm and unshaken evidential foundation of an oft-repeated intent of the donor to give the bank, some day, to Andy, and upon that other and most convincing act, the manual delivery of the certificates by Judge Davis while in a condition of health which clearly evinced his apprehension of speedy death. We cannot find, in our consideration of the case up to this point, substantial support for the argument that, by any words or acts of the donor, prior to his departure for Tacoma, he intended the gift to be dependent only upon his failure to return to Butte; for, no matter what refinements may be given to the language of the donor, no force of speech at this time can overcome the fact that the donor, sagacious and close man that he was, parted with the certificates. Probably, too, Talbott's language was not, at the first hearing (which was not a trial of the ownership of the stock), precise in its details of the occurrence, for he says that he does not see any substantial difference between what he said at that time and upon the trial of this case. But, assuming that what he said on each trial was an exact statement, we certainly cannot now say that the district court was not warranted in its conclusion that the donor intended to give the stock to the donee at the time of the delivery

thereof. The finding, therefore, to that effect, must be sustained, unless subsequent events, by themselves or in connection with preceding affairs, overthrow the finding, or the law will not permit it to stand.

The appellant opens his exhaustive argument with references to the early English text-writers and their definitions of gifts *causa mortis*. We will therefore go further back than he does, and briefly examine the law, to determine whether his primary inferences are sound. If we revert to the Institutes of Justinian, published A. D. 529 (Imperatoris Justiniani Institutiones, by J. B. Moyle), we find the first definition of the essential conditions of a *donatio mortis causa*, as a primary source of the meaning adopted in the common-law reports of England, and in the decisions of many of our own most learned courts. Omitting the Latin text, and accepting the translation of Professor Hammond (Sandars' Justinian, p. 218), we find: "A donation *mortis causa* is that which is made to meet the case of death, as when anything is given upon condition that, if any fatal accident befalls the donor, the person to whom it is given shall have it as his own; but, if the donor should survive, or if he should repent of having made the gift, or if the person to whom it has been given should die before the donor, then the donor shall receive back the thing given. These donations *mortis causa* are now placed exactly on the footing of legacies. It was much doubted by the jurists whether they ought to be considered as a gift or as a legacy, partaking as they did, in some respects, of the nature of both; and some were of opinion that they belonged to the one head, and others that they belonged to the other. We have decided, by a constitution, that they shall be in almost every respect reckoned among legacies, and shall be made in accordance with the forms our Constitution provides. In short, it is a donation *mortis causa* when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir." The original text adds a line illustrating gifts *causa mortis* by reference to the Odyssey of Homer, where Telemachus makes presents to Pireus if he be killed. Sandars then proceeds to elaborate the text as follows: "There are two essential conditions of a *donatio mortis causa*: It must be made with a view of meeting the case of death; it must be made to take effect only if death occurs, and so as to be revocable at any time previous, and to fail if the recipient died before the giver. The donor might, however, at his pleasure, alter the character of the gift, making it irrevocable, but it was always dependent on the recipient outliving the donor. . . . It might be made conditional upon death in two ways. The donor might say, 'I hand you over my horse, but the gift is only to be complete if I die in this enterprise.' Or he might say, 'I give you my horse. If I survive this enterprise you are to give it back to me.' In the latter method, the delivery of the thing is made at once, subject to a conditional redelivery. In the former the

delivery is made conditional. . . . If the gift was made in the first of the two ways above mentioned, although there was delivery, yet the thing was only acquired on the death of the donor, and, the donor not having ceased to be *dominus*, could therefore, if he revoked the gift, bring a real action to reclaim the thing handed over. If the gift was made in the second way, the whole property passed at once by the tradition to the recipient; and as, in the older and stricter law, the *dominium* passed absolutely when it passed at all, the property in the thing could not revert to the donor merely by the condition having been accomplished. He would only have a personal action against the recipient to compel him to give the value of the thing, if he did not choose to give back the thing itself. The later jurists seem, however, to consider that the *dominium* reverted *ipso jure*, and that the donor could bring a real action for the thing itself." Page 219. In these definitions it is to be observed that the distinction between conditions precedent and subsequent is not as closely drawn, as the test of whether the gift may be upheld, as by some modern authorities. Such gifts were regarded as standing "midway between legacies and gifts *inter vivos*. In that it consists in a present act of bounty, it differs from a legacy, which confers no right whatever on the legatee until the testator is dead, and his heir has accepted the inheritance. Here if the donee outlives the donor, the thing given never goes to the heirs at all. It differs from the latter in being absolutely perfected only by the donor's decease. The gift may be made so conditional on that event that the property in the gift does not pass to the donee until its occurrence. In the meanwhile he has only its use and enjoyment. Or the property may pass at once, subject to the understanding that it is to revert to the donor in case of his proving the better life." Moyle's Comments on Justinian's Definitions, p. 222, note 1.

Inasmuch as the appellant founds his discussion of the description and nature of *donationes causa mortis* upon Swinburne, who wrote in the latter part of the sixteenth century upon the Civil Law, we give that commentator's definition: "One, when the giver is not terrified with fear of any present peril but moved with a general consideration of man's mortality, giveth anything. Another, when the giver being moved with imminent danger, doth so give, that straightways it is made his to whom it is given. The third is when any being in peril of death doth give something, but not so that it shall presently be his that received it, but in case the giver do die." Swinburne, Willa, Powell's ed. 1803. The earliest decisions, next after Swinburne's text, to which we have accessible reference, begin with *Drury v. Smith*, 1 P. Wms. 405, where Lord Cowper, in 1717, held that, where a testator, in his last sickness, made a gift, and the possession was transmuted to his nephew, it must be upheld, because "he might in his lifetime, after the making of his will, give away any part of his estate absolutely, and by the same rea-

son might, notwithstanding the will, give away any part thereof conditionally, and this gift being so fully proved," was held to be a *donatio mortis causa*. That a delivery has always been held necessary in England is also sustained by *Lawson v. Lawson*, Id. 441, where a gift was made by a husband, in his last sickness, to his wife of a purse with money in it. *Miller v. Miller*, 3 P. Wms. 356. Just before death the testator called to his servant to reach him his pocket-book, took thereout two bank notes for £300 each, and another note for £100, being a cash note, or payable to bearer, all of which notes he ordered his servant to deliver to his wife, who was present. Afterwards the testator, by word of mouth, gave her his coach and horses. The gift of the £600 notes was sustained upon the ground that the party was in his last sickness, and that they were delivered. The next case, and what may be termed a leading one in England, was Lord Hardwicke's opinion, in 1752, in *Ward v. Turner*, 2 Ves. Sr. 431. It cited the last two cases just above referred to, sustaining the doctrine that there must be an actual delivery. The deductions from the discussion in that case are well summed up by an English writer (Shearwood) in an Elementary Outline of the Principles of Equity. He says that Lord Hardwicke decided that a gift of this description, in order to be valid, must be made: (1) In such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event. (2) On condition that it is to become absolute only upon the event of the donor's death. It follows from this that it is a gift revocable during the donor's lifetime. (3) There must be actual delivery.

Advancing, next, to the time of Blackstone, that commentator treats this species of gift as "another deathbed disposition of property," and thus defines it: "And that is, when a person, in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods, under which have been included bonds and bills drawn by the deceased upon his banker, to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors, and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *causa mortis*. This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession, and so far differs from a testamentary disposition; but seems to have been handed to us from the civil lawyers, who themselves borrowed it from the Greeks." Ham. Bl. Com. p. 771. In *Tate v. Hilbert*, 2 Ves. Jr. 111, Lord Loughborough, in 1793, discussed the delivery essential to sustain a *donatio mortis causa*, and disapproves of the definitions of Swinburne heretofore referred to. He treats them as only references to different texts of the civil law, and says that Swinburne, in his definitions, "is coupling the description

of a legacy with a very short text of the civil law, and there is a perplexity in it." He further says that the first two definitions, of Swinburne the second of which the appellant in this case relies upon, are clearly mere donations. He then discusses the books of Justinian, and says that Swinburne ought to have looked a little further, and he would have found a history by Justinian of the contests upon the subject of gifts. The exact text from Justinian, from which Professor Hammond has worked his translation, as given above, is quoted in full by Lord Loughborough, who thus approves: "There it is clearly and correctly defined, that it had in effect the nature of a legacy, was liable to debts, and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned, at the same time with the passage I have read, an ordinance by the Emperor, that it should be in writing, with five witnesses." He then refers to *Ward v. Turner*, and concurs with the reasoning that there must be some delivery of the property. We cite this case, having had access to the same and studied it with much care, to demonstrate that that portion of Swinburne's definition upon which the appellant relies has not met with approval by the most learned judges in England since Swinburne wrote. Powell in his comments and annotations to Swinburne's text also says: "The two first instances . . . are simple gifts, the latter only applies to the *donatio causa mortis* and is better described or defined in *lege* 27, and in Justin. Inst. title 7, *De donationibus*." See note to Powell's Swinburne, Wills. p. 54, pt. 1. Roper on Legacies approves of the criticisms of Swinburne by Loughborough in *Tate v. Hilbert*, and unequivocally states in his text that "it appears, upon consideration of the before-mentioned definitions (Swinburne's), that the third alone is the proper *donatio mortis causa*; the other two being nothing else than pure irrevocable gifts *inter vivos*." 1 Roper, Legacies, chap. 1. Other English writers have followed Justinian's definition, with the qualification, recognized by Lord Hardwicke in *Ward v. Turner*, that a delivery was essential. Spence on Equitable Jurisdiction, in 1846, called a *donatio causa mortis* a disposition of property "when a person in his sickness, apprehending his dissolution near, delivers or causes to be delivered, any personal goods or chattels to another, or puts the physical means of dominion over them into his power, to keep them for himself or for some one else, in case of the donor's decease. . . . In the event of the donor recovering, the property reverts to him. If the donor die, the property belongs to the donee without the assent of the executor, though not as against creditors." 1 Spence, Eq. Jur. p. 196. Wms. Exrs. (page 887, chap. 2, § 4) briefly summarizes the attributes of a *donatio mortis causa* as follows: "First, the gift must be with a view to the donor's death; second, it must be conditioned to take effect only on the death of the donor by his existing disorder; third, there must be a delivery of the subject of the donation."

In America, commentators, in their definitions, have followed in the line of the mother country. Kent says that such gifts are conditional, like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and in expectation of death, and that there must be a delivery. A gift *inter vivos* was irrevocable; but a gift *causa mortis* was conditional and revocable. 2 Kent, Com. p. 444. Judge Story says such a gift is properly "a gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect there must be a delivery of it by the donor, and it is subject to be defeated by his subsequent personal revocation, or by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime, and therefore in no sense is it a testamentary act." Story, Eq. Jur. § 606. The supreme court of Connecticut, many years ago, defined these gifts as follows: "That species of donation is derived wholly from the civil law, and is where a person, in his last sickness, apprehending his dissolution near, delivers to another personal property, under which have been included bonds payable to the donor and bank bills, to keep in case of the donor's death. Three requisites are necessary to constitute a gift of this sort.

(1) It must be made by the donor, in contemplation of the conceived approach of death. (2) It must be given to take effect only in case the donor dies. (3) And there must be a delivery of the subject of the donation. It is essential that the condition of its not passing while the donor lives be included otherwise it will be a donation of another kind, namely, a *donatio inter vivos*. It differs from the latter in several respects, in which it resembles a legacy. It is ambulatory, incomplete, and revocable during the donor's life. The revocation may be effected, either by the recovery of the donor from his disorder, or by taking back the possession of the property. It can be made to the wife of the donor. On the other hand, it differs from a legacy in several particulars. The claim need not be proved in a court of probate. The title of the donee becomes, by relation, complete and absolute from the time of the delivery. No consent or other act, on the part of the executor or administrator, is necessary to perfect the title of the donee. It is a claim against the executor; a legacy is a claim from the executor." *Raymond v. Sellick*, 10 Conn. 484. Without reviewing in detail the definitions of many more American writers, we find that the general requirements, as laid down by Williams on Executors, succinctly state the law. Of modern American commentators, certainly none are more perspicuous or intelligible in their definitions than Pomeroy, who sums up the discussion in the following words: "A gift absolute in form made by the donor in anticipation of his speedy death, and intended to take effect and operate as a transfer of the title upon, and only upon, the happening of

the donor's death. Between the time when the gift is made and the article donated is delivered, and the time when the donor dies, the donation is wholly inchoate and conditional; the property remains in the donor awaiting the time of his death and passes to the donee when the death, in anticipation of which the gift was made, happens, unless the donation has in the meantime been revoked by the donor; the donee thus becomes a trustee for the donor with respect to the article delivered into his possession until the gift is made perfect by the donor's death. The gift must be absolute, with the exception of the condition, inherent in its nature, depending upon the donor's death, as above described, and a delivery of the article donated is a necessary element; but it is subject to revocation by the act of the donor prior to death, and is completely revoked by the donor's recovery from the sickness or escape from the danger in view of which it was made." 8 Pom. Eq. Jur. 2d ed. § 1146. See also 2 Beach, Mod. Eq. Jur. § 1061; *Grymes v. Hone*, 49 N. Y. 21, 10 Am. Rep. 313; *Michener v. Dale*, 23 Pa. 63; Story, Eq. Jur. pp. 599, 604; 2 Schouler, Pers. Prop. §§ 135, 188; Thornton, Gifts, § 21; Crosswell, Exrs. & Admsrs. § 620.

In *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, relied upon by the appellant, it was said "that a *donatio causa mortis* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent,—that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee," etc. "On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition," etc.

Reverting to the appellant's theory of the evidence in this case, if this definition of Justice Matthews was meant to exactly conform with Swinburne's second definition and rejects all gifts where a donor with intent to make a gift *causa mortis*, delivers the property, and surrenders the possession and control of the subject-matter of the gift, with a statement, such as the donor used in this case, to the effect that, if he died, he wanted the donee to have the property delivered, then there has been a contraction of the generally accepted common-law rule that a gift *causa mortis* could be made by present delivery, yet conditioned upon the death of the donor. But it was not so decided upon the facts of that case, and we doubt whether the definition quoted conflicts with Pomeroy's, when the words used are measured by their strict applicability to the whole subject, and its nature, under consideration, and the inherent qualifications inseparably attached to all gifts *causa mortis*. We believe we are accurate in this last comment upon the opinion of Justice Matthews. We have examined the particular case upon which the reasoning of that opinion is laid,—a decision of the supreme court of Tennessee, made in 1867. *Gass v. Simpson*, 4 Coldw. 288. The Ten-

nessee case was this: The decedent was obliged to leave Tennessee to avoid the operations of the Rebel conscription laws, and went to Kentucky, where he died, at Louisville, in 1863. Before leaving Tennessee, in 1862, he placed in the hands of Mary Simpson some gold and paper money, together with notes, receipts, etc., and stated to her at the time, "If he never returned, he wanted it all to be given to her son, George M. Simpson," who was at that time a minor; and on the day he left he stated to others that, if he never returned he wanted "little George" to have what he had left in respondent's hands. The defendants contended that the facts constituted a valid *donatio causa mortis* of all the effects and money. The court, by Justice Hawkins, after taking up the definition of Swinburne, speaks of the contest which arose at an early day as to the real nature of gifts *causa mortis*, and expressly recognized that a gift *causa mortis* is a conditional gift, dependent upon the contingency of expected death, which need not be expressed or specified by the donor; and, after applying this principle to the facts in the case, it was held that a valid donation *causa mortis* existed in favor of George Simpson. A part of this discussion of the supreme court of Tennessee is quoted verbatim by Justice Matthews as the foundation for his subsequent deductions. After taking up another part of the opinion, to the effect that delivery was essential, he says that "a view of the entire passage leaves no room to doubt its meaning, that a *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be divested by the happening of any of the conditions subsequent,—that is, upon actual revocation by the donor, or by the donor's surviving the apprehended peril or outliving the donee, or by the occurrence of a deficiency of assets necessary to pay the debts of the deceased donor. These conditions are the only qualifications that distinguish gifts *mortis causa* and *inter vivos*. On the other hand, if the gift does not take effect as an executed and complete transfer to the donee of possession and title, either legal or equitable, during the life of the donor, it is a testamentary disposition, good only if made and proved as a will." A close scrutiny of Justice Matthews' deductions would seem, therefore, to demonstrate that he did not mean to disaffirm the general doctrine as it was enunciated by the supreme court of Tennessee. Indeed, he expressly affirms their meaning. But, if the appellant is correct, in this case, in his interpretation of the definition of Justice Matthews, that distinguished jurist has laid down a rule which, if it had been applied to the very case whence it was deduced, could not have coincided with the principles announced therein or with the conclusion reached by the Tennessee court. We therefore cannot believe that the United States Supreme Court intended to say that a gift made in apprehension of death, and where the donor delivered the property to the donee with an expression to the effect that the property was to belong to the donee if he (the donor) should die, could not be sustained. The leading English cases and

the civil law are not very exhaustively examined, in the opinion of Justice Matthews. He seems to have founded his opinion as to what delivery would sustain the gift largely upon the summarized law of the Tennessee case; but, by his elaboration of the doctrine of the Tennessee case, although he affirmed the law thereof, nevertheless, he has apparently laid down a doctrine often invoked and interpreted to defeat gifts *causa mortis*, where exactly such conditions were expressed by the donor as the appellant contends were imposed by Judge Davis in this case, and which would appear, under the weight of authority, including the Tennessee decision, to but merely express the condition which is annexed by law to every donation *causa mortis*. For, no matter whether the gift is made upon death or nonrevocation as a condition precedent or subsequent, upon either condition an absolute and indefeasible title comes to the donee only upon the donor's death. It must be absolute in form by the donor while living. It cannot be absolute in fact until his death. The supreme court of Arkansas, in *Hatcher v. Buford* (1895) 60 Ark. 169, 27 L. R. A. 507, referred to *Basket v. Hassell* upon this point, and declined to follow the usually accepted interpretation of it. Its apparent doctrine is also ably discussed in Travis on Sales, where the author speaks of the "mistake" made by the supreme court. Travis, Sales, pp. 69 *et seq.*

But, however interesting it might be to enter upon a comparison of the various decisions, to determine whether the appellant's interpretation of *Basket v. Hassell* is correct or not upon the question of delivery, and to consider the divergencies of opinion, we refrain from so doing, because, under our view of the facts of this case, the gift herein was delivered within the rule of the letter of the definition of that case as appellant would apply it. The facts of the case at bar so clearly demonstrate that the delivery of the certificates was made by Judge Davis in contemplation of speedy death from his disease, that it is unnecessary to dwell on that feature of the case. The prolonged and dangerous illness of the donor, his age, and the circumstances of the delivery fully show the expectation of Judge Davis to die shortly from the ailment from which he was then suffering. His trip to Puget sound was but a desperate fight for life, or to prolong the life which he felt he must soon lose. The argument that he apprehended death from a railway accident, as said before, is not well founded, in our judgment. But, if it were it could not avail appellant, because the decedent also apprehended death from his disease, and, inasmuch as he failed in health and died soon of such apprehended disease, which was the particular cause of death with especial reference to which the delivery was made, it matters not that he may also have feared death from other and insufficient causes. "The rule is that the donor must not recover from the disease from which he then apprehended death. If he recovers, the gift is void; if he does not recover, and the gift is not revoked, it becomes effectual." *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684; *Gourley v. Linsenbigler*, 51 Pa. 345;

Linsendigler v. Gourley, 56 Pa. 166, 94 Am. Dec. 51; *Craig v. Kittredge*, 46 N. H. 57; *Thornton, Gifts*, §§ 23 *et seq.*; *Williams v. Guile*, 117 N. Y. 343, 6 L. R. A. 366.

Next, as to the important question of the effect of the delivery of the certificates of stock. We start with a delivery, and acceptance of the certificates at the time of the delivery, and the intention on Judge Davis's part to make a complete gift. But we have this question: The subject of the gift was bank stock, shares in a national bank, or the certificates thereof, without indorsement or assignment in writing, and without transfer on the books of the company. Can national bank stock be so transferred, and thus be made the subject of a valid gift *causa mortis*? The appellant asks a negative reply, and, in an argument displaying great research and learning, bases his request upon the common law and cases construed by him to be within the reasoning of the English adjudications. And here, again, is a divergence of opinion between learned writers. Some years back the common law of England, so far as the same was applicable and of a general nature, and not in conflict with special enactments of the territory, was declared to be the law, and was to be considered of full force. But to determine what the common law is, are we to disregard the expositions by judicial authorities of our own country upon the common law? Clearly not. "No one," said Justice McLean, in *Wheaton v. Peters*, 33 U. S. 8 Pet. 659, 8 L. ed. 1080, "will contend, that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union. It was adopted, so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each."

Upon this question we quote from Chief Justice Shaw in *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373, who thus wrote of the adoption of the rules and principles of the common law of England in their applicability to our conditions: "As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents, and decisions, and those digests, treatises, and commentaries, of learned and experienced men, which have acquired respect and confidence by long usage and general consent. If we consult English decisions made since the Revolution, it is not because they have any binding force as rules, but because they are expositions of the rules and principles of the common law, by men of great experience and judgment in the knowledge and application of the same laws which we are seeking to expound. And if we read the digests and treatises of reputable authors, published since we ceased to be English subjects, it is because they contain the authentic records of the precedents and judicial proceedings, which furnish the evidence of the common law. In like manner, the decisions of courts

81 L. R. A.

of other states, having the same common origin, and deriving their laws from the same common source, are valuable and useful in enabling us the more clearly to understand, and the more fitly to apply the rules and principles of our own authoritative code of laws." The appellant relies at once upon Lord Hardwicke's opinion in *Ward v. Turner*. Although some cases and writers do not regard that case as positively deciding that choses in action, such as stocks, cannot be effectually delivered as a gift *causa mortis* without transfer of the legal property, yet it is generally cited to that holding. The property there delivered was receipts for South Sea annuities. We quote, in part, from the chancellor's opinion: "Nor does it appear to me, by proof, that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death; for there is a witness who speaks, that, in some short time before his death, Fly showed him these receipts, and said he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous to allow this donation *mortis causa*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the statute of frauds, and will introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative." *Ward v. Turner*, 1 White & T. Lead. Cas. in Eq. 1217.

After the decision of *Ward v. Turner*, throughout the various cases we find distinctions as to the extent to which Lord Hardwicke meant to go concerning the delivery of choses in action. There is a review of the history of these decisions in 1 Roper on Legacies, pp. 10, 11, *et seq.* But, in 1827, Lord Eldon, under whose judgments have been recognized the expansion of those principles of equity which were matured in the time of Lord Hardwicke, cleared up much of the doubt which had existed before his time, and advanced to the point of construction upon which has been, to a great degree, founded the further expansions of our American courts. *Duffield v. Elwes*, 1 Sim. & Stu. 243, was an action where the defendant was possessed of a bond for a certain sum of money, and had also a mortgage, created by a deed of even date with the bond, to secure the sum mentioned in the bond, and he had another mortgage for a large sum. The second mortgage was dated November 3, 1820. It recited that £30,000 had been advanced upon mortgage by Sir Sandys to the prior mortgagees, and further secured by a bond, and a judgment recovered, and that the mort-

gagees had called in the money. It was witnessed, in consideration of the £30,000 advanced by Elwes to Sandys to pay off the mortgage, that the money and judgment were assigned, and certain premises were also conveyed by mortgage from Sandys to Elwes, to secure the £30,000. Elwes, when on his deathbed, and unable to write, declared that he gave the bond and mortgage, and the money secured by them, to his daughter, Mrs. Duffield. At the desire of Elwes they were delivered into the hands of Mrs. Duffield. The vice chancellor decided that the gift was not complete, because the delivery was not complete as a gift *inter vivos*. But, in the House of Lords, Lord Eldon, after citing the authorities, observed: "Lord Hardwicke is clearly of opinion that the delivery of a bond as a specialty would do; and if, then, the debt is well given by the delivery of the bond, the next question is, What are we to do with the other securities which are, or not, delivered over? In the present case the bond, the assignment, the covenant, and all the deeds are delivered over in such a manner that the representatives of the donor could not get at them; and the question is, whether, considering the difference between an absolute estate in land and a mortgage, the same principle does not apply in the case of a mortgage as in the case of a bond. Upon the whole, then, I am of opinion, that the delivery of these securities is a good *donatio mortis causa*, as raising a trust by operation of law, and that, as so raising a trust by operation of law, they are not within the provisions of the statute of frauds." Roper, Legacies, p. 19.

This celebrated case of *Duffield v. Elwes* is regarded as the turning point in the English law of property susceptible of delivery, and Lord Hardwicke's distinction between "the delivery of property and the delivery of its evidence has assuredly lost its point." 2 Schouler, Pers. Prop. p. 115. *Hewitt v. Kaye* (1868) L. R. 6 Eq. 198, recognizes the principle that "when a man on his deathbed gives to another an instrument, such as a bond or promissory note, or an I. O. U., he gives a chose in action and the delivery of the instrument confers upon the donee all the rights to the chose in action arising out of the instrument." The court approved of the doctrine laid down in *Amis v. Witt*, 33 Beav. 619.

The last English case that we have been able to find is *Robson v. Hamilton* [1891] 2 Ch. 559. Joseph Robson bequeathed and gave to his nephew Joseph Robson his old mahogany desk, "with the contents thereof," and made other dispositions of his other property. The desk was found to contain notes, bankers' deposit receipts, and undorsed checks to the order of the testator. The court sustained the gift of the desk with its contents, except the key to a tin box, and adverted upon the disadvantage to men in making bequests of that kind, and then said: "But in this case, as I have said, I think that the words the testator has used are strong enough, and, properly construed, ought to be held to include all the choses in action. The choses in action, if any distinction is

to be taken, are such as could have been given by the testator by mere delivery as a *donatio mortis causa*. In that case the indorsement of the executors would be required and in this case the indorsement of the executors will also be required. This last expression from the court of appeals of England is evidence of the development of the law in that country upon the subject of gifts *causa mortis*. It is only cited as an instance of the growth of the doctrine permitting gifts of choses in action. Chancellor Kent, about the same time that Lord Eldon decided *Duffield v. Elwes*, wrote that the distinction made by Lord Hardwicke between bonds and bills of exchange, promissory notes, and other choses in action, "seems now to be exploded in this country, and they are all considered proper subjects of a valid *donatio causa mortis* as well as *inter vivos*." 2 Kent, Com. 448. One of the earliest explosions was in *Wells v. Tucker*, 3 Binn. 366, when, in 1811, it was decided that where a bond was delivered by the donor in his last illness to his wife, for the use of a third person, it was a good *donatio causa mortis*. See also 2 Barbour, Rights of Persons & Property, p. 632. Shaw, Ch. J., followed the doctrine of Kent in *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378, and *Sessions v. Moseley*, 4 Cush. 87. The principle has also been recognized by English text-writers. Williams on Executors says bank notes may be the subject of a *donatio mortis causa*, because the property is transferred by the delivery; and, on the same principles, all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them may be the subjects of donations *mortis causa*. 1 Wms. Exrs. p. 829; Roper, Legacies, p. 18, and cases cited. Story, when he wrote in 1835, doubted the soundness of the doctrine of *Ward v. Turner*, to the effect that a promissory note or bill of exchange not payable to bearer, or indorsed in blank, cannot take effect as a *donatio mortis causa*, inasmuch as no property therein could pass by the delivery of the instrument, and boldly said that the doctrine no longer prevails, that, where a delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*, because it would not prevent the property from vesting in the executor; and as a court of equity will not, *inter vivos*, compel a party to complete his gift, so it will not compel the executor to complete the gift of his testator. On the contrary, the doctrine now established by the highest authority is that courts of equity do not consider the interest as completely vested in the donee, but treat the delivery of the instrument as creating a trust for the donee to be enforced in equity." Story, Eq. Jur. 604.

It being clear now that, under the progress of administration of principles of equity, gifts *causa mortis* may be made of incorporeal as well as corporeal chattels, and of choses in action generally, we must examine the class of property in this case,—namely, national bank shares,—and observe whether or not they are to be treated as upon any different plane from that occupied by

shares of stock generally. As will be seen by the statement of the facts, the certificates delivered to Andy were issued in the donor's name, and each certificate contained the words "transferable only by him or his attorney on the books of the bank on the surrender of this certificate." The by-laws of the bank also required a transfer on the books. The Revised Statutes of the United States (§ 5189) provide as follows: "The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferred on the books of the association in such manner as may be prescribed by the by-laws or articles of association. Every person becoming a shareholder by such transfer shall in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." No writing having passed at all between the parties, donor and donee, and no transfer on the books having been made, we must look at the principles and authorities bearing upon the direct point involved.

It was held in *Slaymaker v. Bank of Gettysburg*, 10 Pa. 373, that shares of stock are, in commercial usages, regarded as choses in action, and the certificates are evidence of the title of the holder to them. Now, a chose in action is incorporeal and incapable of delivery except by symbol. We grant that it is essential to the validity of a gift that it should be executed, but, where the nature of the property given is incapable of manual delivery, a delivery of the symbol which represents it is the only way to execute the gift. Things incorporeal, says Schouler, in a learned review of gifts *causa mortis*, were not contemplated by the earlier English jurists at all, but when, in the commercial world, bills and notes acquired a standing before the courts, "delivery of the writing, with or without indorsement, became the rule of transfer." Equitable assignments are now thoroughly recognized in the law, and, as a consequence, gifts that would have failed long ago in England because of imperfect delivery may be now upheld by the aid of a gift of equity. 2 Schouler, Pers. Prop. §§ 72 *et seq.*; Thornton, Gifts, §§ 273 *et seq.* In *Grover v. Grover* (1837) 24 Pick. 261, 35 Am. Dec. 319, it was decided that a valid gift could be made *inter vivos* of a promissory note payable to the order of the donor, without indorsement by him or other writing. The English cases referred to heretofore are cited in the opinion of the court, and Lord Hardwicke's opinions referred to in the following language: "The leading case on this point is that of *Miller v. Miller*, 3 P. Wms. 856, in which it was held that the gift of a note, being a mere chose in action, could not take effect as a donation *mortis causa*, because no property therein could pass by delivery, and an action thereon must be sued in the name of the executor. But in *Snellgrove v. Baily*, 3 Atk. 214, Lord Hardwicke decided that the gift and delivery over of a bond were good as a donation *mortis causa*, on the ground that an equitable assignment of the bond was sufficient. It seems to be very difficult to reconcile these two cases.

The distinction suggested by Lord Hardwicke in the case of *Ward v. Turner*, 2 Ves. Sr. 431, in which he adheres to the decision in *Snellgrove v. Baily*, is technical, and, to my mind, unsatisfactory, and certainly has no application to our laws, which place bonds and other securities on the same footing. We cannot, therefore, adopt both decisions without manifest inconsistency; and we think, for the reasons already stated, that the decision in *Snellgrove v. Baily* is supported by the better reasons, and is more conformable to general principles and the modern decisions in respect to equitable assignments. We are therefore of the opinion that the gift of the note of hand in question is valid." In *Camp's Appeal* (1869) 36 Conn. 88, 4 Am. Rep. 39, it was decided that choses in action, the title to which passes by delivery, may be the subject of a gift, as well as any other species of property, and the court said: "Whatever may be said or thought of the propriety of the law, it is well settled by the modern authorities that choses in action not negotiable, and negotiable paper not indorsed, may be the subject of a gift, and that a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title. In this respect a title by gift is not distinguishable from a title by purchase for a valuable consideration, and, when the claims of creditors do not interfere to affect its validity, such a title will be recognized and protected in the same manner and to the same extent as a title by sale." In *Tillinghast v. Wheaton*, 8 R. I. 536, 5 Am. Rep. 621, the delivery of a savings bank pass book containing entries by the officers of the bank of the amounts deposited by a deceased's wife, with a parol gift of the same by her husband on his deathbed, was a good gift *causa mortis* of the money deposited in the bank. The court there said that in the more recent English decisions the strictness of the ancient rule was relaxed, and the gift was sustained. The courts of Kentucky (*Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173) have recently followed the modern doctrine. A Mrs. Stephenson selected John King as her agent, and when she died King had in his possession a note and some county bonds, the bonds payable to bearer, and the note indorsed in blank. On the day before Mrs. Stephenson died she told her mother that she gave her property to her, and she delivered a paper to her mother, telling her that this paper was to show the property she had at Louisville, and to get her money on the paper. The paper was the letter from the agent, King, containing a statement of the property in his possession belonging to Mrs. Stephenson. The contention was in part in that case that, in order to make such a gift of a note or bond, it must be delivered by passing manually from the possession of the one to the other; but the court held that the delivery required "must be according to the nature of the thing, and usually that means according to the physical nature of the thing to be delivered. . . . Now, will it be insisted, under the more modern authorities, that an actual delivery of the chose in action

to the donee will not constitute a gift? We think not." The earlier cases are reviewed in this opinion, and the gift of the note and bonds was held to be good. In *Hill v. Stevenson* (1873) 63 Me. 364, 18 Am. Rep. 231, a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, was held to be a good delivery, as vesting an equitable title in the donee without assignment. See also *Druke v. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Westerlo v. De Witt*, 36 N. Y. 340, 93 Am. Dec. 517; 3 Redf. Wills, p. 336.

Although some writers of recent date disapprove of the doctrine which sustains gifts *causa mortis* of stock in a bank by mere manual delivery of the certificate, yet there is a recognition that such gifts made are upheld where a complete equitable title vests in the donee, and where the evidence shows that it was plainly the intent of the donor to make the gift. This principle is recognized in *Grover v. Grover*, heretofore cited; also in *Bates v. Kempton*, 7 Gray, 382, and in the following cases: *Allerton v. Lang*, 10 Bosw. 362; *Penfield v. Thayer*, 2 E. D. Smith, 305; and, indeed, it was thought it was recognized by Lord Hardwicke himself in *Snellgrove v. Baily*, criticised in *Grover v. Grover*. Pomeroy, after laying down the modern rule that all things in action "which consist of the promises or undertakings of third persons, not the donor himself, of which the legal or equitable title can pass by delivery, may be the subjects of a valid gift," says, in a note: "It is held in England that shares of stock are not capable of being the subject-matter of a valid donation, because no title can be transferred by delivery; no title can pass except by transfer on the company's own books. . . . Under the law of this country with respect to the title of the assignee before transfer is made on the company's books, there seems to be no reason why a certificate of stock may not be the subject of a valid gift, certainly if it has been indorsed in blank; but in my opinion such indorsement is not necessary." 3 Pom. Eq. Jur. § 1148; 1 Morawetz, Priv. Corp. § 197. In *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, the court sustained a gift *causa mortis* of bank stock, where there was no delivery of the certificate, and no transfer on the books, but an assignment in writing of the shares. It was held that delivery of the certificates without a transfer on the books of the bank would have made no more than an equitable title against the bank, but would have given a legal title as against the assignor, and that the representatives of the donor became trustees for the donee by operation of law to make the gift effectual. In *Walsh v. Sexton*, 55 Barb. 251, a woman, apprehending death, gave some certificates of stock in a railroad to her husband. The certificates, on their face, were transferable only by her or her attorney on the books of the company on surrender of the certificates. There was no transfer, and no power of attorney was signed. The gift was sustained upon the authority of *Westerlo v. De Witt*, 31 L. R. A.

36 N. Y. 345, 93 Am. Dec. 517. This latter case of *Westerlo v. De Witt* (1867) is generally cited, and bears closely upon the case at bar. The donor, apprehending speedy death, told the plaintiff to bring her a roll of paper from the pocket of one of her dresses. She took the roll, and gave it to the plaintiff. There was in the roll a certificate of deposit for \$1,500. After the gift, the donee returned the parcel to the pocket of the dress, as directed by the donor before her death. The donor left a last will and testament, in which she bequeathed to the plaintiff the legacy of \$1,000 and the dress in which the parcel was placed. The plaintiff doubted whether the certificate was intended for her. She was advised that she could not recover it in law. There were other facts and circumstances not necessary to here recapitulate. The court of appeals, by Hunt, J., sustained the gift, upon the ground that it was quite clear that in apprehension of death, or among the living, the gift of a mortgage or an indorsed note may be effected by a simple delivery of the security, and that Mrs. Clinton did not expect or intend to retain any control over the possession of the money or security after the date of the delivery. The security was placed upon the same footing as the money, and both were held to be susceptible of being presented as a gift by delivery. "It is impossible" said the court, "to apply any rule which would make this a valid gift as to the money, and invalid as to the certificate. They must stand or fall together." In *Com. v. Crompton* (1890) 137 Pa. 133, the donor there delivered a box containing a government bond and certificates of railroad stock, with the intent to give the securities to the defendant. The court passed upon the direct question of whether the failure to make a formal written transfer would defeat the purpose of the donor. It was treated as well settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee, without assignment or indorsement in writing; and, to sustain that proposition, the court cited *Wells v. Tucker*, 3 Binn. 366, and *Lacey v. Lacey*, 7 Pa. 251, 47 Am. Dec. 513. "The shares of stock are choses in action, and the certificates evidence of the title to them. Why may not a delivery of certificates, coupled with words of absolute and present gift, invest the donee with an equitable title to the stock, which the donor or a volunteer cannot successfully assail. A stockholder may clothe another with the complete equitable title to his stock, without compliance with the forms printed by the corporation." In *Cook v. Lum*, 55 N. J. L. 373, it is recognized that things in action may be given by a surrender to the donee of the donor's voucher of right or title, although the gift was in that case, on the facts, held invalid. So does Tiedeman on Equity Jurisprudence (§ 359) uphold gifts of choses in action. Brantley, Pers. Prop. § 208, citing Pomeroy's opinion in his note. Lowell on Transfers (§§ 43, 109) lays down the rule that "a certificate is a muniment of title, and a delivery of the certificates, like a delivery of the title deeds in England, may be evidence of an intention to transfer the property they

represent; and, on the same principle, the delivery of a certificate of stock may be a good *donatio causa mortis*, although no transfer of the stock is executed." *Reed v. Cope-land*, 50 Conn. 472, 47 Am. Rep. 663. Promissory notes, with or without indorsements, if delivered, may be good gifts *causa mortis*. *Croswell, Exrs. & Admrs.* § 621; *Vandor v. Roach*, 73 Cal. 614. The delivery of the certificates being intended as a gift of the stock, the donor did all that was required to pass an ownership, especially as there was no blank assignment on the back, and no attorney present to draw one. The authorities above cited permit the circumstances surrounding the actors to be considered. *Thomas v. Lewis*, 89 Va. 1, 18 L. R. A. 170.

The view that a delivery of the shares to Andy without writing or transfer on the books is good is also in direct harmony with *Basket v. Hassell*, *supra*, where it was regarded as unquestionable that a delivery of the certificate of deposit involved therein to the donee, without an indorsement, would have transferred the whole title and interest of the donor in the fund represented by it, and might have been valid as a *donatio causa mortis*. And we here observe that, as the doctrine of this oft-referred-to case seems, upon appellant's theory, to contract the common-law definitions of the character of the conditions attached to a delivery, yet upon this point—that choses in action may be given *causa mortis*—we find the same great tribunal that decided that case expanding the original English definitions so as to include not only choses in action generally, but those which, by delivery, concededly passed but an equitable title against all, except between the parties themselves. Thompson, in his Commentaries on Private Corporations, upholds a gift of stock by a delivery of the certificates, and cites *Basket v. Hassell*, *supra*, to sustain his text, and lays it down that, "in conformity with this doctrine, it has been often held that a valid gift of non-negotiable securities may be made by the delivery of them to the donee, without an assignment or indorsement in writing. This principle has been applied to notes, bonds, stocks, certificates of deposit, and life insurance policies. . . . So, also, it has been held that a valid gift (in view of death) of corporate stocks, may be made by a simple delivery of the certificates, with intent to transfer the stock; even though the certificates on their face are made 'transferable only by her or his attorney, on surrender of this certificate;' though, as already seen, a gift of shares may be executed by a transfer on the books without a deliver of the certificate." § 2390.

The argument that national bank shares stand upon a different footing is not tenable, for it was held in *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532, that, when a certificate of stock in a national bank was delivered (with a blank power of attorney indorsed as between the parties thereto), the title to the shares then passed; the right to the shares then vested in the purchaser. "The entry," said the court, "of the transaction on the books of the bank, where stock is sold, is

required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receiving dividends when declared. . . . Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid." And, again: "The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies." In *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, the delivery of a certificate with the assignment and power indorsed was held to pass the entire title, legal and equitable, in the shares of a national bank, notwithstanding that, by the terms of the charter or by-laws, the stock was declared transferable only on its books. "Such by-laws," said the court, "do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens as the corporation may have upon it, and except the right of voting at elections," etc. Judge Thompson, in his usual clear and vigorous style discusses the doctrine of distinguishing between the legal and equitable ownership of stock where the delivery of the certificate is had, and approves that part of the opinion of Judge Rapallo in the case last cited, and concludes with the following observations of his own: "So, the legal owner of shares in a corporation is the owner in whose name the shares stand on the books of the corporation, whereas the equitable owner is the one who, being the beneficiary,—that is the real owner,—is not registered as such on the corporate books, and who must, if the corporation refuses so to register him, go into a court of equity to compel them to do so. The real meaning is that his title is complete as against everybody but the corporation itself, and those who have a superior right to have the corporation make the transfer to them." *Thomp. Corp.* § 2393.

We are therefore of opinion that it was not indispensable to the validity of the transfer of the stock in question, by our statutes or the law generally, that there should have been any writing on the backs of the certificates, and that an equitable title passed to Andy. This equitable title gave Andy full right to the stock, and equity should afford him the means of obtaining the possession of that incorporeal subject of gift,—stock itself. The intent having existed in Judge Davis's mind to make the gift, and the stock certificates having been delivered, the legal title was complete between Andy and his uncle, subject always, of course, to revocation or to the inherent conditions in gifts *causa mortis*. We need not consider the attitude of third parties or creditors, because none have appeared in this case. The donee,

therefore, having an equitable title and a legal right, may enforce that right by the aid of equity. Many of the cases heretofore cited are where courts have extended their aid to give effect to gifts *causa mortis*. 1 Story, Eq. Jur. §§ 607 *et seq*

Passing to the point of dominion and control, the authorities hold, without much conflict, in recent decisions, that the delivery of a chose in action as a gift must be such as to vest in the donee the equitable title, and to divest the donor of all present control and dominion, always, of course, upon the recognized condition in cases of a gift *causa mortis*; and that a delivery which does not confer upon the donee the present right to reduce the fund into possession, by enforcing the obligation, according to its terms, will not suffice. As we have seen, the intent of Judge Davis was complete in this case, and the delivery passed to the donee the equitable title. Thus did the gift possess the all-important qualities of depriving the donor of all control and dominion over the property; and thus was the right conferred upon Andy to have compelled a transfer on the books of the bank of the stock to him. Under our view of the testimony of the words spoken by Judge Davis subsequent to the gift, it is unnecessary to discuss whether or not there was any limitation or suspension of this right conferred upon Andy by the donor, although, as said, we doubt if there was other than the law implies in all gifts *causa mortis*. No writing was necessary, as said before, to perfect the delivery, but the omission of this ceremony does not lead to the conclusion that the transaction is invalidated, on the ground that, by its omission, the donor was deprived of the control and dominion. The donor had parted, and intended to part, with the muniments of title to the shares in the bank, and thus surrendered the certificates which were necessary to obtain a transfer on the books of the bank.

Did Judge Davis, however, exercise any dominion and control after the date of the gift? The facts and circumstances, as apparent by the statement preceding this opinion, show that his nephew voted 950 shares of stock for the decedent for director, at the regular stockholder's meeting, January 14, 1890.

The holder of this proxy never conversed with Judge Davis regarding the same. It was given to the holder by Andy, and the facts all go to show that from the time Judge Davis executed the proxy, which antedated the gift some three days, he never was at the bank or took any part in its management or affairs. At the time of the meeting, he was sick and away. Andy controlled the proxy entirely. It was necessary to hold the bank meeting, and, to do this, the stock in question had to be voted. As against the bank itself, the legal title to the stock was in Judge Davis, for by its books was it alone guided. Andy produced the proxy, and inserted his brother's name; and at the direction of Andy, as said before, the stock was voted. We cannot see how this proxy can be made to defeat the donor's intent, as evidenced by the words and delivery and surrender of the certificates to Andy after the

date of the proxy. Possibly, when the proxy was signed by Judge Davis he had not made up his mind exactly what to do, or he might have contemplated postponing the execution of this gift; but it would be most unjust to hold that an act done under that proxy, without his knowledge or consent, should nullify all his acts and words sanely done just before he went to Tacoma. And, so far as Andy is concerned, he only did what any layman under such circumstances would have done; that is, assist to confer upon his dying uncle, during the rest of his life, the highest mark of affectionate regard then within his power to bestow. It has taken centuries for the most experienced and wise judges to determine that a donor of a gift *causa mortis* must divest himself, at the time of the gift, of all dominion and control of the article donated, and must place it wholly under the donee's power, and enable him, without further act on his (the donor's) part, to reduce it to his own manual possession; yet it is strenuously urged by the appellant in this case that because Andy did this one single act, made necessary, within a few weeks after his uncle's departure, it should be construed as so inconsistent with the surrender and control of the stock by his uncle, and of his own right of dominion and control over the same, as to deprive him of all his rights. It was the dominion of the donee which controlled the voting of the shares. Every presumption is that the donee accepted such a gift, and we cannot believe for a moment that this conduct of Andy at that bank meeting ought to overcome that presumption, when considered in relation to the intent of his uncle and the delivery of the evidence of the shares to him.

We have not considered Judge Knowles's testimony at the various points throughout this opinion where it might have been pertinent to do so. This omission, however, was due to our desire to avoid needless repetition, for we have regarded it in its application to the whole case. Without repeating it there, we find nothing in the interview between Judge Davis and Judge Knowles, about February 1st, which is not susceptible of reasonable interpretation favorable to Andy. Judge Knowles was not to return to see Judge Davis three days after his first visit with a view to make any testamentary disposition to Andy, for Judge Knowles expressly says that he was not to return "to fix up these gifts exactly," meaning thereby the gifts to Mrs. Wehrspau's daughter, and the Butte Library, and a lady, and two persons in the states. Judge Davis did not ask Judge Knowles about a will, and only referred to these particular gifts as gifts. He did say that Andy "is to control the bank, or have the bank, or both," which language is surely not unfavorable to the respondent in this case; and, indeed, there is reason in the argument that Judge Davis knew that he had given the stock to Andy, and, by his words, that he meant to exclude it from his estate proper. In doing so, he was but carrying out a statement he had made to that effect, long before, to many persons. That the testimony of these prior declarations was ad-

missible is well sustained in reason and in decision. *Moyer's Appeal*, 77 Pa. 486; *Thornton, Gifts*, §§ 222, 234.

The length of this opinion prevents any more extended notices of the many cases cited by the appellant which have upheld contrary views of the law. Many of them turned upon the peculiar facts incident to the words of the gift; others are of a date when systems of commercial transactions between men were far less practical and convenient than in later years; while some adhere to the more ancient common law doctrines which refuse to recognize gifts *causa mortis* of shares until transfer is made on the books. The early Maryland decisions fully sustain appellant's position that a written transfer is necessary. Those cited to us, and others, are cited in *Hinkley's Testamentary Law of Maryland* (pp. 146 *et seq.*). The recent decisions of that state proceed upon *stare decisis*.

The court is asked to pass upon the "Federal question" involved in this case. To us it appears, however, that the main point involved is whether there has been a valid gift *causa mortis*. It being clear to us that the equitable title to the stock passed by the delivery of the certificates, no decision has been made upon that point other than by the common law generally; for we do not think the statutes of the United States attempt to regulate the transfer of such an equitable title. But, if there is a Federal question involved, it is this: Can an interest in the shares of a national bank be legally transferred by the owner thereof to a donee or purchaser, as a gift *causa mortis*, so as to confer the equitable title upon the donee or purchaser, without a written transfer of the shares on the books of the bank, or an indorsement on the backs of the certificates themselves? We answer that question affirmatively, in the light of the decisions of the Supreme Court of the United States, that a transfer on the books of a national bank is not necessary to give to a donee or purchaser an equitable title to the shares. *Cecil Nat. Bank v. Watertown Bank*, 105 U. S. 220, 26 L. ed. 1041; *First Nat. Bank v. Lanier*, 78 U. S. 11 Wall. 378, 20 L. ed. 175; *Johnston v. Laffin*, 103 U. S. 804, 26 L. ed. 534; *Black v. Zacharie*, 44 U. S. 3 How. 513, 11 L. ed. 704. Judge Brewer, as circuit judge, held in *Kansas v. Bradley*, 26 Fed. Rep. 289, that a proposition once decided by the Supreme Court of the United States is no longer to be treated as a Federal question. Nor do questions which involve the ownership of national bank shares always present Federal questions. *Williams v. Weaver*, 100 U. S. 547, 25 L. ed. 708; *Le Sasser v. Kennedy*, 123 U. S. 521, 31 L. ed. 262.

We see no error in admitting the testimony of John E. Davis. The defendant had the burden of proof upon him; and, as the legal title stood in the name of the decedent, it was proper to show that respondent controlled and directed the voting of the stock, although it was voted and stood in the decedent's name. Having been rejected as a witness himself, he was obliged to produce some proof to explain who exercised dominion in fact, and to rebut a presumption

which might otherwise have arisen against him by the records of this bank meeting.

The testimony of Darnold, if entirely credible, would have rendered this case much simpler for discussion. We cannot tell what weight the district court gave to it. It is plausible and consistent in itself, and may have impressed the court as truthful. But we have considered its value as impaired by the omission of Darnold to deny Boyce's affidavits by counter affidavit. We regard Boyce's testimony on the trial as not weakening Darnold's statements. On the contrary, a reason for believing that Darnold told the truth is that Boyce failed to produce his books, which were at his house, he says, and thus to verify his statement that Darnold did not leave his (Boyce's) employ until some time after the alleged interview with Judge Davis in 1890. It was to appellant's interest to impeach Darnold, and Boyce was called for that purpose. To know whether Darnold was in search of employment when he says he called upon Judge Davis was of the highest importance from the standpoint of impeachment, but upon that point appellant wholly failed, although Boyce said he had the evidence in his own possession. Moreover, if the affidavit of respondent is true, Boyce was using Darnold's alleged statement of former perjury to coerce respondent into participation in a scheme to get money from the estate to pay Boyce's debts. Such a proposition, if it were really made, unfolds a brief chapter of moral obliquity on Boyce's part, well calculated to shake the truth of his entire affidavit.

There is nothing whatsoever in the motion for a new trial to show that Darnold would testify differently from the way he did, even if we assume that what he said upon the preceding trial was false. The rule is not to grant a new trial to get impeaching testimony. A prosecution for perjury would be appropriate. *Hopcraft v. Kittredge*, 162 Mass. 768. The same evidence produced on this trial, if the testimony of Darnold were excluded, would be abundantly sufficient to sustain the conclusion reached by the district court; and courts will not grant new trials where it is apparent from the record that the result would probably be the same. *United States v. Biena* (N. M.) 42 Pac. 70.

The findings made cover the issues involved in the pleadings, and are supported by the evidence. Our conclusion is that this gift must be sustained. We believe in adhering to the rule that, where a party claims by way of a donation *causa mortis*, he should make out a strong case. It is therefore the duty of the court to give particular heed to every fact and circumstance in the testimony, being very careful to avoid any conclusion not fully sustained by credible evidence. On the other hand, there is a cardinal principle never to be lost sight of, namely, that the law permits a man to make gifts in apprehension of his death; and if he has done so in due manner, while in full possession of his senses, and with deliberation and intent to bestow his personal property upon another, it would be a fearful injustice to nullify that intent, and take away the prop-

erty from the person justly entitled thereto. The more we have studied this case, the stronger has grown our conclusion that Judge Davis deliberately gave the bank stock to his nephew, and never, by any word or deed, signified any desire whatsoever to revoke the gift. We can find no middle line to follow in applying the rule of equity to the facts. Either the gift was perfected as between the judge and Andy, and must be sustained or the entire case of respondents is conceived in an iniquitous conspiracy with the appellant to enrich himself at the expense of his dead uncle's estate. If there were a conspiracy, the very foundation of it must needs lie in the premise that Judge Davis never handed over to the respondent any certificates of the shares at all before he went to Tacoma. But the premise that he did deliver the certificates is not assailed by any one throughout this case, and, under the testimony, could

not be considered for a moment. So that, when that assumed premise is removed, the whole hypothesis of dishonesty falls with it, and leaves standing by itself, as the correct reasoning and conclusion of the case, the gift of this fortune, which equity will uphold and enforce, as prayed for by the respondents. *The judgment is affirmed.*

Pemberton, Ch. J., and De Witt, J., concur.

Per Curiam: The record in this case was made up entirely with Talbott, as special administrator, as plaintiff, and the briefs so treat him. For that reason he has been called "plaintiff." At the argument of the case, by consent of counsel, John H. Leyson was substituted as plaintiff; Leyson having been appointed as administrator since the appeal in this case was taken.

MARYLAND COURT OF APPEALS.

METROPOLITAN SAVINGS BANK of
Baltimore *et al.*, *Appts.*,
v.

James MURPHY *et al.*, Admsrs. of Michael
Murphy, Deceased.

(82 Md. 314.)

1. **An entry of an account in a savings bank in the names of husband and wife**, subject to the order of either and to survivorship on the death of either, made by a transfer of funds from a former account in the name of the husband alone but designating his wife as the person to whom payment should be made in the event of his absence or death, makes the new account entirely separate and distinct, so that the testamentary character of the old account will not inhere in the new one and make it admissible to probate.
2. **A transfer of a savings bank account to a new account in the names of the former depositor and his wife**, making it subject to the order of either and to survivorship

on the death of either, partakes somewhat of the nature of an equitable assignment, and entitles the wife to the fund after the husband's death.

(January 8, 1896.)

A PPEAL by proponents from a decree of the Orphans' Court of Baltimore County refusing to probate an instrument claimed to be the last will and testament of Michael Murphy, deceased. *Affirmed.*

On July 8, 1873, Michael Murphy opened an account with the Metropolitan Savings Bank of Baltimore, and at the time named in writing on the books of the bank his wife, Ann Murphy, as the person to whom the funds should be paid in the event of his absence or death. In 1884 the legislature of Maryland passed an act, chap. 293, requiring certain formalities in the execution of a paper to make it a valid will, but provided by the second section "that this act shall not affect or be applicable in any wise to any will or bequest executed prior to the first day of August, 1884. On March 5,

NOTE.—Joint accounts in savings banks.

The litigation over joint accounts in savings banks has arisen chiefly in regard to the right of one of the depositors to control the account after the others' death. And in the bulk of these cases the one attempting to control the deposit has not in fact furnished money for the account, but that form of account was adopted for the purpose of giving the claimant an interest in the money after the death of the real depositor. If the depositor retains control over the deposit until his death, such efforts are not generally successful.

The mere opening of an account in the name of the depositor and his sister "and the survivor of them, subject to the order of either," will not be sufficient to give her a title to the money. *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486.

In *Dougherty v. Moore*, 71 Md. 251, the account was in the name of husband and wife "and the survivor, subject to the order of either." Both died the same day, and a controversy arose between their respective administrators as to who had the title to the money, and it was held that although the wife had the right to draw the money, yet, the money being that of the husband, his adminis-

trator, and not her's, had the better right to it after the death of both.

A deposit in the name of the depositor and a third person will not transfer the title to the latter if the depositor keeps possession of the book until his death. *Augusta Sav. Bank v. Fogg*, 82 Me. 588.

An entry in the pass-book, of two names with the words "payable to either or survivor," is not sufficient to constitute a valid gift by the owner of the money to the other person, if the latter never had possession of the book and did not know of the deposit until after the death of the former. *Noyes v. Institution for Sav.* 164 Mass. 583.

An entry in the pass-book, "payable to self or wife," is not sufficient to vest the money in the wife after the husband's death if he retains control of his deposit at all times during his life. *Towle v. Wood*, 60 N. H. 434, 49 Am. Rep. 326.

A deposit in the name of the depositor or another, the latter never having had possession of the book, is presumptively the exclusive possession of the former. *Re Ward's Estate*, 2 Redf. 251.

Making out the pass-book in the joint names of husband and wife is evidence merely that the deposit should be drawn by either of the persons

1885, Murphy's pass-book having been filled up, it was surrendered and a new one issued to him with a number different from that upon the former book, because of a regulation of the bank requiring the number to correspond with the page upon which the account was kept in the ledger; the page of the ledger being changed at the same time that the change in the book was made. This account was in accordance with the custom of the savings banks in Baltimore, opened in the form of "Michael Murphy and Ann Murphy, subject to order of either the balance at the death of either to belong to the survivor." Michael Murphy died in 1888 and the bank paid the balance of the account left at that time to Ann Murphy and her executor. The next of kin of Michael Murphy took out letters of administration on his estate and demanded from the bank the fund remaining in the joint account at the time of Michael's death and the bank refused to pay and attempted to set up the original account which Murphy had opened as a testamentary act by which the title to the fund was transferred to his wife. The orphans' court stated that "although in our opinion the entry in question would operate as a will to convey personal property, having been

executed prior to the act of 1884, chap. 293, and Michael Murphy having died March 2, 1888, yet, nevertheless, the money in question was otherwise disposed of by the entry of March 5, 1885, when Michael Murphy opened a new account in the names of Michael Murphy and Ann Murphy, his wife, subject to the order of either, the balance to be paid to the survivor.

"We therefore dismiss the petition."

Further facts appear in the opinion.

Messrs. Bensinger & Calwell, Alfred Jenkins Shriver, and M. W. Offutt, for appellants:

The requisites of a will of personal property executed before August 1, 1884, when the act of 1884, chap. 293, which made the requisites of wills of personalty and realty the same, went into effect were: (1) the intention to dispose of property after death; (2) that this intention was reduced to writing during the decedent's lifetime; (3) that the writing be complete on its face, or that its imperfections be duly accounted for.

Visitors of Free-School v. Bruce, 1 Harr. & McH. 510; *Brown v. Tilden*, 5 Harr. & J. 371; *Byers v. Hoppe*, 61 Md. 206, 48 Am. Rep. 89; *Western Maryland College v. McKinstry*, 75

named, and does not prove ownership in either of the parties. *Burke v. Slattery*, 10 Misc. 754.

The opening of an account in the name of the depositor and a third person, with the understanding that during the depositor's lifetime the money shall be subject to her absolute control, and on her death it shall go to the third person for certain purposes, does not vest any title in the third person, but upon the death of the depositor the money will go to her administrator. *Providence Inst. for Sav. v. Carpenter*, 18 R. I. 287.

The opening of the account in the name of the depositor and her daughter will not be sufficient to perfect a gift to the daughter of the money remaining in the account at the death of the depositor. *Re Bolin*, 136 N. Y. 177.

A deposit in the name of a man and his wife, he retaining control of the pass-book at all times during his life, will not vest any title to the fund in her. *Wortman v. Robinson*, 44 Hun, 357; *Schick v. Grote*, 42 N. J. Eq. 354.

But there are a few cases in which a deposit in the joint names of two persons has by reason of the existing circumstances been held to inure to the benefit of the survivor.

If a pass-book is in the names of Michael and Mary Smith, "either to draw," upon the death of Michael the title vests in Mary. And upon the death of both the representative of either is entitled to draw, and the same is true of an account in the name of one or the other. *Smith's Estate*, 17 Abb. N. C. 78.

The opening of an account in the name of depositor or her sister, accompanied by a delivery of the pass-book, will vest the latter with the title to the funds upon the death of the depositor. *Hannon v. Sheehan*, 46 N. Y. S. R. 565.

If the account is in the name of the depositor and another, "order of either of them," the sending of the pass-book to the latter will perfect the title in her so that in case of the death of the depositor she may draw the money from the bank. *Mack v. Mechanics' & F. Sav. Bank*, 50 Hun, 477.

If money is deposited by a third person in the name of one person or another, or the survivor, the bank will perform its contract by paying it to either in the lifetime of both, or to the survivor. *Ide v. Pierce*, 134 Mass. 261.

31 L. R. A.

A deposit in the name of one person or another, payable to either or the survivor of them, makes the deposit the joint property of both during their joint lives, and upon the death of one the title will vest immediately and absolutely in the survivor. *Whitehead v. Smith*, 19 R. I. —.

Money deposited by the husband in the joint names of himself and wife will inure to the benefit of both, and the whole will go to the survivor. *Platt v. Grubb*, 41 Hun, 447.

If both actually contribute money to the account, it seems that the survivor will not acquire title to the decedent's share.

If an account is opened in the names of one or another person, and contributions are made by both, the death of one will not terminate his interest, but his administrator may recover the portion of the fund which belongs to him. *Mulcahey v. Emigrant Industrial Sav. Bank*, 89 N. Y. 435, Reversing 62 How. Pr. 463, which held that the money went to the survivor.

An account in the name of the depositor, but containing the statement "subject to his order or the order of" another person named, does not make a joint account, but merely makes the latter the agent of the former to draw the money. *Murray v. Cannon*, 41 Md. 466.

In case of money deposited in the name of a third person with a memorandum that it may be paid to the depositor, parol evidence is admissible to show the intention in making the deposit. *Northrop v. Hale*, 72 Me. 275.

A parol agreement that the money shall not be paid to the one in whose name the account stands unless two other persons who were present when the deposit was made are present at the time of the attempted withdrawal, is not binding if such agreement is contrary to the rules contained in the pass-book. *Riley v. Albany Sav. Bank*, 36 Hun, 513.

In *Whitlock v. Bowery Sav. Bank*, 36 Hun, 460, where the surviving party to the account was made administrator of the other after he had drawn the money, the court held the appointment as administrator legalized the act of drawing the money, if legalization was necessary, so that the act could not be questioned by the administrator *de bonis non* of the deceased depositor.

H. P. F.

Md. 190; 1 Wms. Exrs. 7th Am. ed. pp. 94, 147; 2 Bl. Com. 502; *Powell v. Curtis*, Daily Record June 30, 1891, Orphans' Ct. of Baltimore.

Any instrument which is in its nature ambulatory and revocable during life, and whose operation depends upon the death of its maker, whatever be its form, is a will.

Kelleher v. Kernan, 60 Md. 440; *Carey v. Dennis*, 13 Md. 1; *Cover v. Stem*, 87 Md. 453; 1 Jarman, Wills, 6th Bigelow ed. pp. 19, 21; Beach, Wills, §§ 17, 19; Theobald, Wills, p. 10; *Doe, Cross, v. Cross*, 8 Q. B. 715; *Cock v. Cooke*, L. R. 1 Prob. & Div. 241; *Wareham v. Sellers*, 9 Gill & J. 98; *Powell v. Curtis*, *supra*.

An instrument may be a power of attorney and also a will.

Doe, Cross, v. Cross, *supra*.

An instrument propounded for probate may, on its face, be complete or incomplete. If incomplete on its face it may be established as a will of personal property by extrinsic and parol evidence to the effect that the decedent intended the same to operate in its then form as a will.

Tilghman v. Stuart, 4 Harr. & J. 118; *Byers v. Hoppe*, 61 Md. 212, 48 Am. Rep. 89; *Harris v. Pae*, 39 Md. 544; *Devecmon v. Devecmon*, 43 Md. 345; *Western Maryland College v. McKinstry*, 75 Md. 191.

But if complete on its face, no extrinsic and parol evidence can be received to alter or revoke it.

Byers v. Hoppe, 61 Md. 215, 48 Am. Rep. 89; *Setcell v. Slingsuff*, 57 Md. 587.

The entry was a validly executed will of personality before August 1, 1884. The act of 1884, chap. 293, required certain formalities as to execution.

The second section of the same act provides as follows: "Sec. 2. And be it enacted, that this act shall not affect or be applicable in any wise to any will or bequest executed prior to the 1st day of August, 1884."

Account No. 7,437 was a continuation of Account No. 1,485, the change of number indicating merely that the account had been transferred to a new section of the bank's ledger.

On March 5, 1885, the name of Ann Murphy was added, and the account then stood: "Michael Murphy and Ann Murphy, subject to the order of either, the balance at the death of either to belong to the survivor."

In *Taylor v. Henry*, 48 Md. 550, 30 Am. Rep. 486, a precisely similar entry was declared of no effect when no actual delivery of the fund had taken place.

See also *Dougherty v. Moore*, 71 Md. 251; *Murray v. Cannon*, 41 Md. 466.

The ground of the court's refusing probate to the instrument was that the entry of July 8, 1878, operated as a will but for the entry of March 5, 1885.

The orphans' court having affirmatively found this paper writing to be testamentary in character, should, of necessity and for that reason alone, have admitted the same to probate. Probate desides merely on the *factum* of the instrument.

Gibson v. Cook, 62 Md. 257; *Schull v. Murray*, 32 Md. 15; *State, M. E. Church, v. War-*, 28 Md. 355; *Ramsey v. Welby*, 63 Md. 586;

L. R. A.

Michael v. Baker, 12 Md. 158, 71 Am. Dec. 593; 1 Jarman, Wills, 6th Bigelow ed. p. 38.

Messrs. James J. Lindsay and John T. Ensor & Son for appellees.

Roberts, J., delivered the opinion of the court:

The appeal in this case is taken from an order of the orphans' court of Baltimore county, refusing probate to an instrument claimed to be the last will and testament of Michael Murphy, deceased. There is no controversy as to the facts appearing in the record, which can be briefly stated as follows: Michael Murphy became a depositor in the Metropolitan Savings Bank on Baltimore City, on July 8, 1873, and from time to time thereafter made deposits therein of various sums of money. On the 5th of March, 1885, after he had at intervals drawn from said bank different sums of money, there remained to his credit with said bank a balance of \$1,841.45.

This balance was, by his direction, transferred to a new and different account in said bank, which was opened in the names of Michael Murphy and Ann Murphy (his wife), and at the request of said Michael, which was agreed to by said bank, there was written at the head of the account of said Murphy and wife in the bank book No. 7,437, with the appellant, the following: "It is agreed that this account is opened subject to the by-laws printed on the first and last pages of this book, subject to the order of either. The balance, at the death of either, to belong to the survivor."

The wife survived her husband, and at the time of his death, which occurred March 7, 1888, the balance with said bank to the credit of the joint account of Murphy and wife amounted, with certain accretions of interest, to the sum of \$2,482.67. This sum the appellant, in pursuance of the terms of its contract with Murphy and wife, paid over to the survivor, Ann Murphy. The only question which we are now called upon to decide is: Had the bank authority in law to make such payment? It is the claim of the appellees that the bank acted without authority in making such payment, and the converse of the proposition is maintained by the executor and residuary legatee of Ann Murphy, now deceased. It is contended by the appellant bank that the two accounts in said bank—that in the name of Michael, and that in the joint names of himself and wife—constituted in fact but one and the same continuing account, and both having been opened with said bank prior to the passage of the act of 1884, chap. 293, requiring certain formal prerequisites in the execution of wills of personalty, they are entitled to be considered and construed as testamentary papers, and that the balance in said bank to the joint credit of the husband and wife at the time of his death passed, under the terms of the alleged will, to the wife as the survivor.

It is claimed upon the part of the appellees that when the individual account in said bank in the name of said Michael was closed, it no longer had any connection with or relation to the joint account in the names of the husband and wife, and became thereby wholly disconnected with this controversy. We concur in

this view, and think that the proper construction to be placed upon the two accounts in their supposed relationship is that the closing of the one and the opening of the other left them separate and distinct. And if this be so, there is but one consequence which follows, and it is this: The joint account in the names of the husband and wife ceased to possess a single testamentary attribute, as the entry at the head of the joint account was not, nor was the account itself, written or opened until after the act of 1884, chap. 293, had gone into effect.

So that we entertain no doubt about the legal effect of these accounts as testamentary papers. We are clearly of the opinion that the testamentary character claimed by the appellants as adhering to the first and second accounts by reason of their being one and the same continuing paper is without force and untenable. It is too plain for controversy that the accounts are separate and distinct, and in no just sense testamentary. We do not, however, concur in the view taken at bar of the case of *Dougherty v. Moore*, 71 Md. 248, as concluding the question raised by this appeal. The facts of that case differ very materially from the case presented in the record of this case.

At the death of the husband, the bank paid over to the wife the balance of the account and in doing so carried out in good faith the letter of its contract in *strictissimis verbis*.

This is not a case where the husband retained possession and control of the account in bank, and continued to draw therefrom such sums as his wants might indicate, as was the case in *Dougherty v. Moore*, *supra*, and in many other cases. Nor is the language controlling the ultimate disposition of the joint account in this case in any respect similar to that of *Dougherty v. Moore*. The bank's instructions, in opening the account, were that said account should be subject to the order of either husband or wife, and at the death of either the balance should belong to the survivor. It is neither the object of the law nor the duty of the court to seek by narrow and technical construction the means of invalidating a contract clearly expressive of the intention of the contracting parties, and we think nothing could be clearer than the object and intention of the parties to the contract in the language employed by them in opening the joint account.

While we have not been able to recognize the accounts in evidence as testamentary papers, we entertain no doubt as to the legal

effect and meaning of the entry at the head of the joint account. It is quite true that the title to the deposits referred to in the first account was originally vested solely in the husband, Michael, and it was his privilege to make such disposition of the same as he thought proper. He had the indisputable right to enter into any contract with the appellant that would accomplish his purpose in securing to his wife the protection which these savings deposits might give to her. After opening said joint account the husband never drew one farthing from the bank on that account, which from March 5, 1885, to the date of his death, March 2, 1888, remained undisturbed, save by the addition of some interest items, which were made by the officers of the bank.

The property in controversy consisted of deposits in the appellant bank, which by the direction, authority, and request of the said Michael, assented to by the appellant, was entered in the books of said bank to the credit of himself and wife with the understanding and contract with the bank, indorsed thereon as hereinbefore stated. The parties were *sui juris*, capable of contracting, and having actually contracted, the law exacts fulfilment, which the appellant has done. And we do not think after it has fully executed its part of the contract, it ought now to be required to pay to the appellees the money which it promised to pay, and had already paid to the appellants' testatrix, unless some legal requirement can be established demanding its payment to the appellees.

We have given the most careful consideration to the various cases which have been passed upon by this court bearing any analogy to the facts of this case, but we have found no authority controverting the conclusions at which we have arrived.

This transaction partakes somewhat of the nature of an equitable assignment, looking to the interest of the parties, rather than to matter of form, and the question of the survivorship depended solely upon mere contingency. But looking at this controversy from whatever point we may, we think the appellant paid rightly to Ann Murphy the balance standing to the joint credit of herself and husband at the time of his death. We will, for the reasons assigned, affirm the order of the court below.

Order affirmed with costs, and petition dismissed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CITIZENS' GASLIGHT COMPANY, of
Reading, South Reading, and Stoneham,
v.

Inhabitants of the Town of WAKEFIELD,
Appt.

(161 Mass. 432.)

1. No vote is required to render a town

subject to the obligations of the act of 1881, chap. 370, as to the purchase of property for the establishment of a light plant, in addition to the two votes provided by § 3 of the act, that it is expedient for the town to exercise the authority conferred by the act.

2. A petition to compel a town which has elected to establish a light plant to purchase a plant already in operation, as re-

NOTE.—For a somewhat similar case of compulsory purchase of the plant of a private corporation by a municipality, see *National Waterworks* 81 L. R. A.

Co. v. Kansas City (C. C. App. 8th C.) 27 L. R. A. 827.

quired by act 1891, chap. 370, is not wholly defeated by the fact that the poles carrying the light wires in the highways were not legally located.

3. The schedule of property which the owner of a light plant wishes to sell to a town which has elected to establish one under the act of 1891, chap. 370, need not be sufficiently particular to sustain a decree for specific performance or such as would be required in a formal conveyance of property. It is sufficient if it will enable the commissioners to identify the property and intelligently make an adjudication as to what shall be sold and purchased.

4. Ratification by a gas and electric light corporation of the action of its board of directors in electing in due time to sell its property to a town which has decided to establish a light plant under the act of 1891, chap. 370, before the town has changed its position, will make the act binding, although it was not within the thirty days given the corporation in which to act.

5. A town which elects to avail itself of the provisions of a statute enabling it to establish a light plant cannot attack the act as unconstitutional because it gives the owner of an existing plant the option to compel it to purchase that, and makes no provision for a jury trial as to value.

(May 18, 1894.)

APPEAL by respondents from a decree of the Supreme Judicial Court for Middlesex County in favor of petitioner in a proceeding to compel respondents to take and pay for a portion of petitioner's gas and electric plant upon the ground that they had elected to establish such plant under the act of 1891, chap. 370. *Affirmed.*

The facts are stated in the opinion.

Mr. Samuel K. Hamilton for appellant.
Messrs. Edgar R. Chaplin and Charles R. Darling, for appellee:

Chapter 370 of the act of 1891 is valid and constitutional.

Opinion of the Justices, 150 Mass. 592, 8 L. R. A. 487.

That part of the act requiring a town which proceeds to avail itself of the provisions of the act to buy any lighting plant which is already operating in the town is valid and constitutional.

The provision, instead of impairing vested rights, protects them. It does not compel a town to incur an obligation against its will. Towns are, and may be, compelled to assume obligations toward the public as an agency of the state; they are in this respect unlike an individual.

Agaram v. Hampden County, 130 Mass. 528; *Freeland v. Hastings*, 10 Allen, 570; *Re Kingman*, 153 Mass. 566, 12 L. R. A. 417, Dill. Mun. Corp. 4th ed. § 72; *Cooley*, Taxn. 2d ed. p. 688.

No obligation is incurred by compulsion; the town incurs it voluntarily, if at all.

It is a case of a gift *cum onere*, like the acceptance of a deed poll, in which the grantee assumes certain obligations. The statute is part of the vote, as a statute affecting the rights of a party under a contract is part of the contract.

31 L. R. A.

1 Kent, Com. *421; *Story*, Const. 5th ed. § 1388.

There is no valid objection to the act on the ground that it binds the town to take the plant before it has voted any money or otherwise taken any practical steps towards establishing a plant of its own other than the passage of the votes prescribed by the statute.

Harrington v. Berkshire County Comrs. 22 Pick. 263, 33 Am. Dec. 741; *Shaw v. Charlestown*, 3 Allen, 538; *Briggs v. Cape Cod Ship Canal Co.* 137 Mass. 71; *Drury v. Boston*, 101 Mass. 439; *Whitney v. Lynn*, 122 Mass. 338; *Lewis*, Em. Dom. § 655.

As the law stands the votes of the town constitute an offer to the company, which the latter accepts by filing the schedule.

Braintree Water Supply Co. v. Braintree, 146 Mass. 482.

The schedule is sufficient.

In a conveyance by deed or will a general description, such as all the property which the grantor owns, or owns in a certain place, or merely naming the subject of the grant, such as a house, mill, or wharf, or referring to the grantor's title, is sufficient.

Johnson v. Rayner, 6 Gray, 107; *Greenwood v. Murdock*, 9 Gray, 20, 69 Am. Dec. 272; *Robinson v. Brennan*, 115 Mass. 582.

So in an agreement to convey real estate.

Scanlan v. Geddes, 112 Mass. 15.

A general description of the location of the building, so that one can by inquiry find it, is sufficient in filing a mechanic's lien.

Parker v. Bell, 7 Gray, 429.

The general power of the directors was sufficient to authorize them to file the schedule. The directors of a corporation may make an assignment for the benefit of creditors.

Sargent v. Webster, 13 Met. 497, 46 Am. Dec. 748; *Descombes v. Wood*, 91 Mo. 196, 60 Am. Rep. 289; *Hutchinson v. Green*, 91 Mo. 367; *Ardesco Oil Co. v. North American Oil & Min. Co.* 66 Pa. 375; *Taylor*, Priv. Corp. § 225; *Wait*, Insolvent Corp. § 160.

Directors may institute legal proceedings.

Taylor, Priv. Corp. § 224.

In critical emergencies acts of directors may be justified which otherwise might be unauthorized.

Taylor, Priv. Corp. § 220.

If the original authorities of the directors were insufficient, the ratification by the action of the stockholders makes the proceeding valid.

Story, Agency, 9th ed. §§ 239, 248; *Wharton*, Agency, § 76; *Ang. & A. Corp.* § 304; *Clement v. Jones*, 12 Mass. 59; *Pratt v. Putnam*, 13 Mass. 361; *Fisher v. Willard*, Id. 379; *Emerson v. Newbury*, 13 Pick. 377; *Hewes v. Parkman*, 20 Pick. 40; *First Parish in Sutton v. Cole*, 3 Pick. 232; *Bayley v. Bryant*, 24 Pick. 198; *Haven v. Lowell*, 5 Met. 35; *Conrad v. Abbott*, 132 Mass. 380; *Murray v. Mayo*, 157 Mass. 248; *MacLean v. Dunn*, 4 Bing. 722, 1 Moore & P. 761; *Soames v. Spencer*, 1 Dowl. & R. 32; *Hagedorn v. Oliveron*, 2 Maule & S. 485; *Williams v. North China Ins. Co.* L. R. 1 C. P. Div. 757; *Ancona v. Marks*, 7 Hurlst. & N. 686; *Bolton v. Lambert*, L. R. 41 Ch. Div. 295; *Andreas v. Etna L. Ins. Co.* 92 N. Y. 596; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Cowan v. Abbott*, 62 Cal. 100; *Wisconsin v. Torinus*, 26 Minn. 1; *State v.*

Shaw, 28 Iowa, 67; *Blanchard v. Waite*, 28 Me. 51, 48 Am. Dec. 474; 5 Harvard L. Rev. pp. 11, et seq. article *Agency*.

Field, Ch. J., delivered the opinion of the court:

This is a petition under Stat. 1891, chap. 370, § 13, and the case comes before us by appeal from an order of a single justice overruling the demurrer of the respondent, and by appeal from a decree of a single justice appointing commissioners to determine what property shall be sold by the petitioner, and bought by the respondent, and what the price, time, and other conditions of the sale and delivery, shall be. The facts on which the decree is founded are recited in the decree. The petition was filed on October 28, 1892, and all the proceedings were had before the passage of Stat. 1893, chap. 454.

The decree recites "that the petitioner is, and was at the time set forth in the petition, a corporation established under the laws of Massachusetts, and having its usual place of business at Wakefield, in the county of Middlesex; that it is, and was at said times, engaged in the business of manufacturing gas for the use of the inhabitants of the towns of Wakefield, Reading, and Stoneham, with its main gasworks in Wakefield, and with pipes extending into the towns of Reading and Stoneham; that it was duly authorized by the board of gas commissioners, and by the necessary vote of stockholders, under and in pursuance of chapter 885 of the acts of 1887, to engage in the business of generating and furnishing electricity for light and power in the towns of Reading, Wakefield, and Stoneham, and is, and was at said times, engaged in furnishing electric light for commercial purposes to the inhabitants of the town of Wakefield, with its central lighting station in Wakefield." It is contended that the two votes passed by the town pursuant to Stat. 1891, chap. 370, § 3, to the effect "that it is expedient for the town to exercise the authority conferred upon towns under the provisions of chapter 370 of the acts of the year 1891," are not equivalent to a vote that the town decides to establish a plant for the manufacture and distribution of gas and electricity, but that an additional vote, to the effect that the town decides to establish such a plant, is required before the town becomes subject to the obligations imposed by the statute. See sections 12 and 13. But the statute makes provision for only two votes. Section 12 begins as follows: "When any city or town shall decide as hereinbefore provided to establish a plant, and any person, firm, or corporation shall at the time of the first vote required for such decision be engaged," etc. The provisions thereinbefore made are the votes required by § 3, and the first vote must mean the first vote required by that section. Section 13 begins as follows: "Any person, firm, or corporation desiring to enforce the obligation of any city or town under § 12 to purchase any property shall file with the clerk of such city or town, within thirty days after the passage of the final vote whereby such city or town shall have decided to establish a

plant, a detailed schedule describing such property and stating the terms of sale proposed," etc. The final vote must be the vote at the last of the two legal town meetings mentioned in § 3. This construction is confirmed by the language in the last clause of § 18. We find nothing in the statute, anywhere, indicating that after the town has voted at two separate legal town meetings, called as required by § 3, that it is expedient to exercise the authority conferred by the statute pursuant to § 3, any additional vote is necessary, and we think that this contention cannot avail.

Section 12 provides as follows: "When any city or town shall decide as hereinbefore provided to establish a plant, and any person, firm, or corporation shall at the time of the first vote required for such decision be engaged in the business of making, generating, or distributing gas or electricity for sale for lighting purposes in such city or town, such city or town shall, if such person, firm, or corporation shall elect to sell and shall comply with the provisions of this act, purchase of such person, firm, or corporation before establishing a public plant, such portion of his, their, or its gas or electric plant and property suitable and used for such business in connection therewith as lies within the limits of such city or town. If in such city or town a single corporation owns or operates both a gas plant and an electric plant, such purchase shall include both of such plants," etc. The petitioner, as the decree recites, operated both a gas plant and an electric plant in the town of Wakefield. The respondent contends that its poles for the support of the wires used in distributing electricity were not legally located in the town of Wakefield. On this question the decree recites as follows: "It appeared that an application by petitioner for permission to erect and maintain poles and wires in the streets of Wakefield had been made to the selectmen of Wakefield, under the provisions of chapter 382 of the acts of 1887 (there being another company in said town engaged in, or organized for the purpose of doing, an electric lighting business); that said permission was refused by said selectmen, but upon appeal taken to the board of gas and electric light commissioners, under the provisions of said act, the decision of the selectmen was reversed, and said permission granted, the order of said board being as follows, viz.:

"The Board of Gas and Electric Light Commissioners.

"Boston, May 27, 1890.

"In the matter of the appeal of the Citizens' Gaslight Company of Reading, South Reading, and Stoneham from the decision of the selectmen of Wakefield, refusing to grant it permission to erect poles and string wires in the streets of said town: Ordered, that the decision of the selectmen be reversed, and that permission is granted to the Citizens' Gaslight Company of Reading, South Reading, and Stoneham to erect wires over or under the streets, lanes, and highways of the town of Wakefield, for the purpose of supplying electricity for light and power."

"Thereafter, on August 7, 1890, at a regu-

lar meeting of said board of selectmen, without petition, notice to parties interested, or a public hearing, the following vote was passed, *viz.*: 'Voted, that the Citizens' Gas-light Company of Reading, South Reading, and Stoneham be and is hereby authorized and empowered to engage in the business of furnishing electricity for light and power in the town of Wakefield, and to erect poles and string wires in the streets and highways of said town, the location of said poles to be hereafter designated, and subject to such restrictions as to quality and style as may be imposed by the selectmen of said town of Wakefield, and subject also to such other provisions and conditions as may be required by said board of selectmen.' And a copy of said vote was furnished to the petitioner by the secretary of the board of selectmen of the town of Wakefield. But, except as aforesaid, the selectmen of the town of Wakefield had not given the petitioner any writing specifying where the posts to be used might be located, the kind of posts, and height at which, and the places where, the wires might run; and no such specifications had been recorded in the records of the town of Wakefield, in accordance with chapter 109, § 3, of the Public Statutes, and of chapter 221 of the laws of 1883. And, except as aforesaid, said petitioner received no written consent from the board of selectmen of said town to erect poles, lay or erect wires over or under the streets, lanes, and highways of said town, or to dig up and open the ground within the streets or highways of said town for the purpose of laying lines of wires, or to erect and maintain lines of wires upon or above the surface of the streets and highways of said town, as provided in either chapter 382 or 385 of the acts of 1887, or in compliance with any other statute. As to whether any oral directions or consent regarding said matters were given by the selectmen, no evidence was introduced by either party." The contention is that, so far as the electric plant is concerned, every pole supporting the wires within the limits of the highways in the town of Wakefield is a public nuisance, and that the town cannot be compelled to purchase property of the petitioner which the petitioner cannot legally use, and which may be removed or destroyed as a nuisance. The petitioner had received general authority to erect poles and lay wires in the public streets of the town. How far the particular location of the poles, and the quality and style of them, were subject to the approval of the selectmen of the town need not now be considered. The petitioner actually owned and operated an electric plant in the town. The specific property which the town is required to purchase in accordance with the provisions of the act, and the price, time, and other conditions of the sale, are to be determined by the commissioner or commissioners to be appointed under § 13, Stat. 1891, chap. 370. If the poles in the public ways were not legally located, this would not entirely defeat the petition; and what effect it would have upon the property to be purchased, or the price to be paid for it, cannot now be determined.

R. A.

The respondent contends that the petitioner has not complied with the provisions of the act, in filing a detailed schedule of the property within thirty days after the passage of the final vote, as required by § 13. The final vote was on August 15, 1892. The directors of the company, on September 9 1892, voted that the company file a detailed schedule of its property, in accordance with the act, and that the secretary be authorized to sign and file the same; and on September 12 the secretary, in the name of the company, filed with the clerk of the town a statement in detail of its plant, and the price and terms upon which the company would sell its property to the town. The contention is that the schedule should not be a mere list or catalogue of property, but a formal inventory, with a particular description, sufficient to enable a court to make a decree for specific performance, or such as would be required in a formal conveyance of the property. The provisions of the statute are that, if the corporation desires to enforce the obligation of the town to purchase any property, it shall file "a detailed schedule describing such property and stating the terms of sale proposed. If the parties fail to agree as to what shall be sold, or what the terms of sale and delivery in accordance with the provisions of this act shall be," either party may apply to the court, and the court shall appoint a commissioner or commissioners, who shall adjudicate "what property, real or personal, including rights and easements, shall be sold by the one and purchased by the other." It is evident that the schedule is not intended to settle finally just what property is to be included in the sale. We think that the schedule was required for the purpose, not of furnishing such a formal description of the property as may be necessary or proper in a conveyance, but of furnishing such information, in detail, to a city or town as the parties may need intelligently to negotiate for the purchase, or, if the parties cannot agree, of furnishing to the commissioners such a bill of particulars as may be necessary or convenient for an intelligent adjudication of the matters which they are to determine. We cannot say that the schedule filed in this case, on its face, appears not to be made up in sufficient detail to enable the town to understand what property, specifically, the petitioner owned and used in its business in the town of Wakefield; and we think that the commissioners probably could identify the property from the schedule, and intelligently make their adjudication. Certainly, it does not appear in the papers before us that the commissioners will be unable to identify the property from the schedule, and from such facts as necessarily must be put in evidence before them.

The schedule was filed by the secretary under the authority of a vote of the directors of the company, and it is contended that it was beyond the power for the directors to determine whether the company would elect to sell its property to the town, and to avail itself of the provisions of the statute. See Pub. Stat. chap. 106, § 28. The by-laws of the company are not set out in the papers.

It appears, however, that on September 19, 1892, the stockholders, at a meeting called for the purpose of taking action upon a proposition to sell the plant and assets of the company, and to transact such other business as should come before the meeting, ratified the action of the directors, but this was more than thirty days after the passage of the final vote by the town. We think that the vote of the stockholders must be considered as within the notice or call for the meeting at which it was passed. It does not appear that there was any change of position on the part of either of the parties between the action of the directors and that of the stockholders, and the petitioner duly filed its petition within sixty days after the filing of the schedule. Without considering whether the determination to sell the property to the town, and to file the schedule in accordance with the provisions of the statute, was within the authority of the directors, and assuming that the filing of the schedule within the thirty days is to be treated as a condition precedent to the right of the company to enforce the obligation of a city or town to purchase its property, we are of opinion that the ratification by the stockholders in this case must be taken as equivalent to original authority. The town took no action to rescind its votes between the time of filing the schedule and the vote of the stockholders, if any such action could have been taken, and the petitioner has never attempted to repudiate the action of the board of directors. See *Bolton v. Lambert*, L. R. 41 Ch. Div. 295; *Andrews v. Etna L. Ins. Co.* 92 N. Y. 596; *Nims v. Mount Hermon Boys' School*, 160 Mass. 177, 22 L. R.

A. 364; *Dempsey v. Chambers*, 154 Mass. 380, 13 L. R. A. 219.

It is contended that Stat. 1891, chap. 370, is unconstitutional. It is not in violation of the Constitution of Massachusetts for the legislature to authorize a town to purchase and maintain either a gas or an electric plant for the purpose of furnishing light to its inhabitants. *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487.

The legislature might have authorized cities and towns to erect and maintain such plants without requiring the cities or towns to purchase any existing plant of this kind, belonging to private persons or a corporation, but it has not done so. Under this statute a city or town is not required to establish any such plant, and private persons or corporations are not required to sell to any city or town any existing plant. In this respect, there is nothing compulsory in the statute. But if a town chooses to act under the statute, it must act in accordance with its provisions, and take the burdens with the benefits. The statute does not provide for a trial by jury upon the value of the property purchased, or upon any of the terms of the purchase. If we assume that, when property is taken by a town for a public use, the owner of the property has a right to a jury trial upon the amount of the reasonable compensation to be paid, still article 15 of the Declaration of Rights has no application to a party who comes in voluntarily under the provisions of a statute which provides for the determination of his rights and obligations in another manner than by a jury trial.

Decree affirmed.

SOUTH DAKOTA SUPREME COURT.

MCCOOK COUNTY, *Recept.*,

v.

Edward KAMMOSS *et al.*, *Appls.*

(.....S. D.)

*1. Section 2612, *Comp. Laws*, imposes the duty upon "the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability."

2. While the statute prescribes no procedure for enforcing this duty as to future maintenance, a county which, under the direction of the law, has furnished necessities to such indigent and helpless father, may recover therefor in an action against the children whose duty it was to furnish the same, and whose re-

fusal so to do made it necessary for the county to furnish such necessities.

(October 28, 1895.)

APPEAL by defendants from an order of the Circuit Court for McCook County overruling a demurrer to the complaint in an action brought to enforce defendants' liability for the support of their father. *Affirmed.*

The facts are stated in the opinion.

Mr. A. C. Biernatzki, for appellants:

A complaint alleging an open account and a balance due states two causes of action.

Eisenhower v. Stein, 39 Kan. 281.

When the complaint states a demand upon a claim due and a claim not due, there is a misjoinder of causes.

Wurlitzer v. Suppe, 38 Kan. 31; *Union R. & Transp. Co. v. Traube*, 59 Mo. 355; *Weinland v. Cochran*, 9 Neb. 480.

*Headnotes by KELLAM, J.

NOTE.—The decision in the above case is especially interesting as an affirmation of the right of action based on a statutory duty where the statute does not in terms provide a remedy. As the duty to provide the support rests by law upon the children first, and then, in case of their default, upon the county, the case is distinguishable from that of *Albany v. McNamara* (N. Y.) 6 L. R. A. 212, in 31 L. R. A.

which aid to a person was held to be voluntary so that no action would lie for reimbursement.

In this connection the case of *Rowell v. Vershire* (Vt.) 8 L. R. A. 708, is also interesting, where it was held that a promise of aid by the overseer of the poor to a man who by law had the duty of supporting a daughter was without consideration.

A summary proceeding may not be joined with any other cause of action although arising out of the same transaction.

Or v. Wickham, 38 Kan. 225.

So a statutory liability arising upon delinquencies cannot be joined with a common-law liability, if subsequent in time.

Abbott, Trial Brief, § 421, and citations: 11 Am. & Eng. Enc. Law, p. 1015, 1; 2 Wait, Pr. 451; Boone, Code Pl. 52; *Gates v. Kieff*, 7 Cal. 124.

Without statutory provisions, moral duty to support an indigent parent cannot be enforced, nor can action be maintained for the recovery of necessities already provided.

Edwards v. Davis, 16 Johns. 281; *Stone v. Stone*, 32 Conn. 142; *Augusta v. Chelsea*, 47 Me. 267; *Davson v. Davson*, 12 Iowa, 512; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Almy v. Harris*, 5 Johns. 175; *Sritzerland County Comra. v. Hildebrand*, 1 Ind. 555; *Storms v. Sterens*, 104 Ind. 46; 17 Am. & Eng. Enc. Law, pp. 353 et seq.; *Hamlin County v. Clark County*, 1 S. D. 132.

The statute, while saying that it shall be the duty of a child to support an indigent parent, has established no way in which this duty can be enforced, nor conferred upon any one the authority to enforce it: that is, failed to create a legal duty, and the provision is merely declaratory of a moral duty.

Kentucky v. Dennison, 65 U. S. 24 How. 66, 16 L. ed. 717.

The moral obligation, if any exists, could not be enforced, for our law does not go the length of the civil law to enforce a mere moral obligation.

Bremer County v. Curtis, 54 Iowa, 72; *Thorne v. Deas*, 4 Johns. 97; *Ehle v. Judson*, 24 Wend. 97; *Cole v. Bedford*, 97 Mass. 326; *Bishop*, Cont. 44.

The expenditure of the \$100 by the overseers of the poor was a charity, for which there can be no recovery.

Deer Isle v. Eaton, 12 Mass. 327; *Bennington v. McGennen*, 1 D. Chip. (Vt.) 44; *Bishop*, Cont. last ed. 209.

At common law the promise to pay for necessities previously furnished to either child or parent was not binding, being supported by merely a moral obligation.

2 Kent, Com. p. 208; *Bishop*, Cont. last ed. 90.

Mr. P. W. Scanlan, for respondent:

If the complaint states a good cause of action other causes incorrectly stated will not make it demurrable.

Boone, Code Pl. § 135; *Greentree v. Rosentock*, 61 N. Y. 583; *Conaughty v. Nichols*, 42 N. Y. 83; *Ledwich v. McKimm*, 53 N. Y. 307.

A demand for several distinct forms of judgment can be no misjoinder.

2 Wait, Pr. 450, 451; *Colstrum v. Minneapolis & St. L. R. Co.* 31 Minn. 367; *Lattin v. McCarty*, 41 N. Y. 107.

The county must provide maintenance for poor whether relatives are ordered to do so or not.

Mappes v. Iowa County Supers. 47 Wis. 31; *Stone v. Glover*, 60 Vt. 651.

Persons may be called upon to support their poor relatives.

Salem v. Andover, 3 Mass. 436; *Sayward v.* 81 L. R. A.

Alfred, 5 Mass. 245; *Jasper County v. Osborn*, 59 Iowa, 208; *Boone County v. Ruhl*, 9 Iowa, 276.

Kellam, J., delivered the opinion of the court:

McCook county brought this action to recover from appellants \$100, paid by the county for the support and maintenance of their indigent father, and for a judgment requiring them to contribute to his future support. This appeal is from an order overruling a demurrer to the complaint. The grounds of demurrer were: First, that plaintiff has not legal capacity to sue; second, that several causes of action have been improperly united; and, third, that the complaint does not state facts constituting a cause of action.

There is no merit in the first ground. The statute expressly authorizes a county to sue (Comp. Laws, § 572). The second ground will be noticed after the third is disposed of.

Does the complaint state facts sufficient to constitute a cause of action in favor of the county against the appellants? Section 2612 of the Compiled Laws is as follows: "It is the duty of the father, the mother, and the children of any poor person, who is unable to maintain himself by work, to maintain such person to the extent of their ability." This provision innovates the common-law rule, by imposing upon children, to the extent of their ability, the duty of maintaining their poor and helpless parents. The statute declares the duty of such children to support such parents as expressly and unequivocally as the common law declares the duty of parents to support their minor children. Appellants contend that this statute declares only a moral duty, for it provides no means for its enforcement. This may be true so far as future support is concerned, but the general law affords the same means for compelling payment for necessary support by an adult child who disregards this imposed duty as it does in the case of a neglectful father. The duty rests upon the child, but, in consequence of his neglect, the statute humanely requires the county to provide such support. The county does not act officiously, but under the coercion of the law, and supplies the support which the son or daughter was under obligation to supply. The duty to support being by law put upon the child, he is liable upon the same principle that the father is liable at common law for necessary support furnished to a destitute minor child, whom it is his duty to provide for. If, under such circumstances, the county, under the direction of the law, furnishes necessities to the indigent and helpless father, we think, upon principle, it ought to and may recover therefor against the children whose duty it was to furnish the same, but who neglected and refused so to do. The statutes of most of the states go further, and provide a procedure by which such children may be compelled to supply future support. Ours does not. Whether the omission was an oversight or deliberate we do not know. Our conclusion is that the complaint states facts which would entitle the county to recover for the necessary support theretofore furnished the father, but we are unable to find any statutory authority for the court to make

a judgment requiring the defendants to undertake the future support of their father. For such necessities as it has already furnished, or for such as, under the same conditions, it may hereafter furnish, it may maintain an action against the defendants. The complaint stating no cause of action for future maintenance, there was no misjoinder.

The complaint stating one good cause of action, the demurrer was properly overruled, and the order appealed from is affirmed.
All concur.

Petition for rehearing denied March 11, 1896.

MICHIGAN SUPREME COURT.

DETROIT

v.

BOARD OF WATER COMMISSIONERS
of the City of Detroit, *Plff. in Certiorari.*

(.....Mich.....)

Water need not be furnished without pay by an incorporated board of water commissioners having no source of revenue for the running expenses of the water-works except the water rates, to a house of correction which is under the control for the most part of a board of inspectors, and not of the city council, although the city is obliged to pay the expenses so far as they exceed the earnings of the institution, since any such burden should be laid upon the whole body of taxpayers of the city, and not upon those only who are private consumers of water.

(March 3, 1896.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment granting a mandamus to compel defendant to furnish water free of charge to the Detroit house of correction. *Reversed.*

The facts are stated in the opinion.

Mr. Henry M. Duffield, for plaintiff in certiorari:

The city of Detroit has heretofore asserted, in defense of actions brought against it in the state and Federal courts, that it has no control or responsibility for the acts of the superintendent and officers of the house of correction; and such is the law of this state.

Detroit v. Laughna, 34 Mich. 402; *Scharzwaelder v. Detroit*, U. S. Dist. Ct. Mich.

The board of water commissioners is a corporation auxiliary to the city of Detroit and in charge of its waterworks; it is confined in its own procedure to raising money from water rates charged for the use of water. These are the primary resources for paying current expenses and expenses for the extension of the works.

Jones v. Detroit Water Comrs. 34 Mich. 273.

Mr. John J. Speed, for defendant in certiorari:

The board of water commissioners, as well as other boards and commissions, is a part of the municipal government of the locality known as the city of Detroit; and although for certain purposes the right to sue and be sued and to hold property in its own name is

conferred upon this board, still this board can only under our system of government exist as a mere agency.

People, Park Comrs., v. Detroit, 28 Mich. 228, 15 Am. Rep. 202.

The board of water commissioners is not merely a trustee for the benefit of individual consumers of water who pay water rates.

The term "public use" in the 7th section of the act creating the board of water commissioners is broad enough to include public buildings.

The term "public" when applied to a building is one which exists by public authority and is used for public purposes.

See title *Public*, 19 Am. & Eng. Enc. Law, pp. 302-304.

Hooker, J., delivered the opinion of the court:

The city of Detroit, through its corporation counsel, ask a mandamus to compel the board of water commissioners to furnish, free of charge, water to the Detroit house of correction. The writ was granted by the circuit court, and the respondent has brought the proceeding to this court by certiorari.

The Detroit house of correction appears to have been built by the city under a general power, given to the common council, "to establish and build jails, workhouses, and houses of correction for the confinement of offenders, to erect, and provide for erecting, the necessary buildings therefor, and control and regulate the same; to appoint all necessary officers for taking charge of the same and of persons confined therein; to prescribe their powers and duties, to provide for their removal from office, and the filling of vacancies." Sess. Laws 1857, p. 106, subdiv. 60. Other sections of the charter provide for the confinement of state offenders, at the expense of the state and the various counties, and subsequent statutes took away much of the control originally given to the council and lodged it elsewhere. See How. Stat. chap. 344. The status of this institution has been before the courts, and in the case of *Detroit v. Laughna*, 34 Mich. 402, this court said: "The city, indeed, built the prison, and has an interest in its finances, as it is responsible to a certain degree for its expenses; but after the house was built under provisions of the city charter, which may or may not have been legally sufficient to provide for its future management, the legislature,

NOTE.—For water rates as taxes, see note to *Wagner v. Rock Island (Ill.)* 21 L. R. A. 519.

See also, as touching the character of such charge 31 L. R. A.

for water, *Springfield F. & M. Ins. Co. v. Keeseville (N. Y.)* 30 L. R. A. 660.

either discovering defects, or more probably recognizing the manifest impropriety of allowing a prison to be managed by a city council, passed a statute which removed any doubt concerning the legal position of that establishment. On the 15th of March, 1861, an act was passed entitled 'An Act to Establish the Detroit House of Correction and Authorize the Confinement of Convicted Persons therein.' By this act, the government of the prison was put under the control of a board of inspectors, of whom three were to be appointed by the common council, on the nomination of the mayor, and in addition to these, the mayor and the chairman of the board of state prison inspectors were made *ex officio* members. The regulation and discipline were to be under rules adopted by the board, leaving the council no voice except concerning the approval of rules relating to salaries and compensation of officers and employees. There is no very important power which the council can exercise without the concurrence of the inspectors, except in the selection of the superintendent, whose powers and duties are all governed by the act of 1861 and the general laws of the state. Any interference whatever by the common council, either in the selection of inferior officers or in the internal management of the prison, would be unlawful and nugatory. While it has at various times in legal experience been customary to allow and sometimes to compel, prisons to be built and maintained by larger or smaller municipal corporations, yet all criminal prisons are and must be public and not private places of detention, and no imprisonment can be lawful that is not authorized by public laws. In England it is settled that all prisons, by whomsoever kept, are the King's prisons (2 Inst. 100; *Ex parte Evans*, 8 T. R. 172), and no new prison can be erected except by act of Parliament." We find, therefore, that, while the legislature has required the city to pay the expenses of the house of correction to the extent that they shall be found to exceed the earnings, its management and its appropriations are not within the control of the council, these being confided to officers provided for by the law, except as the assent and concurrence of the council are necessary to extraordinary appropriations, etc.

The board of water commissioners is a corporation created in the year 1853, by act of the legislature, and given the charge of the waterworks, which it is authorized to manage and extend, and to regulate and fix and collect water rates from the owner or occupant of each house or other building having or using water. Laws 1853, p. 180; 3 Laws 1873, p. 135. These water rates seem to be the only source of revenue provided for the running expenses of the waterworks. *Jones v. Detroit Water Comrs.* 34 Mich. 273. Extensions, etc., are provided for from other sources, and fire hydrants may be ordered by the fire commissioner, in which case they must be paid for from the funds of the fire commission. If required by the council, it must pay the expense.

31 L. R. A.

It is now contended that the house of correction belongs to the city, and is a public institution, and, as such, is entitled to be supplied with water free of charge. It is a significant fact that those having in charge the management of the house of correction do not make this application, and that the city is the moving party. As already shown, the city must provide for the expenses of this institution, so far as they are not covered by the earnings. Such expense, then, should be a burden upon the whole body of taxpayers of the city. If the water must be paid for, it must come out of the general tax, unless it can be paid from the earnings. On the other hand, if the institution is entitled to have the water furnished gratuitously by the commissioners, the burden is not borne by the city at large, but by those only who are private consumers of water. The fund derived from water rates is depleted to that extent, and it might easily be so seriously affected as to require a raising of the rates. If, as contended, the water commissioners cannot refuse to furnish water gratuitously to this institution, they have practically no alternative but to furnish what is required, nor have they any means of preventing wastefulness, or the extension of its use to many purposes to which steam or other power is now applied. The common council would be powerless to control it. The house of correction should be supported from its own fund, and if, as is reported, it produces a handsome balance over expenditures each year, it should not be permitted to increase such amount by compelling the water board to use a part of its income from water rates; and we can see no difference between requiring the water board to pay a sum of money directly to the management of the institution, and expending it for water to be furnished.

It is said that there is no merit in the defense that it is merely a matter of bookkeeping, and that what is paid for water is taken from one city pocket and put into another; but we have shown that this is not true, inasmuch as one fund must be furnished by the city at large, or, possibly, by the county of Wayne and other counties, or the state at large, while the other is made up by a comparatively small portion of the inhabitants of the city, *i. e.* those who pay water rates. Again, if this were a mere matter of bookkeeping in the sense contended for, its natural tendency would be towards an economical use of water by the institution. It is probable that the board of water commissioners was created for the frugal and economical management of the waterworks, and the conduct of the business connected therewith, and that it could not have been intended that it should be at the mercy of every institution that may be called public. Whatever may be its duty as to furnishing water for the general purposes of the city, we think that it is not under an obligation to furnish it to this institution without pay.

We think the order of the Circuit Court granting the writ should be reversed.

The other Justices concur.

ARKANSAS SUPREME COURT.

A. L. ROGERS, *Appl.*,
v.
STATE of Arkansas.

(60 Ark. 76.)

1. One who fires a shot necessarily fatal, in self-defense, is not guilty of homicide in firing another shot which also would be fatal, after the other party has abandoned the conflict, where the last shot does not contribute to or hasten death.
2. A definition by the court of "great bodily injury" as a "felony committed on the person" is erroneous. The question must to a great extent be left to the judgment of the jury.
3. Failing to put a statement of law contained in an admonition to counsel in writing is not error in the absence of a request to do so.
4. A general request to put all instructions in writing does not cover a remark of the court in response to a remark of counsel in his argument.
5. A person charged with murder, who procures a continuance to obtain the testimony of an absent witness cannot be prejudiced by the failure of his attorneys, without his knowledge, to comply with a direction of the court to take such person's testimony to be used on an application for bail, made after such witness appears.
6. A judge cannot testify as a witness in a criminal trial over which he is presiding, under Sand. & H. Dig. § 2965, providing that the judge may be called as a witness by either party, but that in such case it is in the discretion of the court to order the trial to take place before another judge or jury.

7. The giving of testimony by the presiding judge on a trial for murder, reflecting on the good faith of defendant in a previous application for a continuance, is reversible error, although the testimony is subsequently excluded and no objection was taken to the competency of the judge as a witness, where the competency of the evidence was objected to.

(December 15, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Yell County convicting him of manslaughter. *Reversed.*

Statement by Riddick, J.:

The appellant, Rogers, was indicted by the grand jury of Johnson county for the crime of murder. The indictment alleged that he killed and murdered one M. L. Kernoodle in said county by shooting him with a pistol. A change of venue was taken to Yell county, and the case was there tried. The evidence showed that Rogers and Kernoodle became engaged in a combat in the town of Clarksville, near the barber shop in which Kernoodle worked; that they had only struggled a moment before Rogers drew a pistol from his

NOTE.—Competency of judge as witness in a cause on trial before him.

- I. Rule as to judges.
- II. Justices of the peace.

As to disqualification of a judge by reason of his prior connection with the case, see *note* to State, *Ambler v. Hocker* (Fla.) 25 L. R. A. 114 (1894).

The competency of a judge as a witness in a case not on trial before him will form the subject of a separate note.

Introduction.

The principle laid down in *ROGERS v. STATE* as to the competency of a judge as a witness is in keeping with the other decisions upon the question.

I. Rule as to judges.

In 2 *Hawk. P. C. chap. 46, § 17, p. 608*, it is stated that it is no exception against a person giving evidence either for or against a prisoner that he is one of the judges or jurors who are to try him.

So, in a note to *Trial of Colonel Hacker*, in 5 *How. St. Tr. 1178, 1181 (1880)*, it is stated that the secretary and president of the council were both in commission for the trial of the prisoners and set upon the bench, but there being occasion to make use of their testimony against Hacker, one of the prisoners, they both came off the bench and were sworn and gave evidence, and did not go up to the bench again during the trial, and it was agreed by the court that they were good witnesses though in commission, and might be made use of.

Again, in proceedings against the Five Popish Lords, 7 *How. St. Tr. 1384 (1680)*, the prisoners were told that it would be best for them to produce all the witnesses they had, and not to leave anything undone that they could prove, whereupon the question was asked whether if they should name any of the House of Peers as their witnesses such fact should exempt them from being judges, and the 31 L. R. A.

question was answered in the negative, and it was stated that if they had any witnesses among any of the lords, they might very well testify on behalf of the accused and yet remain still in the capacity of their judges.

And in *Trial of Fernley and Others for High Treason in the Year 1685*, 11 *How. St. Tr. 459*, it was stated that every man knew that a judge in a civil matter tried before him, and a counsel even against his client, had been enforced to give evidence, provided it be not of a secret communicated to him by his client, for in that particular a judge ceased to be a judge, and was a witness of whose evidence the jury were the best judges, though he reassumed his authority and was afterwards a judge of the jury's verdict.

Upon *Trial of Earl Macclesfield*, 16 *How. St. Tr. 1252 (1725)*, it was stated that in judicial proceedings, especially in a criminal case, witnesses of all sorts were to be examined upon oath.

The above would seem to have been the old rule, but it seems now to be agreed that the same person cannot be both witness and judge in a cause which is on trial before him. If he is the sole judge he cannot be sworn. If he sits with others he still can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another. *Morse v. Morse*, 11 *Barb. 510 (1851)*.

And the tendency of the decisions would seem to be that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness, but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he do not return to the bench. *People v. Dohring*, 50 *N. Y. 374, 17 Am. Rep. 349 (1874)*; *People v. Miller*, 2 *Park. Crim. Rep. 197 (1854)*.

pocket, and shot Kernoodle. Kernoodle turned, and ran into his shop, screaming, "Murder." As he entered, or was about to enter, the door of the shop, which was only a few steps away, Rogers fired again. Kernoodle staggered to the back part of the shop, sank down on the floor and expired almost instantly. The ball from the first shot entered the front part of the body, near the left nipple; and that from the second entered the back, near the spine. Both balls passed entirely through the body, and both, in the opinion of the medical experts, were fatal wounds, though they did not feel quite so certain that the last wound would have destroyed life as they did that this result would have followed from the first wound alone. There was a conflict in the evidence as to whether Rogers or Kernoodle was the aggressor in the combat. From some of the evi-

dence one might conclude that the killing was premeditated on the part of Rogers; that he armed himself, and going to the shop where Kernoodle worked, beckoned him to come out, and then, having willingly entered into a combat with him, deliberately killed him. There is other evidence which contradicted this, and tends to show that Kernoodle was the aggressor, and that being a large and powerful man, he walked up to Rogers, and, after some words, without provocation, struck Rogers a violent blow with his fist, pushed him against the wall, and was about to throw him down when Rogers fired the first shot. There was some proof tending to show that at the time Kernoodle struck Rogers he was armed with a razor, although this was contradicted by other proof. The other facts will sufficiently appear from the opinion. The jury found the defendant guilty

The objection to the competency of a judge as a witness goes to the power of the court, the power to administer the oath, to decide on a question of competency, or the admissibility of parts of the evidence, to commit for refusing to answer, and to exercise over the witness all the other powers of the court which may be called into requisition for the protection of the rights of the party. *Morse v. Morse, supra*.

Public policy will excuse a judge from testifying if he insists upon it, but it is no ground for exception that he did not insist upon his right to be excused. *Welcome v. Batchelder, 23 Me. 85 (1843)*.

In *Dabney v. Mitchell, 66 Ala. 495 (1890)*, where a cause was tried before a judge of the probate court upon *ex parte* evidence, it was held that such judge was not a competent witness, and that an affidavit made by him, even though taken before an officer having authority to take and certify affidavits, could not be received as evidence.

In *Ross v. Buhler, 2 Mart. N. S. 512 (1824)*, it was held that a district judge could not give evidence on a trial of an action in which he sat as judge, and the court stated that the Spanish law expressly forbade it, for the reason that such judge who was to administer the oath must do it alone, and was to decide as to his competency and to determine on the absence of evidence if a nonsuit was prayed.

In *People v. Miller, supra*, it was held, upon an indictment for obtaining the signature to a certain promissory note by false pretenses, that the county judge who presided at the trial could not be sworn and examined as a witness, as he could not occupy both positions at the same time.

Where, during the progress of a trial, the presiding judge, at the request of the respondent and over the objections of the appellant, took the witness stand and testified concerning testimony offered by the appellant in some prior action involving the matter in dispute, it was held that it was error. *Maitland v. Zanga (Wash.) 44 Pac. 117 (1896)*.

Where, upon a trial, one of the justices was called as a witness and gave material evidence, it was held that the court was disorganized, and that the conviction made thereunder was irregular. *Dohring v. People, 2 Thomp. & C. 458 (1873)*.

In *People v. Dohring, 50 N. Y. 374, 17 Am. Rep. 349 (1874)*, a justice of the sessions, who was sworn as a witness, did not leave the court-room while the trial was progressing, nor abandon the trial, but left the bench for a space intending to return to it, and did so return. The court held that it was error to permit such justice to take his place and be sworn and testify as a witness, not upon the ground that any harm was caused, but because such practice, if sanctioned, would lead to embar-

assing results and hinder justice and be a scandal to the courts.

In the above case it was shown that two justices of the sessions were indispensable to constitute a legally organized court of sessions, and that neither could be dispensed with any more than the county judge.

In the above case, however, the court had originally obtained jurisdiction and the judge was examined by the consent of the people and the prisoner, and it was therefore held that the court had full jurisdiction even though such justice was examined as a witness, the court overruling the prior decision in the case in *2 Thomp. & C. 458 (1873)*, upon that point.

II. Justices of the peace.

In *Baker v. Thompson, 89 Ga. 486 (1892)*, the evidence of a presiding magistrate in a justice's court upon a trial before a jury on appeal in the court over which he presided was refused upon the ground that the law made no provision for the administration of an oath to him as a witness, and upon the ground that he could not be sworn before himself.

So, in *Perry v. Weyman, 1 Johns. 520 (1806)*, it was assigned as error that the justice before whom the case was tried was sworn by another justice as witness in the cause, the court held that such oath was extra-judicial and improper, and reversed the judgment.

Where a party seeks to avail himself of the evidence of a justice of the peace before whom the cause is tried through the intervention of a jury, he must, before the commencement of the trial, proceed according to the provisions contained in the Ohio statute, for the removal of the cause and its trial before another justice of the peace. *McMillen v. Andrews, 10 Ohio St. 112 (1859)*.

The provisions of the Ohio statute (*Swan's Statutes*, p. 510, § 758), are that if at any time before the trial shall have commenced it shall be made satisfactorily to appear to the justice before whom any cause is instituted or is pending for trial, by affidavit of either party, that such justice is a material witness for either party, or that a fair and impartial trial cannot as he believes be had in such township, the cause shall be in the first case transferred to some other justice of the township for trial, and in the last to some justice of adjoining townships. *Ibid*.

In *McMillen v. Andrews, supra*, the question was whether a justice of the peace, before whom a cause was being tried through the intervention of a jury, could be required by either party to be sworn and testify in such case the other party objecting, and the court held that he could not. — E. W.

of the crime of voluntary manslaughter, and assessed his punishment at five years in the penitentiary.

Messrs. McKennon & Patterson, J. E. Cravens, and Martin & Murphy, for appellant:

If the first shot was fired justifiably, it was not made criminal by the second. If the first was justifiable and the second criminal, the appellant committed no criminal homicide, unless the second was an agent in causing death.

2 Bishop, New Crim. L. §§ 636, 637; Kerr, Homicide, §§ 82, 33; *Livingston v. Com.* 14 Gratt. 592; *State v. Scates*, 5 Jones, L. 420.

The definition of "great bodily harm" excluded everything but mayhem and rape. It was legally inaccurate, and also an unwarranted violation of the appellant's request that charges be put in writing.

Mazzie v. State, 51 Ark. 177; 2 Archbold, Crim. Pr. & Pl. *285; *Reg. v. Cor. Russ.* & R. C. C. 362; *Reg. v. Ashman*, 1 Fost. & F. 88; *Reg. v. Nicholls*, 9 Car. & P. 267; *Reg. v. Griffiths*, 8 Car. & P. 248, 2 Moody, C. C. 40, 1 Leach, C. C. 71; Jacob, Fisher's Dig. vol. 3, p. 3468; *Baker v. State*, 4 Ark. 56.

Messrs. James P. Clarke, Attorney General, and Charles T. Coleman for the State.

Riddick, J., delivered the opinion of the court:

We need not consider the objections urged against the definitions of the words "wilfully" and "deliberately" contained in instruction No. 1, given by the court. The object of those definitions, we suppose, was to inform the jury concerning the distinctions between the different degrees of homicide. As the defendant was only convicted of manslaughter, it is plain that, whether erroneous or not, they did him no harm. We find no error in either of the instructions numbered 2, 9, and 11, given by the court on its own motion, and to which defendant excepted. When taken in connection with the other instructions, we think they state the law as favorably to appellant as he had the right to demand.

The twelfth instruction given by the court, and to which the defendant objected, is as follows: "(12) If the jury believe that the defendant inflicted upon the body of the deceased two mortal wounds; that both wounds were necessarily fatal, and either of which, independent of the other, would have produced and resulted in the death of the deceased within a short time, of which two wounds the jury believe the deceased died; and the jury further find that the deceased had in good faith declined all further contest with defendant, and that, while deceased was fleeing from him, defendant inflicted the second fatal wound upon the body of the deceased by shooting him a second time,—although the jury might believe the defendant fired the first shot in self-defense, the killing would not be justifiable, but would amount to manslaughter only." It is said by Mr. Bishop that "whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible, if death follows, he will be deemed guilty of the homicide, though the person beaten would have died from other causes, or would not have died from

this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death in a degree sufficient for the law's notice." 2 Bishop, New Crim. L. § 637. To same effect, see *Kee v. State*, 28 Ark. 160.

If the defendant fired the first shot in necessary self-defense, and then afterwards, when Kernoodle had abandoned the contest, and was fleeing, he again fired upon him, inflicting another wound, when the circumstances were not such as to make a reasonable man in his situation believe that he was then in immediate danger of great bodily injury, he would be guilty either of some degree of homicide, or of an unlawful assault, depending upon the question whether or not the wound inflicted by the last shot either caused, contributed to, or accelerated his death. In other words, if the last shot was not fired in necessary self-defense, and the wound inflicted by it either caused his death, or contributed to or hastened it, the defendant would be guilty of some degree of homicide, even though the first shot was fired in self-defense, and though at the time the last shot was fired the deceased was already so severely wounded that his death would have followed in a very short time. On the other hand, if the first shot was fired in self-defense, and the last shot neither caused his death nor contributed to or hastened it, then he could not properly be convicted of any degree of homicide, but might be convicted of an assault. *Davis v. State*, 45 Ark. 464. The court, in giving instruction No. 12, doubtless had these rules of law in his mind, and the instruction, abstractly considered, is nearly correct, if not entirely so; but we doubt if in this case it presented the question in such a way as to let the jury understand that, in the event the first shot was fired in self-defense, then it became material for them to determine whether the last shot contributed to or hastened his death. Instruction No. 4, asked by the defendant, substantially covered the law on this point, but it was rather long, and also stated that, if the second shot did not contribute to the death of deceased, the jury must acquit, whereas they might still have found defendant guilty of an assault.

Another question raised by counsel is concerning the meaning of the phrase "great bodily injury." One of the counsel for defendant, in the course of his argument before the jury, stated that the law books did not define such phrase; whereupon the court interrupted him, and said that the law books did define it, and that its meaning was "a felony committed on the person." To this remark of the court defendant excepted at the time, and now contends that it was not a correct statement of the law, and that, even if correct, it should have been reduced to writing. It was held in *Reg. v. McNeill*, 1 Craw. & D. 80, that to constitute "a grievous bodily harm," under a statute of Geo. IV., it was not necessary to show that the wound be on a vital part, or that the injury be of a permanent nature, or that life be endangered thereby; but that proof that the prisoner committed an assault with a deadly weapon, whereby a severe wound was inflicted, was sufficient to sustain an indictment for an assault to inflict grievous bodily harm. In the

case of *Lawlor v. People*, 74 Ill. 230, the court said that the phrase "serious bodily injury" meant substantially the same as "great bodily injury," and that the meaning of both was "a high degree of injury, as opposed to a slight injury." The phrase "great bodily injury" is difficult to define, for the reason that it well defines itself. It means a "great bodily injury," as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault, something more than attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances; but, as such an injury may under some circumstances be committed and still the offender not be guilty of a felony, it is therefore not accurate to define "great bodily injury" as "a felony committed on the person." What constitutes a great bodily injury, and whether the circumstances in any case are such as to justify one in believing that such an injury is about to be committed upon him and in defending himself against it, are matters which must be left to a great extent to the judgment of the jury.

It is also contended that the court, before making this remark concerning the meaning of the phrase "great bodily harm" or "injury," should have reduced it to writing; but we do not think this contention is well taken. It is the duty of the court to restrain the remarks of counsel within proper bounds. If, in the opinion of the court, counsel should announce propositions of law to the jury which are incorrect and misleading, the court should admonish counsel so that he may desist. It is not necessary to stop to reduce the admonition to writing before making it, but if it contains a statement of law calculated to influence the verdict of the jury, the court should, at request of counsel, reduce the same to writing, and, if necessary, repeat it in its written form to the jury. No request was made to reduce this remark to writing. The general request to put all instructions in writing cannot be held to cover this remark, for it was not intended as a part of the instructions, but only as a correction of what was conceived to be a misstatement of the law in the part of counsel.

During the progress of the trial the presiding judge was called as a witness, and, over the objections of the defendant, testified on behalf of the state. His testimony was, in substance, that at a former term of the court, before the change of venue was taken, the defendant had filed a motion for continuance on account of the absence of one Bert Cunningham, whom he alleged was a material witness in his behalf. Afterwards Bert Cunningham appeared, and,

defendant having made an application for bail, the judge, in open court, notified the attorneys of defendant that they might take the testimony of said Cunningham to be used on the application for bail; to which notification the attorneys of defendant made no response, and took no steps to procure the testimony of said Cunningham. It was not shown that the defendant was present at the time this notification was given to his attorneys, or that he in any way approved of the conduct of his attorneys in this regard; on the contrary, defendant testified that he had been in prison, and did not know such notification was given. This evidence tended to make the impression that defendant had endeavored to procure a continuance on account of the absence of a witness whose testimony he did not want, when the failure to take this deposition may have been due to the neglect of his attorneys, and through no fault of the defendant. We think it clear that the testimony was incompetent. The trial judge seems to have arrived at the same conclusion, and afterwards, acting as a court, excluded the testimony which he had given as a witness. But the question still remains whether a judge, while presiding at a trial of a criminal case, may, against the objection of the defendant, testify as a witness on the part of the prosecution. The only reference to this question we find in our statute is § 2965, Sand. & H. Dig. That section is as follows: "The judge or juror may be called as a witness by either party; but, in such cases, it is in the discretion of the court to suspend the trial and order it to take place before another judge or jury; and when a party knows at the time the jury are impaneled that a juror is to be called by him as a witness, he shall then declare it, and the juror shall be excluded from the jury." This section was taken from the Code of Practice in Civil Actions, and is the same as section 660 of that Code. There is a provision in the Code of Criminal Practice that the provisions of the Civil Code shall apply to and govern the summoning and coercing the attendance of witnesses, and compelling them to testify in all criminal prosecutions; but that provision, we think, refers to the chapter of the Civil Code regulating the issuance of subpoenas for witnesses and attachments for contempt. It does not refer to the competency of witnesses. While there are other portions of the Civil Code applicable to criminal proceedings, we do not find anywhere that this section is to apply to such proceedings; on the contrary, the language of the section itself furnishes convincing proof that it was only intended to apply to civil cases. It states that, when the judge or juror is called as a witness, it is in the discretion of the court to suspend the trial, and order it to take place before another judge or jury. It is plain that on a trial of a defendant for a felony, after the jury are impaneled and sworn, the court would have no power, without the consent of the defendant, to suspend the trial, and order it to take place before another jury. So we conclude that this section was not intended to apply to criminal proceedings, and that we have no statute permitting a judge to testify as a witness in a criminal trial over which he is presiding.

In the absence of such a statute we think it

clear that a judge cannot testify under such circumstances. It has been held in England that a judge may give evidence, but that if he does so he must descend from the bench, and cannot return thither during the trial. Sichel, Practice relating to Witnesses, 14. This rule was applicable to trials where the court was composed of several judges. In such a court, a judge might descend from the bench, testify, and take no further part in the trial of the case without interfering with the progress of the trial. Speaking of this question, Mr. Rapalje says: "If the judge sits alone, he cannot be sworn at all; and, if he be one of several judges, he ought not to be, unless he leaves the bench during the trial. In such a case, the maxim that 'no one shall be both judge and witness in the same cause' prevails." Rapalje, Witnesses, § 45.

This question came before the supreme court of New York in a case where one of the two judges presiding had testified, and Folger, J., who delivered the opinion of the court, said that it was erroneous, "because such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts." In the same opinion, referring to the same matter, he says: "Other considerations may be added: If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance that he may for reasons sufficient to himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench, and take part in disposing of the interlocutory question thus arising, and upon the decision being made, go back to the stand or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings." *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 549. This reasoning applies with even greater force where the court is composed of only one judge, for, if the judge of such a court takes the stand to testify against the defendant, there is no one to control his testimony or keep him within proper bounds. Even if he can control his own testimony, and discharge, at the same time, what have been called "the incompatible duties of witness and judge," yet, however careful and conscientious he may be, the chances are great that by thus testifying he will to some extent detract from the dignity that should surround the functions of his high office. Instead of the impartial judge administering the law with a firm and even hand, he takes on for the time the appearance of a partisan, endeavoring to uphold by his testimony one side against the other. More than likely he provokes unseemly conflicts between himself and counsel, and arouses the distrust of the party against whom he testifies. In addition to this, the higher his character and standing as a judge the more danger that he thus gives the party in whose favor he testifies an

undue advantage over the opposing side. For these reasons, in the interest of the dignity and decorum of the circuit court and the orderly procedure therein, we feel compelled to hold that a judge presiding at a criminal trial cannot, against the objection of the defendant, be sworn and testify as a witness on the part of the prosecution. Bishop, Crim. Proc. § 1145; Underhill, Ev. § 313. We do not mean to intimate that in this case there was any partiality shown by the learned judge of the circuit court. The record shows to the contrary. The section of the Digest above referred to is calculated to mislead if not read carefully, and the mistake arose from being compelled to construe it in the hurry of a *nisi prius* trial. There were objections made to other rulings of the court, but when taken in connection with the facts of this case, we do not discover any error except as above indicated. For those errors the judgment is reversed, and the cause remanded for a new trial.

A petition for rehearing was subsequently filed, in response to which Riddick, J., on January 26, 1895, delivered the following opinion:

On the argument for rehearing, it was contended that no proper objection was made or exceptions saved to the action of the judge in taking the stand as a witness, and that for that reason the judgment should not be reversed. The language of the objection and exception is as follows: The presiding judge was "sworn as a witness on the part of the state, and he testified, against the objection of the defendant, touching an application for continuance, etc." At the close of his testimony there was an exception in the following words: "To the introduction of this evidence the defendant objected, but the objection was overruled, and the defendant at the time excepted." In the motion for new trial the following is set up as one of the grounds for a new trial: "The court erred in allowing himself to be introduced as a witness on the part of the state in rebuttal, against the objection of the defendant and in testifying, etc." "The office of the objection," says Judge Elliott, "is to present to the trial court the specific grounds upon which the court is asked to act in giving a decision, so that the court may be fully informed as to the reasons for the ruling sought by the objecting party." On the other hand, "an exception is not required to present specific grounds or reasons upon which a ruling is asked, for an exception follows the ruling, while an objection precedes it and lays the foundation for the exception." Elliott, App. Proc. 726. In his objection, preceding the testimony of the judge, the defendant gives no reason why he objects, and, in this respect the objection is defective, as the objection should state the grounds on which it is based, unless otherwise apparent. *Vaughan v. State*, 58 Ark. 373; *Hurley v. State*, 29 Ark. 17; *Blackburn v. Morton*, 18 Ark. 392. As the objection does not state the grounds on which it is based, it is not clear whether this objection was to the competency of the witness or to the competency of his testimony. As the bill of exceptions shows another and distinct objection to the introduction of the testimony, it would seem that the first objec-

tion was to the competency of the witness, and we so treated it in deciding the case. But, if we take the objection as one to the competency of the evidence only, the result must be the same; for while, as a general rule, an error in admitting incompetent testimony is cured by afterwards excluding it, to this rule there are exceptions. If the case is one where the appellate court can clearly see that the direction to the jury not to consider the evidence did not remove the prejudicial effect, it comes within the exception to the rule. *Elliott, App. Proc. § 702; Holder v. State*, 58 Ark. 482.

Apart from the incompetency of the judge as a witness, his testimony was also incompetent for reasons stated in the opinion. It tended to show that the defendant had not acted in good faith in making his application for continuance at a former time; that he had made an application for a continuance on ac-

count of the absence of a witness whose presence he did not desire. Our Constitution forbids judges from charging juries on questions of fact, and this was a statement of facts by the judge to the jury, from which they might readily draw conclusions very damaging to the defendant. It was, in effect, an expression of an opinion by the presiding judge to the jury unfavorable to the conduct and veracity of defendant. Although the court excluded the testimony, the jury still had this opinion of the presiding judge in their minds, and we think the prejudicial effect remained. Even if it be conceded that the defendant failed to object to the competency of the judge as a witness, he did object to the competency of his testimony, and, under such circumstances, we cannot say that the defendant had a fair and impartial trial; and the motion to rehear must be denied.

MISSISSIPPI SUPREME COURT.

JACKSON BANK, *Appt.*,

v.

R. W. DUFHEY *et al.*

(72 Miss. 971.)

Insolvent members of an insolvent firm cannot use the partnership property to pay their individual debts, leaving the partnership debts unpaid.

(May 20, 1895.)

A PPEAL by plaintiff from a decree of the Chancery Court for Hinds County in favor of defendants in a suit to set aside certain trust deeds. *Reversed.*

The facts are stated in the opinion.

Messrs. Nugent & McWillie for appellant.

Messrs. E. E. Baldwin and Williamson & Potter for appellees.

Cooper, Ch. J., delivered the opinion of the court:

The appellant, a firm creditor of the appellees, Dufhey & Ascher, exhibited its bill in chancery, seeking to annul as fraudulent two certain deeds of trust whereby the firm assets were encumbered to secure the individual debts of the partners. The evidence, fairly construed, discloses these facts: Dufhey one of the partners, was indebted to the defendant Caldwell in the sum of \$5,000, and Ascher, the other partner, was indebted to Hart in the sum of \$5,550. The firm and the individuals composing it were insolvent. On October 3, 1893, Dufhey executed a deed of trust on all property owned by him individually and upon his undivided half interest to certain property, specifically described, owned by the firm, to secure the debt due by him to Caldwell. On the same day Ascher executed a deed of trust conveying his individual property and his un-

divided half interest in certain property specifically described, owned by the firm, to secure the debt due by him to Hart. The book accounts, and certain horses which had been bought for resale, were not included in the conveyances; but the stock kept in livery, the carriages, feed, and other appurtenances, were all encumbered. Forfeiture of both conveyances was fixed for the same date,—January 1 following,—at which time, the secured debts remaining unpaid, the trustees were authorized and directed to make sale of the mortgaged property, and out of its proceeds to pay the secured debts. The members of the firm testified that they expected, by the collection of the outstanding book accounts, by the sale of the stock not included in the deeds, and from the profits of the business, to pay the firm debts; but a careful consideration of the evidence satisfies us that at the time the deeds were executed the firm and its members were hopelessly insolvent, and that no expectation could reasonably have been entertained that the firm debts could be paid after the firm property had been devoted to the individual debts of the partners. What followed the execution of the deeds was at best the struggle of mere hoping against hope, and postponing for a short time the inevitable end.

The issue is thus sharply presented whether it is lawful for the members of an insolvent firm to convert the joint estate into severalty and appropriate it to the payment of the individual debts of its members, leaving the firm debts unpaid. The question has never, so far as we are advised, been before the court, though expressions may be found, suggestive of the inclination of some of the judges who have been members of the court, to the view that the dominion of the partners over firm property is not limited by the existence of firm debts and the insolvency of the firm. In *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 530,—a case of a solvent firm,—Judge Chalmers, while carefully limiting the decision to the question involved (*i. e.* the right of a solvent firm to devote firm assets to the payment

NOTE.—For power of firm to assume individual debts of partners, see note to *Re Edwards & Wiggin's Estate* (Mo.), 20 L. R. A. 681.

of the debts of one of the members), cites with apparent approval the cases of *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *National Bank v. Sprague*, 20 N. J. Eq. 13; *Allen v. Center Valley Co.* 21 Conn. 130, 54 Am. Dec. 333, and *Sigler v. Knox County Bank*, 8 Ohio St. 511,—which clearly hold that an insolvent firm may devote firm assets to the debts of its individual members; and also *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Freeman v. Stewart*, 41 Miss. 138; *Carter v. Beaman*, 6 Jones, L. 44; *Ex parte Ruffin*, 6 Ves. Jr. 119, and *Campbell v. Mullett*, 2 Swanst. 553,—which are sometimes cited as supporting the same view. In *Hanover Nat. Bank v. Klein*, 64 Miss. 141, 60 Am. Rep. 47, it was sought by the creditors of a banking firm to subject to their demands the proceeds of insurance policies upon the life of one of the members in favor of his wife, the premiums on which the bill averred had been paid with firm money, while the firm was insolvent. The answer denied the insolvency of the firm at the time the premiums were paid, and there was no evidence on this point. The case was decided on this point. Judge Arnold, however, in delivering the opinion of the court, gave expression to an emphatic dictum, that the insolvency of the firm and its members would not have changed the result. In addition to the cases cited by Judge Chalmers in *Schmidlapp v. Currie*, he referred to the cases of *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370, and *Roach v. Brannon*, 57 Miss. 490. In neither *Whitton v. Smith*, Freem. Ch. (Miss.) 231; *Freeman v. Stewart*, 41 Miss. 139; *Roach v. Brannon*, 57 Miss. 490; *Schmidlapp v. Currie*, 55 Miss. 597, 30 Am. Rep. 580; nor *Hanover Nat. Bank v. Klein*, *supra*,—was the question now involved presented for decision. In all of them the nature of the right of partnership creditors to resort to firm assets for the satisfaction of their demands was considered, and the decisions in the cases in which the point was involved were that the right, being a derivative one, and resting on the rights of the partners, had been lost by the waiver of the partners, under the circumstances of the particular cases. The question involved is *res nova* in this state, and we deal with it as such.

The authorities, with practical uniformity, agree that the right of partnership creditors to have the partnership property applied to the payment of partnership debts is a derivative one, resting upon the equities of the partners as between each other. The conflict of decision arises with the question whether the partners may, by convention, waive their rights, and convert the joint estate into severalty, thus subjecting it to the debts of the individual members, or, by direct appropriation, apply the joint estate to such debts. It is quite generally held that this may be done so long as the partnership is solvent, and a going concern. Some courts seem to hold that if the partnership, though insolvent, is yet engaged in the prosecution of its business, it may thus deal with the partnership estate; and others, that this may be done even though the partnership is insolvent, contemplates dissolution, and converts the joint into separate estates for the purpose of applying it to the individual debts of its members. In *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370, the individual members of

an insolvent firm had applied all the partnership property to the payment of their respective individual debts. The firm's creditors sought to subject it to their demands, but relief was denied upon the ground that the right of firm creditors was a derivative one, and could not be enforced except so long as the partners themselves retained their lien upon the property. Speaking on the precise point, the court said: "The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors,—a fraud which those partners could waive, and which was subsequently waived by the act of fusion." The clear effect of this decision is that it is not a fraud upon partnership creditors for an insolvent firm to devote the joint estate to the payment of the separate debts of the partners, leaving no provision for firm creditors. In no other case we have seen has the question been presented where the conversion of the whole assets into separate estates or the devotion of all of them to individual debts was involved. The reasoning of other courts, however, in the following cases would seem to conduct to the same conclusion as that reached in *Case v. Beauregard*, viz.: *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *Allen v. Center Valley Co.* 21 Conn. 130, 54 Am. Dec. 333; *Winslow v. Wallace*, 116 Ind. 324 [*Fletcher v. Sharpe*, 1 L. R. A. 179]; *People v. Farrington*, 119 Ind. 164, 4 L. R. A. 535. See also other cases, probably holding to the same effect, cited in notes to section 560 of 1 Bates on Partnership. But the decided weight of authority is that while the right of firm creditors to go against the firm property in postponement of the right of creditors of the individual members is a derivative right, and rests on the right of the members of the firm, and while that right is lost by the bona fide waiver of their rights by the partners, it is not lawful for the members of the firm, in contemplation of insolvency, to divert the firm property, and apply it to the payment of the debts of the individual members, or to convert the joint estate into estates in severalty, to prevent its being subjected by firm creditors. *Ex parte Mayou*, 4 De G. J. & S. 664; *Ex parte Snowball*, L. R. 7 Ch. 534; *Cron v. Cron's Estate*, 56 Mich. 8; *Cribb v. Morse*, 77 Wis. 322; *Willis v. Bremner*, 60 Wis. 622; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 633; *Phelps v. McNeely*, 66 Mo. 554, 27 Am. Rep. 378; *Reyburn v. Mitchell*, 106 Mo. 365; *Roop v. Herron*, 15 Neb. 73; *Arnold v. Hagerman*, 45 N. J. Eq. 186; *Darby v. Gilligan*, 33 W. Va. 246, 6 L. R. A. 740; *Shackelford v. Sackelford*, 32 Gratt. 503; *National Bank v. Sprague*, 21 N. J. Eq. 530; *French v. Lorejoy*, 12 N. H. 458; *Flack v. Charron*, 29 Md. 311; *Clements v. Jessup*, 36 N. J. Eq. 569; *Elliot v. Stevens*, 38 N. H. 311; *Gallagher's Appeal*, 114 Pa. 353, 60 Am. Rep. 350; *Patterson v. Seaton*, 70 Iowa, 689; J. Parsons, Partn. § 196; Bates, Partn. § 563; Jones, Mortg. § 120;

Beach, Mod. Eq. §§ 787, 788; Hare & W's note to *Silk v. Prime*, 2 White & Tudor, Lead. Cas. in Eq. pt. 1, p. 353. The principle controlling in these cases is stated with precision by Judge Dixon, delivering the opinion of the court in *Arnold v. Hagerman*, 45 N. J. Eq. 186. We quote from that opinion at large, as we adopt and approve the reasoning of the court: "In equity, a partnership is for some purposes deemed a single entity. Thus, when the property involved in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and is used first to liquidate the debts, . . . and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intention of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in *Ex parte Ruffin*, 6 Ves. Jr. 119, it has been generally held that the partners could put an end to this right, and that if, by their agreement, the partnership is dissolved and its property is assigned to one of their number or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct. . . . Growing out of this right of partners has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally, it may be said that this equity of creditors continues only so long as the right of partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which ordinarily it is attached. In this respect it resembles the claim which the general creditors of an individual have upon his property; it is neither an estate nor a lien; it is ordinarily but a right, by lawful procedure, to acquire a lien during the ownership of the debtor; yet under certain circumstances that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay, or defraud his creditors, the right of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers for good consideration, without notice. . . . Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual; and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent extinguishment of the right of its partners *inter se*, yet if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects." In *Clements v. Sharp*, 36 N. J. Eq. 569, it was said: "Partnership creditors, in equity, have an inherent

L. R. A.

priority of claim upon partnership property over individual creditors, and a transfer of partnership property by one partner with the consent of the other partners, or by all the partners, to pay individual debts, is fraudulent and void as to firm creditors, unless the firm was then solvent and had sufficient property remaining to pay the partnership debts." The recognition of this equity in favor of firm creditors does not impair any proper exercise of the power of the partnership over its property or affairs, nor bring within the control of a court of equity all partnerships which are insolvent in fact, or in a condition of temporary inability to meet their obligations. The apprehension of this result seems to have been influential in leading the court, in *Sigler v. Knox County Bank*, 8 Ohio St. 511, to adopt the opposing view. But the statute against fraudulent conveyances does not operate to control the lawful dominion of individuals, though insolvent, over their property; nor does mere insolvency confer jurisdiction upon equity to take charge of and administer their estates. And yet it cannot be denied that the statute does restrain the insolvent from disposing of his estate for the purpose of withdrawing it from liability to his creditors. Why should a different rule be applied to an aggregation of individuals than to them separately? The inquiry must in either case be whether the purpose and effect of the act are lawful or forbidden. If lawful, it may be done by the individual or by a firm; if unlawful, the act is equally void, as to the creditor injured, whether it be done by the one or the other.

But it is again said that it cannot be a fraud for one to devote whatever right or property he has to the payment of an honest debt. This is true if one devotes his own property to his own debts; but is it not a fraud in law if A appropriates his property to pay B's debt, leaving his own creditors unpaid? Take the case at bar. Durfey and Ascher appropriated one half of their joint estate to pay Ascher's debt. Now, if this was all that had been done, it would be manifest that the creditors of Durfey could treat the conveyance as fraudulent, because it would have been a clear donation by Durfey to the creditors of Ascher, at the expense of his creditors, he being insolvent. But it is said that Ascher at the same time conveyed his interest in the other half of the joint estate to the creditors of Durfey, and so each conveyance became a consideration of the other, and each partner received a full consideration for his release of his right as a partner. The reply is that a full consideration does not make a contract otherwise unlawful valid. If A agrees to do one unlawful act if B will do another, of what avail is it that each will reap a benefit from such act of the other? Durfey had a right to have the partnership property applied to the partnership debts, and Ascher had a like right. While these reciprocal rights existed, they were of value as property rights of the debtors to a certain class of creditors,—i. e. firm creditors. Now, it is manifest that for the very purpose of preventing these creditors from resorting to these rights for the satisfaction of their demands the rights themselves were waived, and attempted to be obliterated. We are unable to perceive any just

principle upon which the right of a debtor can be recognized to thus deal with his estate for the very purpose of obstructing his creditors. It is to be noted, also, that neither partner could make a cent by the transaction. Five thousand dollars' worth of property will pay only \$5,000 of debts, whether its proceeds be applied to partnership or individual liabilities. The partners would, in either event, after the payment of the debts of either class, owe precisely the same sums. To permit the consummation of the scheme would

be of no benefit to them. Its sole effect would be to withdraw the property from one class of creditors who had created the joint estate, had given credit on the faith of it, and had a right to resort to it, and to permit its appropriation to another class, who dealt with the individuals composing the firm, with a full knowledge that all they could get out of the partnership assets was what remained after payment of the partnership debts. The complainant is entitled to the relief prayed by its bill.

The decree is reversed, and cause remanded.

OREGON SUPREME COURT.

STATE of Oregon, *ex rel.* A. C. TAYLOR,
Respt.,
v.

W. P. LORD *et al.*, *Appts.*

(.....Or.....)

1. **A private individual cannot have public officers enjoined** from using public funds unless some civil or property rights are being invaded, or, in other words, unless he is going to get hurt by the transaction.
2. **In all cases of purely public concern** affecting the welfare of the whole people or the state at large the action of a court can be invoked only by such executive officers of the state as are by law intrusted with the discharge of such duties.
3. **The state, suing in its corporate capacity** for the protection of its property rights, stands in no different or better position than an individual in respect to an injunction against public officers.
4. **The mere signature of the attorney general in his official capacity to a complaint** or bill shown to be that of a private relator is not sufficient to impress it with the functions and capacity of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity.
5. **The location of a site for a public institution**, the purchase of a tract of land therefor at that place, the employment of an architect to draw plans, etc., for the building, and the letting of contracts therefor by a commission of which the governor is a member, are matters governmental and executive in their nature, with which the courts cannot interfere by injunction.
6. **A commission named by the legislature, of which the governor is a constituent part**, and which is empowered to perform the services which it would otherwise be the duty of the governor to perform, and which is governmental in its nature, pertaining to matters *publici juris* and affecting the welfare of the

people at large, is not subject to an injunction from the courts.

7. Courts will not assume to pass upon constitutional questions unless properly before them.

8. A court of equity will not assume to determine the constitutionality of a legislative act unless the case comes within some recognized ground of equity jurisdiction, and presents some actual or threatened infringement of the rights of property on account of such unconstitutional legislation.

(January 27, 1896.)

A PPEAL by defendants from a decree of the Circuit Court for Marion County in favor of relator in a proceeding brought to enjoin defendants from executing a provision of a statute relative to the location and erection of a branch insane asylum. *Reversed.*

Statement by **Wolverton, J.:**

This is a suit to enjoin the defendants, William P. Lord, H. R. Kincaid, and Phil Metschan, in their capacity as a state board of commissioners of public buildings, from carrying into effect certain acts of the legislative assembly providing for the construction of a branch asylum in the eastern portion of the state, and appropriating money therefor, because of the alleged unconstitutionality of the portions thereof locating such asylum in eastern Oregon. The amended complaint, omitting the caption and formal parts, is as follows:

That the relator herein, in connection with other citizens of the state of Oregon, is a resident taxpayer within said state, and owns property within said state subject to taxation therein. That the defendants, Wm. P. Lord, H. R. Kincaid, and Phil Metschan, are, in the order in which their names appear in this amended complaint, the governor, secretary of state, and state treasurer of the state of Oregon, and as such constitute the board of commissioners of public buildings for said state of Oregon, and as such board are bound to expend large sums of the moneys of plaintiff, to

NOTE.—For denial of injunction to restrain governmental or political action merely because unconstitutional, see also *Fletcher v. Tuttle* (Ill.) 25 L. R. A. 143, and *note*; *State v. Pennoyer* (Or.) 25 L. R. A. 81.

R. A. 362; *Green v. Mills* (C. C. App. 4th C.) *ante*, 90. But see also, on the other hand, *McCullough v. Brown* (S. C.) 23 L. R. A. 410, and *State v. Cunningham* (Wis.) 17 L. R. A. 145.

be raised by taxation, for the purposes herein-after more fully stated, which expenditures the plaintiff alleges are unlawful, and repugnant to the organic law of the state of Oregon, namely: The said board, by virtue of the powers vested in them as such board, are about to expend large sums of money belonging to the plaintiff in the purchase of lands at some point east of the Cascade mountains for the purpose of constructing what is alleged to be a branch asylum in the eastern portion of said state, as one of the public institutions of the state, which said act of the defendants aforesaid they claim to exercise under and by virtue of a so-called act of the legislative assembly of the said state purporting to have been passed by said legislature at the 17th biennial session thereof, which said act was filed in the office of the secretary of state on the 21st day of February, 1893. That, of the aforesaid moneys of the plaintiff, said defendants propose to, and, unless restrained by this honorable court, will expend of the moneys of the plaintiff then claimed to have been appropriated, and also subsequently appropriated by the 18th biennial session of said legislature, the sum of \$165,000, in the construction of said buildings and fitting the same for use, and for lands on which to erect said buildings. That the said defendants, as such board, threaten to, and are about to, appoint three citizens of the state of Oregon, to be known as supervisors of the work of constructing such buildings, in some of the counties east of the Cascade mountains, more than 300 miles from the seat of the government of said state, which said alleged supervisors are to have charge of the work of constructing such buildings on lands to be purchased and paid for by them of the moneys of the plaintiff, and threaten to, and are about to, direct said supervisors to expend large sums of money belonging to the plaintiff aforesaid in advertising for plans and specifications for such buildings, and are about to proceed to construct, in pursuance of said so-called act of said legislature aforesaid, a branch insane asylum and a public institution, together with outbuildings, excavations, and appurtenances thereto which, in the judgment of said alleged supervisors, may be necessary, under the direction and supervisory control of the defendants hereinbefore named, and are about to expend, of moneys of the plaintiff aforesaid, the sum of \$1,500, to the said so-called supervisors, for their alleged services in the construction of said work. That the said defendants, as such board, propose to, and unless restrained will, if said buildings are permitted to be constructed and erected, employ a superintendent to conduct said institution, at a salary of \$2,500 per annum, and assistant physicians and attendants, all to be allowed the same compensation now fixed by law for like officers and attendants at the state insane asylum at Salem. That the said proposed expenditures of the plaintiff's moneys aforesaid, if permitted, would be contrary to law and the Constitution of the state of Oregon, in that the said institution is not being constructed at the seat of government of the said state, but more than 300 miles therefrom; that the expenditures extend to the equipping, furnishing, officering, and maintaining the same, and will greatly increase the

burden of taxation, and require the expenditure of \$100,000 more than would be necessary to expend in the construction of like buildings at the seat of government. And the plaintiff further alleges: That the annual cost of maintaining the same after it is equipped and ready for use will be \$50,000 per annum more than would be necessary to be expended in maintaining like services for the unfortunate insane of said state, if the same facilities are provided therefor in connection with the institution now in operation at the seat of government. That, unless restrained by this honorable court, the defendants will purchase and pay for the lands aforesaid; contract therefor, and build, and pay for said building; appoint the supervisors, and employ superintendents, physicians, and attendants, upon salaries as aforesaid,—all to be paid out of the public funds of the state of Oregon, raised by taxation, thereby greatly increasing plaintiff's burden of taxation, to the great and irreparable injury of plaintiff. That plaintiff has no plain, speedy, or adequate remedy at law for the redress of the grievances herein complained of. Wherefore plaintiff prays that an injunction may issue restraining the defendants and their agents, servants, and attorneys, from using the moneys of the plaintiff for any of the purposes which they propose, as specified in the complaint, and that on final hearing said injunction be made perpetual, and for such further order or relief as may be meet with equity, and also for costs and disbursements.

James McCain, District Attorney for the Third Judicial District.

H. J. Bigger and W. H. Holmes, Attorneys for Plaintiff.

State of Oregon, } ss:
County of Marion, }

I, A. C. Taylor, being first duly sworn, say that I am the person commencing the above action as relator for and in behalf of the state of Oregon; that I have read the foregoing complaint, and know the contents thereof; that I believe said complaint to be true.

A. C. Taylor.

Subscribed and sworn to before me this 2d day of March, 1895.

Webster Holmes,
Notary Public for Oregon.

[Seal.]

The defendants demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of suit, which demurrer being overruled, the defendants answered. A trial was had upon the issues thus joined, resulting in a decree in accordance with the prayer of the complaint, from which defendants appeal.

Messrs. George G. Bingham and J. C. Moreland, for appellants:

Injunction will not lie to restrain executive action.

People v. The Governor, 29 Mich. 330, 18 Am. Rep. 89; *State v. Towns*, 8 Ga. 372; *People v. Bissell*, 19 Ill. 233, 63 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *State v. Warmoth*, 23 La. Ann. 1, 2 Am. Rep. 712; *Re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *Re Inquiries Submitted by Governor*, 58 Mo. 369; *State v. The Governor*, 25 N. J. L. 331; *Jonesboro, F. B. &*

B. Gap Turnp. Co. v. Brown, 8 Baxt. 490; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *State v. Kirkwood*, 14 Iowa, 162.

The president of the United States cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional, nor will a bill having such a purpose be allowed to be filed.

Mississippi v. Johnson, 71 U. S. 4 Wall. 475, 18 L. ed. 437.

The court will not grant an injunction, unless the plaintiff proves that he will be damaged. Speculation will not answer the demands of the law.

Gibbs v. Green, 54 Miss. 612; *Tongue v. Gaston*, 10 Or. 328; *State v. Pennoyer*, 26 Or. 205, 25 L. R. A. 862; Hill's Code 1895, § 107; *Essex v. Wattier*, 25 Or. 75.

When an act of the legislature has long been recognized as binding, and when important affairs of the community affecting individual rights have been transacted in accordance with its provisions, it should not be disturbed, unless it plainly and unequivocally conflicts with the organic law.

Craford v. Beard, 12 Or. 452; Endlich, Interpretation of Statutes, § 527; *Stuart v. Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115; Cooley, Const. Lim. pp. 81, 82; *Kelly v. Multnomah County*, 18 Or. 359; *Mitchell v. Campbell*, 19 Or. 198; *People v. La Salle County Supers*, 100 Ill. 504; *Moers v. Reading*, 21 Pa. 188; *Johnson v. Joliet & C. R. Co.* 23 Ill. 207; *People v. Dayton*, 55 N. Y. 377; *Rogers v. Goodwin*, 2 Mass. 478.

Messrs. James S. McCain, District Attorney, **H. J. Bigger**, and **William H. Holmes**, for respondent:

The appellants are acting without authority of law, and in violation of the Constitution of the state of Oregon, and may be enjoined like other corporate officers from wasting public funds in doing that which the law gives them no authority to do, or for proceeding in a manner contrary to that prescribed by law.

Carman v. Woodruff, 10 Or. 135; *White v. Multnomah County Comrs.* 3 Or. 317, 57 Am. Rep. 20; *Wormington v. Pierce*, 22 Or. 606; *Baker v. Payne*, Id. 335; *Rice v. Smith*, 9 Iowa, 570; *Drake v. Phillips*, 40 Ill. 388; *Colton v. Hanchett*, 13 Ill. 615; *Webster v. Harwinton*, 32 Conn. 131; *Portland & W. Valley R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299.

The relator need not be the real party, or have any special interest to enforce a public right, but as a voter and citizen he has a general interest in the execution of the law.

State v. Ware, 13 Or. 380.

The same rule applies in this case as in an application for mandamus.

The relator need show no further interest than that of a citizen interested in having the law enforced or observed, or an unlawful act enjoined.

Pike County Comrs. v. People, 11 Ill. 208; *Hall v. People*, 57 Ill. 307; *Glencoe v. People*, 78 Ill. 383; *People v. Pacheco*, 29 Cal. 212; *Linden v. Alameda County Supers*, 45 Cal. 7; *Sanger v. Kennebec County Comrs.* 25 Me. 291; *Heffner v. Com.* 28 Pa. 108; *People v. Regents of University*, 4 Mich. 98.

Injunction is the proper, in fact the only, remedy, as the appellants have acted, and pur-

pose and threaten to act, in violation of the Constitution and the rights of the people, who have only the remedy of injunction.

State v. Judge of 7th Jud. Dist. Ct. 42 La. Ann. 1104; *Bradley v. Powell County Comrs.* 2 Humph. 428; *Ford v. Farmer*, 9 Humph. 157; *Bridgenor v. Rodgers*, 1 Coldw. 259; *Marion County v. Grundy County*, 5 Sneed, 490; *Hilliard, Inj.* 443; *High, Inj.* §§ 1308, 1319, 1321, 1327.

Article 14, section 3, of the Constitution of the state of Oregon provides that all the public institutions in the state, hereafter provided for by the legislative assembly, shall be located at the seat of government.

The act by which the legislative assembly sought to authorize the appellants to locate a site, and erect one of the public institutions of the state in eastern Oregon, was clearly unconstitutional and void.

Cooley, Const. Lim. 81, 93; Sutherland, Stat. Constr. §§ 307, 308; Throop, Pub. Off. § 846, note 5, §§ 555, 853, note 3.

Constitutions are always to be construed strictly.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 188, 6 L. ed. 68.

Counsel for appellants has failed to distinguish between the governor of the state acting in his executive capacity, and his acting in a clerical capacity in the discharge of some duty cast upon him by an act of the legislature.

Pennoyer v. McConaughy, 140 U. S. 1, 35 L. ed. 363.

The inquiry primarily is, Is the act sought to be restrained by the injunction one which is purely ministerial; or does it partake of any element of judgment or discretion upon the part of the governor?

Pennoyer v. McConaughy, *supra*; *State v. Chase*, 5 Ohio St. 528; *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371; *Cotten v. Ellis*, 7 Jones, L. 545; *State v. Police Jury*, 39 La. Ann. 759; *Groome v. Grinn*, 43 Md. 572; *Middleton v. Low*, 30 Cal. 597; *Gray v. State*, 72 Ind. 567; *Harpenden v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664; *State v. Kirkwood*, 14 Iowa, 162; *State v. Blusdel*, 4 Nev. 241; *State v. Whitesides*, 30 S. C. 579, 3 L. R. A. 777; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 15 L. R. A. 369; Mechem, Pub. Off. §§ 954 *et seq.*; Moses, Mandamus, 80.

Wolverton, J., delivered the opinion of the court:

When this case was here before (26 Or. 205, 25 L. R. A. 862), we held that a private individual could not have public officers enjoined from using public funds, unless it could be shown that some civil or property rights were being invaded, or, in other words, that the individual was going to get hurt by the transaction. Upon that principle it was decided that he should be required to show that the location and building of the branch asylum in eastern Oregon would be attended with greater cost and expense than if constructed at the capital, thereby increasing the burden of taxation which would be imposed upon him, with others, whose duty it is to contribute to the support of the government. It was also held that the state, suing in its corporate capacity

for the protection of its property rights, stood in no different or better position in this regard than an individual. This doctrine is supported by high authority. Allen, J., in *People v. Canal Board*, 55 N. Y. 395, says: "When the state as plaintiff invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the particular relief demanded." And as is said by the same eminent jurist in *People v. Ingersoll*, 58 N. Y. 14, 17 Am. Rep. 178: "A distinction is to be observed between actions by the people or the state, in right of the prerogative incident to sovereignty, and those founded upon some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are determined between individuals." To the same effect is the doctrine announced in *People v. Fields*, 58 N. Y. 514. See also 2 High, Inj. § 1327. So that we then concluded the plaintiff herein occupied no better or superior position, from a legal standpoint, for enforcing the remedy sought to be invoked, than the plaintiff in *Sherman v. Bellows*, 24 Or. 553. From this position we see no sufficient reason for receding, as we believe it to be sound in law, and supported upon reason and authority. It is insisted that the decision in *White v. Multnomah County Comrs.* 13 Or. 317, 57 Am. Rep. 20, stands in the way of this position, but we do not think so. *White* had a private interest to subserve in bringing the suit. The increase of the burden of taxation consequent upon maintaining the machinery necessary to secure a registration of voters under the law was sufficient to give him a standing in court to restrain the invasion of a private right. See *Fletcher v. Tuttle*, and *Blair v. Hinrichsen*, 151 Ill. 41, 25 L. R. A. 143. But the question touching the power of the court to interfere by injunction in restraint of the action of the county commissioners was not mooted at the hearing, and was not a point in controversy, although jurisdiction was necessarily assumed before the ultimate question in the case could have been decided. So the case is not in point, nor is it controlling here.

It is stoutly contended that it is shown by the evidence taken and submitted that the relator will be damaged by reason of the location and construction of the branch asylum at Union, under the rule above established. We have carefully examined all the testimony found in the record, and are unable to concur with this view. The whole theory of the relator, by which he seeks to establish injury, is based upon the assumption that the legislative and executive departments of the state will, in the event that the location and construction of the branch asylum is restrained, provide ways and means for the construction of such institution upon what is known as the "Cottage Farm,"—a tract of land now belonging to the state, and situate some 6 miles from the capital,—and thereby prevent the necessity of purchasing and acquiring other lands upon which to establish and construct such buildings; that they will utilize in connection therewith certain outbuildings now in use by the state, and the expense of constructing other like buildings; and that, by reason of the proximity

R. A.

of such location to the present state asylum, they could dispense with the cost of an additional superintendent and some additional physicians and assistants. But who can say that the legislature would be content to build the branch asylum at the Cottage Farm, or that it would see fit to utilize the outbuildings now in use in connection therewith, or that it would not, in any event, provide for the employment of an additional superintendent, and other physicians and assistants? The matter is of such vital and public concern, and attended with such diverse and dependent circumstances, and so wholly and peculiarly within the province of the legislature to devise the ways and means, that it would be but a conjecture at best to attempt to determine in advance the result of its deliberations in this respect. If the conditions assumed were established, then the question might possibly be capable of demonstration; but where the establishment of these conditions is first left to a body with discretionary powers, the ultimate question for the court to pass upon becomes speculative, and too remote for practical solution and determination. So we are constrained to pass the point without further comment touching the evidence submitted.

But it is now contended for the first time that this is a suit by the state in the right of a prerogative incident to sovereignty; that it was instituted by the law officer of the state in the interest of the whole people, and being so instituted, the high prerogative powers of government are set in motion, and that the courts of appropriate jurisdiction will take cognizance to control the officers of state from acting in violation of duties imposed upon them by law, and more especially where they sustain trust relations to the whole people,—not in the sense that a public office is a public trust, but as it pertains to the public funds of the people, raised by taxation, and intrusted to their management and control under the laws of the state. Under the common law, suit was instituted in behalf of the Crown, or of those who partook of its prerogative, by the attorney general, who made his complaint to the court purely by way of information. A private person, having cause to complain in a court of equity, proceeded by written statement of his cause, which was called a "bill in chancery." In all cases of suits which immediately concerned the rights of the Crown, its officers proceeded upon their own authority, without the intervention of any other person; but, where the suit did not immediately concern the rights of the Crown, they generally depended upon the relation of some person whose name was inserted in the information, and who was called the "relator." It sometimes happened that the relator had an individual interest in the matter in dispute, as where he was entitled to compensation for an injury. In such a case his personal complaint was joined to and incorporated with the information given to the court by the Crown officer. These together comprised what is known and termed as an "information and bill." It was the general practice, where suits immediately concerned the right of the Crown, for the Crown officers to proceed without a relator; yet by reason of a prerogative of the Crown not to pay

costs to a subject, except in certain cases, sometimes, through the tenderness of the officers towards the defendant, the interposition of a relator was required, against whom the costs were taxed in case it appeared that the suit was improperly instituted or prosecuted. The introduction of a relator was a mere act of favor on the part of the Crown and its officers. Story, Eq. Pl. 9th ed. §§ 7, 8; 1 Dan. Ch. Pr. 2, 3, 7, 11, 12; *State v. Dayton & S. E. R. Co.* 36 Ohio St. 434; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631. In *Atty. Gen. v. Dublin*, 1 Bligh, N. R. 312, Lord Redesdale says: "The relator is introduced properly by the attorney general, that there may be some person responsible for the costs of the proceedings, if finally there should be an opinion in the court that the information has been improperly instituted, or if in the course of the proceedings it should be in any manner improperly conducted. It is for the benefit of the subject that the attorney general in all those proceedings provides persons to be responsible as relators in the information, that the court may award against them what the court cannot do against him." So that the relator, where the proceeding immediately concerned the rights of the Crown, except so far as to stand sponsor for costs in case the Crown officers were unsuccessful in the suit, had no personal right or authority to become a party to the proceeding, either by relation or otherwise. It was only in cases where he had some private or individual interest to subserve, either in conjunction with the rights of the Crown, or wherein it was the province of the Crown to protect the rights of its subjects, acquired from it by grant or otherwise, that he could as a matter of right, interpose, as a relator, through the attorney general, to set in motion the machinery of the court.

The case stands different in mandamus proceedings. There a private person may, in behalf of the public, and without showing any individual or special interest to be subserved, become a relator, and, through the proper state officer, institute the proceeding. Although the authorities are much divided it is settled in this state that "where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result; it being sufficient to show that he is a citizen, and as such is interested in the execution of the law." *State v. Ware*, 13 Or. 383; High, Extr. Legal Rem. § 431. But in equitable proceedings, where the immediate rights of the Crown were alone concerned, we have seen that the attorney general only could invoke the action of the courts through the instrumentality of an information, and, if a relator was made a party, it was at his discretion that there be some one to stand responsible for the costs; the relator, as of right having no interest in the proceeding, and no power or authority to direct or control the suit in any particular whatever.

The attorney general could, at common law, by information in chancery, enforce trusts and prevent public nuisances and the abuse of

trust powers. *People v. Miner*, 2 Lans. 396. His supervision, through equitable instrumentalities, of public trusts, and his authority to prevent the abuse of trust powers public in their nature, were apparently the outgrowth of equitable interposition regarding charitable uses. It was formerly held that it was the source from which the funds were derived, and not the purpose for which they were dedicated, that constituted the use charitable. *Atty. Gen. v. Heelis*, 2 Sim. & Stu. 77. But subsequently it was settled that the purpose to which the funds were dedicated was the real criterion by which the charitable use was to be determined. And this enlargement of the principle governing charitable uses extended equitable jurisdiction to public trusts involving all funds raised by taxation or otherwise for public purposes. *Atty. Gen. v. Brown*, 1 Swanst. 265; *Atty. Gen. v. Dublin*, 1 Bligh, N. R. 312; *Atty. Gen. v. Eastlake*, 11 Hare, 218-221. In the latter case it was declared that the attorney general was the proper person to represent those who were interested in having these public funds faithfully applied to the general and public purposes for which they were provided and intended. Allen, J., in *People v. Ingersoll*, *supra*, says: "It is well settled in England that, in right of the prerogative of the Crown, the attorney general, in his name of office, may proceed, either by information or by bill in equity, to establish and enforce the execution of trusts of property by public corporations, to prevent the misappropriation or misapplication of funds or property raised or held for public use; and the abuse of power by the governors of corporations or public officers, or the exercise of powers not conferred by law, and, generally, to call upon the courts to see that right is done to the subjects of the Crown who are incompetent to act for themselves. Ordinarily, the remedies sought have been preventive, but in some cases, as incident to the preventive and prospective relief, a claim has been made for retrospective relief, especially when the misappropriated funds could be traced and reclaimed in specie. The jurisdiction has been sustained upon the general principles of the right and duty of the court to grant preventive relief, and the relief actually granted, if any, in addition and as incident to that, has depended upon circumstances." But in all cases the court's action was invoked against faithless trustees to compel a proper execution of the trust, and the right use of trust funds, at the hands of those charged with its administration. A breach or violation of public duty enjoined upon those with whom the trust and the execution thereof are confided or committed, either actual or threatened or impending, is at the foundation of every action by the attorney general or of the Crown, or the people as sovereign and essential to the right of either to maintain, as well as the right of a court of equity to entertain jurisdiction of, a suit by either touching property or funds held by public or municipal corporations for public use. These principles thus established in England have been affirmed to some extent by the courts of this country, and applied in like cases. In *People v. Ingersoll*, *supra*, it is further said: "Doubtless, the prerogatives of the Crown, except as affected by constitutional limitations, exist in the people

as sovereign, but to what extent the exercise of this prerogative is committed to the public officials, either by the legislature or by the common law, is a question worthy of grave consideration, and not to be lightly decided, and should only be determined when necessary to a judgment and decision. . . . If there were no other remedy for a great wrong, and public justice and individual rights were likely to suffer for want of a prosecutor capable of pursuing the wrongdoer and redressing the wrong, the courts would struggle hard to find authority for the attorney general to intervene in the name of the people." The doctrine is broadly asserted in Missouri, where it is held that it is competent for the state, through its authorized officers, to proceed in equity in restraint of public corporations doing acts in violation of the Constitution and laws of the state. *State v. Saline County Ct.* 51 Mo. 350. But the case made was for a misappropriation of public funds in subscriptions to a railroad company, which funds were to be raised by assessment and taxation of the people of Saline county. So that the case is authoritative only upon the power of a court of equity, through its injunctive process, to restrain public officers in the misapplication and misappropriation of public funds instituted at the instance of the executive or law officers of the state. The decision is, however, based, to a large extent, upon a statute providing that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages." 2 Wagner, Stat. p. 1032. Bliss, J., in that case, admits that he found some difficulty in regard to the question whether injunction would lie at all, but concludes that, both upon reason and authority, "when the wrong is a public one, suit may be brought in the name of the state, by its proper representative, and under our statute that representative is the circuit attorney." See also *State v. Dayton & S. E. R. Co. supra*; *State v. Curators State University*, 57 Mo. 178; *State v. McLaughlin*, 15 Kan. 228.

The Wisconsin cases, though not authority here, serve to illustrate the question touching sovereignty and prerogative appurtenant thereto, and the use of the extraordinary remedy by injunction, when it is invoked in the service of a sovereign state and in the interest of the whole people, as distinguished from its ordinary use, or coupled with ordinary equitable proceedings. It may be said here that injunction, in itself, is not prerogative or jurisdictional. It was issued in cases where the court had jurisdiction otherwise as preliminary or interlocutory to the final decree, or to give effect and permanency to such a decree. It was remedial and in aid of jurisdiction already attached within the vast range of equitable cognizance. Not so with mandamus, habeas corpus, and quo warranto. They were common-law prerogative writs, which "appertain to and are peculiarly the instruments of the sovereign power, acting through its appropriate department; prerogatives of sovereignty, represented in England by the King, and in this country by the people in their cor-

porate character, or in other words, the state." *Atty. Gen. v. Blossom*, 1 Wis. 278. It has been said that injunction and mandamus are correlative in their operation; that where the one commands the other forbids; that, where there is nonfeasance, mandamus compels the duty, and, where there is malfeasance, injunction will restrain. But this is so in manner only. Injunction is frequently mandatory, and mandamus sometimes operates as a restraint. Aside from this, the injunctive writ, not being jurisdictional, but remedial, in its operation, a case of well-established equitable cognizance must be presented before its use and adaptation would become appropriate, and it is not every restraint which may seem beneficial as a remedy that the writ will enforce. For instance, some civil or private right must be about to be invaded, or some matter of public trust or concern, of which equity takes cognizance, must be deleteriously involved or affected, before injunction can be brought into requisition. So that it is apparent that it is not every case wherein mandamus will command that injunction will, in contrast, restrain. By reason of a provision in the Wisconsin Constitution conferring original jurisdiction upon the supreme court "to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same," it has been there held that injunction is a quasi prerogative writ, and founds jurisdiction as if it were an original writ, whenever a question arises appropriate to its use, which "should be a question *quod ad statum reipublice pertinet*; one affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 513; *Atty. Gen. v. Eau Claire*, 87 Wis. 425; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561. Notwithstanding this constitutional provision, the earlier cases sought for equitable grounds in support of the injunctive writ. For instance, in *Atty. Gen. v. Chicago & N. W. R. Co. supra*, it was argued that courts of equity have no jurisdiction, at the suit of the attorney general, to enjoin usurpation, excess, or abuse of corporate franchise. The court, after a careful review of the authorities, both English and American, concluded that the jurisdiction exists in this country as well as in England, and says: "The equitable jurisdiction by injunction goes upon the ground of nuisance. As, indeed, any intrusion upon public right is in the nature of purpresture. The ancient jurisdiction to restrain nuisance is perhaps the most direct ground of the modern jurisdiction under consideration. And the former is fully asserted as an American jurisdiction, as to remedies both by private persons and by the attorney general for the public," citing 2 Redf. Railways, 307, and 2 Story, Eq. Jur. §§ 920-928. And so in *Atty. Gen. v. Eau Claire, supra*, which involved the damming of a public river by the city of Eau Claire, the court, considering such an encroachment as a purpresture, and within equitable jurisdiction to enjoin, and as it concerned the sovereign prerogative of the state and the prerogative jurisdiction of the supreme court, declared it to be a fit case for the exercise of its original jurisdiction by the injunctive writ. But in

State v. Cunningham, supra, which was a later case involving the constitutionality of the act of apportionment of the state into senatorial and assembly districts, the court placed its jurisdiction, as it had intimated might be done in *Atty. Gen. v. Chicago & N. W. R. Co. supra*, upon the single ground that the Constitution had adapted the writ of injunction to prerogative uses. Pinney, J., says: "It may well be conceded that courts of equity would not, by reason of their original jurisdiction, have authority to interfere by injunction in a case such as this; but it is to be borne in mind that the writ of injunction under our Constitution is put to prerogative uses of a strictly judicial nature, as a remedy of a preventive character in case of threatened public wrong to the sovereignty of the state, and affecting its prerogatives and franchises and the liberties of the people; their rights being protected in this court by information in the name of the state, on relation of the attorney general." The learned judge spoke advisedly when he said "it may well be conceded that courts of equity would not, by reason of their original jurisdiction, have authority to interfere by injunction" in such a case, as indeed there is high authority in support of the concession. *Fletcher v. Tuttle*, and *Blair v. Hinrichsen*, 151 Ill. 41, 25 L. R. A. 143, are cases involving similar questions, arising out of the passage of an act to apportion the state of Illinois into senatorial districts, claimed to be unconstitutional and void, but the suits were instituted by private individuals; and it was there decided that, wherever the established distinctions between equitable and common-law jurisdiction are observed, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. And the case of *State v. Cunningham, supra*, is distinguished. Doctrine of similar import is laid down by Chief Justice Fuller in *Green v. Mills*, 16 C. C. A. 516, 69 Fed. Rep. 852, ante, p. 90,—a very recent and well considered case. But, whatever the true doctrine might be as to the right use of the injunctive writ in cases involving merely political rights, the question is not involved here. These cases operate, however, as powerful factors in determining equitable jurisdiction, and fixing the right use of the injunctive writ. Under the Wisconsin Constitution, injunction being held to be a quasi prerogative writ, its operation becomes correlative with the common-law writ of mandamus, and will lie to restrain excess in the same class of cases that mandamus supplies defect, the use of the one writ or the other in each case turning solely on the accident of overaction or shortcoming of the defendant. But not so where the distinction between the equitable and common-law jurisdiction is still observed, as it is in this state. Hence, if jurisdiction to issue the injunctive writ is to be entertained, it must be based upon some well-defined equitable grounds to support it.

We have seen, however, that in England the equitable jurisdiction to enforce trusts, and prevent public nuisances and the abuse of trust powers, was invoked for prerogative pur-

poses. Whenever necessary, an appropriate injunction was issued in aid of the jurisdiction, and became effective in its exercise. While the writ of injunction is not in itself a prerogative writ, it is put to prerogative purposes when used in aid of equitable jurisdiction invoked for such purposes. We have also seen that in this country the jurisdiction and the writ may be called into requisition for like purposes. Now, when so called into requisition, in cases appropriate for its adoption and use, is there any reason why the remedy thus invoked is not as effective for the accomplishment of like high purposes as the quasi prerogative writ peculiar to the state of Wisconsin under her Constitution? We think that none exists. So, therefore, the lawfully constituted authorities are not without an appropriate remedy in a case where public officials are proceeding in derogation of law in the application and use of public funds, wherever special injury cannot be predicated. The sovereign state, the whole people, have a right to see that the laws are duly executed. In most cases the common-law prerogative writs are appropriate for the accomplishment of such ends. Whether appropriately denominated "prerogative" in the states of the Union, it differs but little. They emanate from a like high source, pertain to sovereignty, and are adapted to like uses and purposes. But, wherever it is necessary to prevent the abuse of trust powers and the misapplication of trust or public funds, the equitable remedy is likewise appropriate, and likewise emanates from the like high source, and is attended with equivalent attributes of power. See *People v. Ingersoll*, and *State v. Saline County Ct. supra*. But the rule and the doctrine upon which it is based have their limitations. It is not every class of public officers that may be controlled in any event at the hands of the judiciary. This will become apparent in the further development of the opinion.

We have here to deal with matters not political, but with matters *publici juris*, and with the acts of public officers touching the administration of public funds, and affecting the whole people, or the state at large. And the question comes to this: Whether the governor, the executive officer of the state, can be enjoined while in the discharge of official duties. We speak of the governor, as it is, in effect, the act of the governor which this proceeding is intended to interdict. True, the act providing for the construction of a branch asylum at Union, and appropriating funds therefor, has empowered the board of commissioners of public buildings of the state of Oregon, consisting of the governor, secretary of state, and treasurer, to superintend the construction thereof; but, in the absence of such a commission, it would be the duty of the governor to see that the law was carried into effect. So that whether the duty is performed by the governor, or by a commission named by the legislature, of which he is a constituent part, and empowered to perform the service, the rules of law touching the interference of the courts with the performance of such duty must be the same, whether required to be performed by the one or the other. The purpose of the legislature was to construct and equip

more commodious buildings and apartments for the accommodation of the insane and idiotic of the state. To provide for and take care of this unfortunate class of individuals, both for their own good and protection, as well as for the protection and security of all citizens, is a matter purely of public concern, as it relates to the welfare of the whole people. The subject is one of governmental concern only, and relates entirely to the legislative and governmental departments of state. In pursuance of this purpose, the acts involved here were passed and became law by the approval of the governor. That the legislature had the undoubted right to determine upon the necessity for such additional buildings, and the amount of funds necessary for their construction and equipment, as we have said in our former opinion, no one can dispute. Furthermore, it was entirely within its co-ordinate powers to pass an act locating the branch asylum in the eastern part of the state, and no power vesting in the government could prevent it from so doing, and yet its validity would be determined by the fundamental law, when properly invoked. The governor could prevent its becoming a law by the exercise of the veto power confided to him. But, as above stated, the measure became a law by the approval of the executive. It is the duty of the governor to see that all laws are faithfully executed, and it is now proposed to execute this law. The judicial department is called upon to prevent its execution. Is it competent for it to interpose in this proceeding, and restrain the executive department of the state? It may well be admitted that if the duty pertained to acts which are merely ministerial in their character,—which call for no exercise of judgment or discretion, and do not relate to political or governmental matters,—the governor of the state may, at the suit of interested parties, in a proceeding appropriate for the purpose, be compelled, at the hands of the judiciary, to perform them. *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 16 L. R. A. 369; *Gaines v. Thompson*, 74 U. S. 7 Wall. 347, 19 L. ed. 62; *Moses, Mandamus*, 80; *Enterprise Sav. Assn. v. Zumstein*, 15 C. C. A. 153, 67 Fed. Rep. 1000; *Board of Liquidation v. McComb*, 92 U. S. 541, 23 L. ed. 628. But if it pertains to duties which require the exercise of judgment or discretion to perform, or to matters political or governmental in their nature, all the authorities agree that the executive is clearly independent of the other co-ordinate departments of government, and is not subject in any manner to their direct supervision or control. Chief Justice Taney, in *Mississippi v. Johnson*, 71 U. S. 4 Wall. 498, 18 L. ed. 440, says: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." This definition of a "ministerial duty" is concurred in by Mr. Justice Miller in *Gaines v. Thompson*, *supra*. Now, what is the nature of the duties cast upon the governor by these acts? Are they purely ministerial, or do they belong to the domain of governmental affairs? What is he, or the board of which he is a member,

31 L. R. A.

required to do? This latter question answered, the former is answered, also, without the necessity of comment. He shall, within sixty days, locate a site for a branch insane asylum at some point in one of the counties named, lying in the eastern part of the state. He shall contract for and purchase a tract of land at the place selected. He shall hire a competent architect, who shall, under the direction of the board, draw plans, prepare specifications, etc. When completed, the board shall approve, and thereupon shall give notice, and in due time let contracts, etc. In all these prescribed duties there is not a single item that partakes of a ministerial character. They all pertain to executive duties, and are wholly and entirely governmental in their nature and purport. The governor can execute them, or not, at his will, as they fall exclusively within his department of government. To test the question as to whether these enumerated duties are ministerial or governmental, suppose these acts of the legislature were entirely free from doubt touching their constitutional validity, and the governor, or the board acting in his aid, should refuse to execute the requirements thereof; would this court, by a mandamus proceeding, compel him to act? Undoubtedly not, and why? Because the acts required of him do not fall within the domain of those acts which are denominated "ministerial." On the contrary, they are governmental in their nature, pertain to matters *publici juris*, and affect the welfare of the people at large. Now, for the sake of the argument, concede that the law is unconstitutional, and that injunction is an appropriate remedy, and is competent to restrain where mandamus will compel; could this court with any more propriety or right interfere with the governmental and executive acts of the governor? No one will so contend. Chief Justice Marshall, in *Marbury v. Madison*, 5 U. S. 1 Cranch, 170, 2 L. ed. 71, says: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." In *People v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89, Judge Cooley says: "In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases, in our judgment, the courts would be entirely without jurisdiction; and, as regards such an officer, we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance." So that, looking to the nature of the thing to be done and the duty to be performed by the governor under the requirements of these acts, there can be but one conclusion in respect to them. Whatever else may be said, they are not ministerial, and hence no judicial process of the courts can issue to compel or restrain, or in any manner affect or interfere with, the executive volition of the governor with respect thereto. The mere fact that a law is alleged to be unconstitutional does not confer jurisdiction upon courts to interfere with the acts of the executive officers while proceeding in pursuance of its requirements. *Mississippi v. Johnson*, *supra*. True, the board is empow-

ered to make payment upon contracts as the work progresses, and it is contemplated that such payments and disbursements shall be made out of the public funds so appropriated by the legislature; but neither the governor nor the board can obtain a dollar of such funds without a warrant from the secretary of state, by the very terms of the acts themselves. There is no intimation anywhere that the secretary is about to or is intending to draw, or is contemplating the drawing of, any warrant against such fund, or any public fund of the state. Indeed, the secretary of state, acting in his capacity as such officer, is not a party to the suit.

The judiciary takes cognizance of such proceedings only, if at all, which operate incidentally as a check upon a co-ordinate branch of government. It may, in a proper case, proceed against an officer engaged in the discharge of purely ministerial functions, which may indirectly or incidentally affect the acts of a co-ordinate branch, and even nullify and render them inoperative; but directly, as against officers acting in a political, governmental, or discretionary capacity, it never has and never will, so long as the relative duties and powers of the co-ordinate departments are justly observed. *Gaines v. Thompson, supra*. Moreover, it is not fit that these great powers pertaining to sovereignty, which affect the whole people alike, and none less nor more than the rest, should be invoked by individual citizens, or by a class or classes, or body corporate, or an aggregation thereof less than the whole state. State officers should not be subjected to the annoyance of a suit at the instance of every individual, when civil or property rights are not invaded, who might conceive that the laws were being improperly administered, or that public funds were not being applied to legitimate public purposes. State government being divided into three co-ordinate branches,—executive, legislative, and judicial,—it is most essential to the preservation of the autonomy of government that there be no encroachment of one branch upon another. And to this end the just limitations of the constitutional powers accorded to either branch should be nicely defined and jealously guarded. But sometimes one branch of government, in the discharge of its co-ordinate functions, oversteps the limit of its constitutional powers. In such a case one or both of the other branches of government may operate as a check upon its action. The legislature may pass an act in disregard of the inhibitions of the Constitution. The executive may veto the measure, or, failing to do so, the judiciary may refuse to recognize it as controlling. The governor acts upon his own motion, and by right of high constitutional powers and privileges reposed in him. The judiciary acts, not upon its own motion, but only when some suitor duly authorized by law presents, in due form, a cause appropriate for its cognizance. Its machinery may be set in motion by private suitors, in some form or another, in all cases where civil or property rights are being invaded or intrenched upon to their injury or damage, be the suitor ever so humble, or the injury to be encountered ever so small; but in all cases of purely public concern, affecting

the welfare of the whole people, or the state at large, the court's action can only be invoked by such executive officers of state as are by law intrusted with the discharge of such duties. The attorney general was such an officer at common law. Under the Constitution (art. 7, § 17), the prosecuting attorneys are made the law officers of the state, and of the counties within their respective districts. These officers, says Waldo, J., in *State v. Douglas County Road Co.* 10 Or. 201, are possessed "with the powers, in the absence of statutory regulation, of the attorney general at common law." When the office of attorney general was created, it was made the duty of the incumbent to "prosecute or defend for the state all causes in the supreme court in which the state is interested." Sess. Laws 1891, p. 188. Whether his duties and powers in any manner supersede those of the prosecuting attorneys, it is not now necessary to inquire; but a vital question here is whether this proceeding has been properly instituted by the law officer of the state, whether he be a prosecuting attorney or the attorney general. The pleading, by virtue of which it is contended the court should take and entertain jurisdiction, may properly be termed a bill in equity by a private individual, to wit, A. C. Taylor, the relator. It is verified by him, and purports to be his bill, and not the information of the district attorney for the third judicial district, although signed by that officer. We have seen that at common law if a private individual had an interest in the proceeding apart from the interest of the government, he might, as relator, have his bill incorporated with the information of the attorney general, which was denominated an "information and bill." In practice, if it should afterwards appear that the relator had no interest to be subserved, the bill was dismissed, and the information retained. *Atty. Gen. v. Vivian*, 1 Russ. Ch. 236, 237; *State v. Cunningham, supra*. But do we find here what may be termed an information or bill by the law officer of the state? As such an officer is the only person competent to institute a proceeding of the nature under consideration, the information should show upon its face, in no uncertain manner, that he is the officer instituting and prosecuting the suit, and the sole person responsible for its inception and maintenance. The most common form of instituting like proceedings, it seems, has been in the name of the attorney general. *Cosaw Min. Co. v. South Carolina*, 144 U. S. 585, 36 L. ed. 543. Less frequently they are brought in the name of the Crown or the state upon the relation of the attorney general. *State v. Hibernian Sav. & L. Assn.* 8 Or. 896. And, if permissible at all to bring the suit in the name of the state alone, the complaint or information should show upon its face that the appropriate law officer brings the same for or in behalf of the state. The proceeding in either form would fix the responsibility for the maintenance thereof upon that officer, and it is not believed that the mere affixing of his signature in his official capacity to a complaint or bill shown to be the bill of a private relator is sufficient to impress it with the functions and capacity of an information competent to put in

motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity. See *State v. Saline County Ct. supra*; *Bigelow v. Hartford Bridge Co.* 14 Conn. 578, 36 Am. Dec. 502; *State v. Anderson*, 5 Kan. 115; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 100; *Iroquois County Supers. v. Keady*, 34 Ill. 296; *People v. Pacheco*, 29 Cal. 213; *Atty. Gen. v. East India Co.* 11 Sim. 380; *Bobbett v. State*, 10 Kan. 15; *United States v. Throckmorton*, 98 U. S. 70, 25 L. ed. 96.

Having reached these conclusions, the decree of the court below will be reversed and the complaint dismissed. This leaves the constitutional question still undisposed of, and the fact that we would probably not declare the acts to be unconstitutional cannot affect or change our duty in the premises. Courts will not assume to pass upon a question of that character, unless properly before them; and the case at bar, as presented, not being within our jurisdiction to hear and determine, it is clearly not within our province to assume now to decide that question, although of grave public importance. "As a general rule a court will not pass upon a constitutional question and decide a statute to be invalid unless a decision upon that very point becomes necessary to the determination of the cause." Lord, J., in *Elliott v. Oliver*, 22 Or. 47. We said when this case was here before that "this rule arises out of the due respect which one co-ordinate branch of the state government entertains towards another." The legislature, in adopting laws for the government of the people, does so under its construction of the Constitution, and the just presumption always prevails that the business of the legislature is transacted with due regard to the fundamental law by which its acts are limited and governed. It must be a clear case, therefore, and one in which the constitutional question is the very *lis mota*, before courts will assume the responsibility of declaring an act of the legislative assembly void upon constitutional grounds, and reverse the judgment of a co-ordinate branch of the state government. The case before us affords a striking illustration of the soundness of this doctrine. The law complained of was passed at two succeeding sessions of the legislative assembly, and received the approval of two executives of the state. By the last act an expenditure of \$25,000 under the former, in the purchase of a site for the branch asylum, is approved, as well as all other acts of the board in pursuance of its provisions. At the time of the passage and approval of the latter act this case was pending in the courts, which fact was strongly calculated to attract the attention of both the legislative and executive branches of the state government to the direct point at issue, and it is but just to assume that the question of its constitutionality was duly and carefully considered. Hence the peculiar gravity of our assuming at this time to pass upon the constitutional question so ably and elaborately presented at the hearing. Being inhibited by the rule under discussion, we cannot go into the question.

81 L. R. A.

These conclusions are concurred in by the full bench, but the majority of the court are of the opinion that such conclusions are susceptible of support on other grounds, and in this connection we will proceed to state them. The power of a court of equity, in a proceeding by the attorney general or district attorney to enjoin the issuance of warrants in payment for the Eastern Oregon Asylum,—as is heretofore intimated might be done if it be conceded that the act locating it is in violation of the Constitution,—it is believed, is involved in grave and serious doubt, and, further, the facts in the case do not seem to bring it within any recognized equity jurisdiction. It is not claimed, nor can it be, that the objects and purposes of the acts in question are unconstitutional, or that the defendants threaten to apply the public funds to an unconstitutional use, or to waste or dissipate them. The claim is that the legislature has directed that the branch asylum shall be located at a place other than the seat of government, in violation, as plaintiff claims, of the duty imposed upon it by the Constitution; and this, it is asserted, is sufficient ground upon which a court of equity should assume jurisdiction. This is not enough. The construction and location of public buildings of the character in question are purely a public governmental question, belonging to the legislative and governmental departments, and affect no private or property right. Nor do the facts of this case justify the conclusion, as a matter of law, that it would be of any pecuniary injury to the state. If the legislative and executive departments have misconstrued the Constitution in this regard, their responsibility is to the people. A court of equity cannot for that reason alone assume the right to sit in judgment on their acts. There is no authority to be found in the Constitution or statutes of this state for the exercise of such an extraordinary power, nor is it believed it can be found in the analogies of the common law. In this state the distinction between common law and equity, as a matter of substance, prevails, although both jurisdictions are invested in the same court. *Ming Yue v. Coos Bay R. & E. R. & Nav. Co.* 24 Or. 392. And, it being well settled that a court of chancery is conversant only with the maintenance of property rights, it has no jurisdiction to interfere with the duties of the other departments of government, except when necessary to the protection of such rights, and cannot even then interfere with the discretion invested in either of such departments. "The office and jurisdiction of a court of equity" says Mr. Justice Gray in *Re Sawyer*, 124 U. S. 210, 31 L. ed. 405, "unless enlarged by express statute, are limited to the protection of rights of property." And in *Sheridan v. Colvin*, 78 Ill. 247, it is said: "It is elementary law that the subject-matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property, and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come

within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property." See also *Green v. Mills*, 16 C. C. A. 516, 69 Fed. Rep. 852, *ante*, p. 90, and authorities cited by Mr. Justice Gray in *Re Sawyer*, *supra*. The several departments of government are each independent of the other. To the judicial department is intrusted the determination of rights and the encroachment of remedies, and, as an incident to the protection of property, a court of equity has the undoubted right to refuse to recognize as valid a clearly unconstitutional act of the legislature, because the Constitution is the paramount law of the land, which every suitor can invoke when an infringement of his rights is threatened under some law in violation thereof. But the mere fact that an act of the legislature is alleged to be unconstitutional gives it no jurisdiction to determine that question. Its duty is to determine actual controversies, when properly brought before it, and not to give opinions upon mooted questions or abstract propositions. Before it can assume to determine the constitutionality of a legislative act, the case before it must come within some recognized ground of equity jurisdiction, and present some actual or threatened infringement of the rights of property on account of such unconstitutional legislation. When the question, as here, is *publici juris* alone, affects no property rights, and no threatened waste of the public funds is shown, it may be well doubted whether the court has any more power to interfere with the duties of the other departments, on the ground that their acts may be unconstitutional, than it has with their discretionary powers or duties. The independence of the different departments in this respect is so complete that, however ill advised the action of the legislature or executive may be, and no matter how gross an error may be committed, a court of equity is nevertheless powerless to interfere when rights of property are not involved, unless express authority is conferred upon it to do so. The decision of a large class of public questions must, in the very nature of the case, be left to the legislative and executive departments, and when the decision is made it must be accepted as correct. Among these is the construction and location of public buildings, and the presumption is just as conclusive that in the discharge of this duty they observe the provisions of the Constitution as it is that the courts properly interpret that instrument when called upon to do so in discharge of the duty intrusted to them. It is true that by this rule, practically, public or private interests may sometimes suffer in either instance, although theoretically there are no such cases; but, however gross the

31 L. R. A.

wrong in fact committed by the other departments, a court of equity is powerless to remedy it, unless property rights are involved, or appeal to the judiciary is given by law. No greater evil could exist, under our form of government, than the usurpation by the judiciary of powers not intrusted to it. It should therefore refuse, under all circumstances, to assume jurisdiction in any case which affects the powers, duties, or prerogatives of the other departments of government, unless its right to do so is so clear as to admit of no reasonable doubt. In the opinion of the majority of the court, this record does not present such a case. No great public wrong is threatened, nor will public justice or individual rights suffer by the execution of the law in question. And, more, it must be admitted that the construction sought to be placed upon the Constitution by the plaintiff is at least open to serious question. It has, for almost a quarter of a century, received a practical exposition to the contrary by the legislative and executive departments, each of which is as much bound to obey the Constitution as the courts; and to this exposition the courts would be bound to yield, in a proceeding properly within their jurisdiction, unless satisfied that it is repugnant to the plain provisions of the Constitution. Indeed, the very act locating the branch asylum at Union, the execution of which is now sought to be enjoined, was passed by the legislature with only three dissenting votes, while this suit was pending, and its constitutional right to enact such a law thereby challenged. Moreover, it was approved by the present executive, whose eminent legal attainments and familiarity with the question (it having been argued before him in *Sherman v. Bellows*, 24 Or. 553) justly entitle his opinion in the matter to great respect. The court is bound, therefore, to assume that in the opinion of the legislature and executive there is no constitutional inhibition against the passage of such a law, and while none of these facts would excuse the court from assuming jurisdiction, if its right to do so was clear, nor would the exposition given the Constitution by the other departments be absolutely controlling upon it, when called upon, in the discharge of its duty, to construe that instrument, yet they afford a very persuasive argument why the court should not struggle to find some grounds, doubtful at best, upon which it can rest its jurisdiction. Before it could assume the power to question the legality of the action of the other departments of government in such a case its right to do so ought to be beyond all possible question, and it ought to be able to place its jurisdiction upon some well-settled ground for equitable interference, which it is believed cannot be done in this case.

Let an order be entered dismissing the complaint and dissolving the injunction.

FLORIDA SUPREME COURT.

James K. DUKE, *Appt.*,
v.

Greenfield TAYLOR *et al.*

(.....Fla.....)

- *1. The domicile and citizenship of a corporation belong to the state under whose laws it is created. It exists only in contemplation of law and by force of the law, and where that law ceases to operate the corporation can have no existence. Hence a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty.
2. Though a corporation must dwell in the place of its creation, its existence there will be recognized in other places, and its residence in one state creates no insuperable objection to its power of contracting in another.
3. Where a corporation has been legally created and organized under the laws of a sister state for the transaction of any business there, it may, by comity existing between the states, transact business in this state, provided it be not in contravention of our laws or public policy.
4. A corporation created under the laws of one state cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions in its organization.
5. The courts will not take judicial knowledge of the laws of another state under which a corporation is claimed to have been created, when the corporate existence is in issue, but proof of such laws must be made in order that the courts may be advised of the legal warrant for the creation of such corporation.
6. A corporation *de facto* is one where the company has made an effort to organize under some law authorizing the creation of such a corporation, but there is an irregularity in the organization, and where a corporation *de facto* exists and does legitimate business in its corporate name, the stockholders are not liable as partners. There can, however, be no corporation *de facto* unless it can exist *de jure*.
7. An attempted organization of a corporation in this state under a supposed charter obtained under the laws of another state, no authority being shown for the grant of such charter, or of user thereunder in the state of its creation, renders the participants in the attempted organization here liable as partners, on proper demand against such association.
8. One must contract with or deal with an association as a corporation exercising corporate powers before he can be estopped from denying its existence as a corporation.

(January 14, 1886.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Orange County in favor of defendants in an action brought to recover

*Headnotes by Mabry, Ch. J.

NOTE.—For *de facto* foreign corporations, see also note to Cone Export & C. Co. v. Poole (S. C.) 24 L. R. A. 293.

For *de facto* domestic corporations, see note to Rutherford v. Hill (Or.) 17 L. R. A. 549.

21 L. R. A.

the amount alleged to be due on a promissory note. *Reversed.*

Statement by Mabry, Ch. J.:

Appellant instituted suit against appellees, Taylor and fifteen others, as partners doing business as the Florida Orange Hedge Fence Company, on a note as follows:

Orlando, Fla., March 23d, 1887.

Two months after date we, or either of us, for value received, jointly and severally, as principals, promise to pay to the order of Collis Ormsby, at the First National Bank of Orlando, at its office in Orlando, Florida, the sum of \$654; and it is further agreed that if this note be not paid at maturity, the same shall draw interest at the rate of 3 per cent per month after maturity until paid, together with an attorney's fee and all costs should said note be collected by law. We each hereby waive all right to any exemption by law and under the Constitution, and permit any legal execution to levy upon whatever we may have to satisfy this note.

Florida Orange Hedge Fence Company,

By its Pres. Jno. W. Childress,

James A. Knox, as Secty & Treas.

Indorsed: Collis Ormsby.

The declaration alleges the transfer and indorsement of the note to appellant before maturity.

Taylor, James A. Knox, and Wiley Abercrombie were served, and they filed pleas as follows: That the Florida Orange Hedge Fence Company was a corporation organized under the laws of the state of Tennessee, and doing business in the state of Florida, and that said company was not then and had never been a partnership. Second, that the note sued on was given by the president and secretary of said corporation for a corporation debt, and that the same was accepted as the note of the corporation, and not as the note of a partnership, and that plaintiff knew when the note was assigned to him that it was a note of a corporation, and he accepted it as such.

Taylor filed two separate pleas, the second one of which was overruled on demurrer and no amendment offered. The plea not demurred to alleges that defendant was not then and had never been a member of any copartnership known as the Florida Orange Hedge Fence Company, and he knew of no such copartnership. Issue was joined upon the pleas recited, and the record shows that the cause was, by consent of parties, submitted to the judge without a jury, upon the plea in abatement, and that the court sustained the plea in abatement and dismissed the cause. The appeal from this decision was entered to the January term, 1892, of this court.

On the trial defendants put in evidence a certified copy of a charter purporting to have been obtained under the general laws of the state of Tennessee for organizing corporations. The alleged charter recites that by virtue of the general laws of the land five persons named were constituted a body corporate by the name of Florida Orange Hedge Fence

Company, for the purpose of planting, wiring, trimming, and manufacturing fence; and certain enumerated powers incident to corporations are conferred upon the company. The terms of all officers, not to exceed two years, are to be fixed by the by-laws, and the directors, to consist of five or more members, at the option of the corporation, are to be elected by a majority of votes cast, each share representing one vote. The directors are required to keep a full and true record of all their proceedings, and an annual statement of the receipts and disbursements is required to be copied on the minutes. The books of the corporations are required to show the original or subsequent stockholders, their respective interest, the amount paid on shares, the transfer of stock, by and to whom made, and also other transactions in which a stockholder as creditor might have an interest. The first board of directors was to consist of five or more corporators, and they were to apply for and obtain the charter. The name of the corporation is the Florida Orange Hedge Fence Company, but there is nothing in the grant of powers to indicate that the corporation was organized to do business in Florida, or in any other state than Tennessee. The certified copy of the charter offered in evidence has attached to it a certificate under the hand and seal of the clerk of the county court of Montgomery county, Tennessee; that the named corporators acknowledged the execution of the instrument for the purposes therein contained, and also a certificate from the secretary of state that the charter, with certificate of probate, was received and duly registered by him.

Appellees proved by the deposition of one of the corporators that at least three of them met in Clarksville, Tennessee, soon after the charter was obtained, but the witness was unable to say, as he did not remember, what formalities were had in the way of electing officers. At this meeting the means and methods of operating the company were considered, and a conclusion was reached to go to Florida for the purpose of carrying out the plans of operation. In pursuance of the determination reached, three of the corporators went to Orlando, Florida, and the evidence of this witness, as well as others introduced by appellees, shows that, at the place named in this state, officers for the corporation were elected, stock was issued, the corporation organized and started its business in Orange county, Florida. After the corporation was organized in this state, a record was made upon the books of the company of the meeting in Tennessee, and appellees put this in evidence. It is as follows:

Clarksville, Tenn., February 21st, 1885.

Whereas, C. G. Smith, W. M. Daniel, A. Howell, and H. C. Merritt, of Tennessee, and Samuel Johnson of Kentucky, on the 16th day of February, 1885, obtained a charter for the Florida Orange Hedge Fence Company from the state of Tennessee, which charter is in words and figures following, to wit. (Then follows a copy of the charter with certificates on it, including one from the recorder of Montgomery county, Tennessee, that record of the instrument had been made in his office)

31 L. R. A.

The minute concluded as follows:

And whereas, the said charter provides that said five persons named as incorporators in said charter shall constitute the first board of directors, and in pursuance of the forms granted them, a quorum of said directors this day met in the office of Smith & Lurton, in the city of Clarksville, Tennessee, there being present C. G. Smith, W. M. Daniel, and Samuel Johnson. C. G. Smith was, on motion, made chairman, and, on motion, Samuel Johnson was made secretary. C. G. Smith presented to the board the resignations of A. Howell and H. C. Merritt as directors in the company, which were accepted. Thereupon the board adjourned.

Chas. G. Smith, Chairman, Secretary.

This minute was made from memoranda supposed to have been reduced to writing at the time of the meeting. The testimony further shows that three named corporators, after the meeting in Tennessee, went to Orlando, and, with others, the defendants in the present suit being among them, held meetings, adopted a corporate seal, elected officers, and issued stock to subscribers, and that the parties participating in the organization of the corporation in this state, and acquiring stock therein, did so in good faith, believing that the corporation was legally incorporated. Ormsby, the party to whom the note sued on was given, was secretary under the organization in Florida, and the note was for services due from the company to him as secretary. The organization here continued to do business openly as a corporation under the charter mentioned, but took no steps towards organizing a corporation under the laws of this state by filing articles of incorporation or doing any of the things required to form a corporation here. A witness for appellees stated that the company did business openly and notoriously as a corporation in Orange county, Florida, and that its place of business was near the business house of appellant; that he did not know that appellant knew when he received the note that the company was a corporation, but had reason to believe that he did. Witness was not positive, but was under the impression that the company set some hedge fences for appellant. The effect of the latter's testimony is that he did not know that the Florida Orange Hedge Fence Company was a corporation, and supposed it was a joint-stock company; that Ormsby informed him that the stockholders were individually liable for the payment of the note, and that it was so stated in the articles of agreement. He also stated that "the book he showed it to me in was a large book similar to this" (pointing to the record book of the company). "He turned to the book and read to me in substance as follows: 'The stockholders are severally and jointly liable individually at all times for all money due and owing to laborers, servants, clerks, and operatives of the company.'" It was also shown that the defendants sued were stockholders and members of the company when the note was given.

The other facts are stated in the opinion.

Mr. William H. Jewell, for appellant:

The evidence fails to show that the defend-

ants were a corporation; the documentary evidence is insufficient, the various steps incorporating, prescribed by the law of Tennessee, should have been complied with.

Tenn. Act, March 19, 1875; 1 Beach, Corp. § 16, and note, p. 295; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104, 41 Am. Rep. 85.

Even granting the charter regular, and competent evidence of the facts alleged therein, still there was no organization of such company in Tennessee. A corporation cannot act without being first organized, for until then it has no life, it has not come into being.

Boone, Corp. § 34.

A corporation must obtain its legal existence in the state of its origin.

4 Am. & Eng. Enc. Law, p. 193, note 8; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; 1 Lawson, Rights, Rem. & Pr. § 338; Ang. & A. Corp. § 514.

A corporation must not only obtain but retain its legal existence in the state of its origin. It cannot migrate.

Bank of Augusta v. Earle, *supra*; 1 Lawson, Rights, Rem. & Pr. 655, § 387; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Hale v. Union Mut. F. Ins. Co.* 32 N. H. 295, 64 Am. Dec. 370.

Organizing a corporation or holding stockholders' meetings outside the state of its creation are void acts.

Miller v. Ewer, *supra*; Ang. & A. Corp. § 498; *Hill v. Beach*, 12 N. J. Eq. 31; 1 Lawson, Rights, Rem. & Pr. §§ 338, 476, pp. 790, 791; *Montgomery v. Forbes*, 148 Mass. 249; Cook, Stock & Stockholders, § 591; *Smith v. Silver Valley Min. Co.* 84 Md. 85, 54 Am. Rep. 769; Boone, Corp. § 66; 1 Beach, Corp. §§ 285, 286.

Appellees cannot legally claim protection from individual liability behind alleged corporate character.

Montgomery v. Forbes, *supra*; *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 366.

The note sued on in no way indicates that it is the note of a corporation.

Williams v. Bank of Michigan, 7 Wend. 539; *Holloway v. Memphis, E. P. & P. R. Co.* 28 Tex. 465, 76 Am. Dec. 68; *Clark v. Jones*, 87 Ala. 474; 1 Lawson, Rights, Rem. & Pr. § 344.

Neither is transacting business with appellants an admission of their incorporate character.

United States Bank v. Stearns, 15 Wend. 315; 1 Lawson, Rights, Rem. & Pr. p. 611, § 344; *Williams v. Bank of Michigan*, and *Holloway v. Memphis, E. P. & P. R. Co.* *supra*.

The law of estoppel does not apply to one who is attempting to enforce a contract.

Cook, Stock & Stockholders, §§ 233, 424; *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 366.

If defendants were not in fact a corporation, nor *de facto* such so that plaintiff might be bound by some estoppel, then they could be sued as partners.

Hill v. Beach, 12 N. J. Eq. 31; *Fuller v. Rowe*, 57 N. Y. 26; *National Union Bank v. Landon*, 45 N. Y. 410; Cook, Stock & Stockholders, § 237; 1 Beach, Corp. §§ 16, 162, p. 295, note; *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104, 41 Am. Rep. 85; *Lewis v. Tilton*, 1, 220, 52 Am. Rep. 436; 1 Lawson,

A.

Rights, Rem. & Pr. 607, p. 1073, § 599; Hawes, Parties, § 92, notes 1 and 7; Ang. & A. Corp. 591.

Messrs. Beggs & Palmer, for appellees:

The Florida Orange Hedge Fence Company was at least a *de facto* corporation under the laws of the state of Tennessee, and under the comity existing between the states was fully authorized to carry on its business in the state of Florida.

1 Cook, Stock & Stockholders, 237; 2 Cook, Stock & Stockholders, 694.

The Florida Orange Hedge Fence Company was a *de facto* corporation because there had been an effort to legally incorporate, and the mere fact that one of the certificates to the charter was absent did not invalidate the corporation and render the stockholders liable as partners.

1 Cook, Stock & Stockholders, §§ 234, 310; *Allen v. Long*, 80 Tex. 261.

Stockholders in a *de facto* corporation are not liable to its creditors as partners, especially when they purchased stock after organization and charter.

American Salt Co. v. Heidenheimer, 80 Tex. 344.

The subscribers for and holders of stock in a manufacturing corporation which had been defectively organized, and transacted business under such defective corporation, do not thereby become partners, general or special, in such business.

Fay v. Noble, 7 Cush. 188; *Trowbridge v. Scudder*, 11 Cush. 88; *First Nat. Bank v. Almy*, 117 Mass. 476.

When a creditor contracted with a *de facto* corporation in its corporate capacity and within the scope of its assumed powers, he cannot deny its corporate existence and character, and cannot charge the stockholders with the debt.

1 Cook, Stock & Stockholders, § 234, p. 311, note 1; *Snider's Sons' Co. v. Troy*, 24 Am. St. Rep. 887, note, 91 Ala. 224, 11 L. R. A. 515; *Rutherford v. Hill*, 29 Am. St. Rep. 600, note, 22 Or. 218, 17 L. R. A. 549.

Foreign corporations may exercise any and all its powers in another state unless forbidden by statute.

2 Cook, Stock & Stockholders, 624.

It is legal for citizens of one state to take out a charter in another state, even though all the corporate business is to be transacted in the first state.

Demarest v. Flack, 128 N. Y. 205, 13 L. R. A. 854; Cook, Stock & Stockholders, ed. 1894, § 237.

Mabry, Ch. J., delivered the opinion of the court:

One of the pleas in this case, called a plea in abatement, alleges that the Florida Orange Hedge Fence Company was a corporation organized under the laws of Tennessee, and doing business in this state. According to the recognized American doctrine, the domicile and citizenship of a corporation are regarded as belonging to the state under whose laws the corporation is created. In the case of *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274, it is said that "a corporation can have no legal existence out of the boundaries

of the sovereignty by which it is created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. It is, indeed, a mere artificial being, invisible and intangible; yet it is a person, for certain purposes, in contemplation of law, and has been recognized as such by the decisions of this court." And in *St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 498, 20 L. ed. 192, it is said, in reference to a corporation, that, "it can exercise its franchises extraterritorially only so far as may be permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*." In recognition of the doctrine announced in the case first cited it was held by this court in *Taylor v. Branham*, 35 Fla. 297, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. And where a number of individuals assume to act in a corporate capacity in a state where they have not been clothed with corporate existence and authority, they cannot there be recognized as a legally constituted corporation, though they may have been duly incorporated in another state, and such persons, in the state where they assume corporate capacity, will be treated as and held to the responsibility of partners. In the case just cited in this court the record showed that there was an attempt at an organization of a corporation in this state under a supposed charter obtained under the general laws of Tennessee without any organization or user in that state. Where a corporation has been legally created and organized under the laws of a sister state for the transaction of any business there, it may, by comity existing between the states, transact business in this state, provided it be not in contravention of our laws of public policy. Our general incorporating laws recognize the transaction of business by foreign corporations in this state, and in the absence of express legislative assertion to the contrary, the courts of this state would be bound to recognize the comity existing among the states. While this is true, it is also well settled that a corporation created under the laws of one state cannot hold corporate meetings in another for the purpose of organizing the corporation, electing its officers, or performing any strictly corporate functions in its organization.

A corporate charter was granted by the legislature of Maine, and the corporators met in New York, accepted the charter, elected officers and a board of directors for the corporation, and it was held in *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619, that all votes and proceedings of persons professing to act on the

capacity of corporations, when assembled without the bounds of the sovereignty granting the charter, are void. The corporators in a charter granted by the state of North Carolina met in Baltimore, Maryland, and accepted the charter, and it was held that the acceptance was invalid, and the corporation had no legal existence. *Smith v. Silver Valley Min. Co.* 64 Md. 85, 54 Am. Rep. 768. After a corporation had been duly organized in the state of its creation there may be some questions as to the legality of meetings of directors, or even stockholders, without the limit of the state, as to which we express no opinion; but there can be no doubt from the authorities that the first meeting to organize the corporation and elect its first officers must be within the state where it is created. 1 Beach, Priv. Corp. § 286.

In our judgment there was no sufficient proof before the court to sustain the plea in the case before us, that the Florida Orange Hedge Fence Company was a corporation organized under the laws of Tennessee and doing business in Florida. In the first place, the laws of Tennessee, authorizing the formation of such a corporation as the supposed charter purports to create, were not put in evidence so far as the record shows, and we do not see that we can take judicial knowledge of the laws of another state under which a corporation is claimed to have been created. The authorities indicate that proof of such laws must be made in order that the court may see the legal warrant for the creation of such corporations. *Holloway v. Memphis, E. P. & P. R. Co.* 23 Tex. 465, 76 Am. Dec. 68; *United States Bank v. Stearns*, 15 Wend. 314; 1 Lawson, Rights, Rem. & Pr. § 344. Conceding that there was legal authority for obtaining the charter in question, the evidence fails to show any organization of the corporation in Tennessee, or any user under the charter in that state; but it does show, in our opinion, an attempted organization in this state under the charter. The first officers were elected here, and the only stock ever issued was in Orlando. The meeting in Tennessee cannot be regarded as resulting in any corporate action to the extent of organizing a corporation under the charter. Taken in connection with what one of the corporators testified, the conclusion is that they determined to come to Florida to carry out the methods and plans of operating the company, and the testimony shows that they did come to this state and attempted to organize by adopting a seal, electing officers, and issuing stock, and although such action on their part appears to have been in good faith, under the belief that the corporation existed, it was ineffectual to accomplish any organization in law. Under the authorities referred to there can be no organization of a corporation in this state under a charter obtained in a foreign jurisdiction to do business there. The present case does not come within the principle decided in *Demarest v. Flack*, 128 N. Y. 205, 13 L. R. A. 854, where citizens of that state obtained in West Virginia a charter and organized under it for the purpose of doing business in the state of New York. From the evidence produced in this case we are of the opinion that the proceedings on the part of appellees and associates in attempting to organize a corporation in this state were void, and no corporation was in fact organized.

It is contended for appellees that the Florida Orange Hedge Fence Company was, under the organization mentioned, a corporation *de facto*, and that appellant cannot be permitted to question its existence; and, further, that he is estopped from denying its existence, because both he and his assignor recognized and dealt with the company as a corporation. Cook states, in his book on Stock & Stockholders and Corporation Law, 8d ed. § 233, that "there are many cases to the effect that a corporation creditor seeking to enforce the payment of his debt may ignore the existence of the corporation, and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with by the company in question. For instance, it has been held that where the articles of association were signed, but not filed until some time subsequently, debts contracted in the interim might be collected from the stockholders as partners. So also a total failure to file or record the certificate or articles of incorporation has been held to render the members liable as partners; as also an omission of the members to sign and publish the articles of association, or an indefinite statement of where the principal place of business of the corporation is to be." And in § 284 he states that "during the past few years, however, the great weight of authority has clearly established the rule that where a supposed corporation is doing business as a *de facto* corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company. The corporation is a *de facto* corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under that law and is transacting business in a corporate name." The two views here expressed by this author indicate the dividing line between the decisions on the subject. The case of *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 11 L. R. A. 515, contains a clear statement of the diversity of judicial opinion in reference to the matter. The authorities pro and con, are cited in *note* to the case of *Rutherford v. Hill* (Or.) 17 L. R. A. 549, and reported in 29 Am. St. Rep. 596. Conceding that the rule approved by Cook, in § 234, to be the correct one, we do not perceive how an association of persons can exist as a corporation *de facto* unless they can legally become a corporation *de jure*. It is stated in *Snider's Sons' Co. v. Troy*, *supra*, that "a corporation *de facto* exists, when from irregularity

31 L. R. A.

or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law — when there is an organization with color of law, and the exercise of corporate franchises." The cases cited in *note* to *Rutherford v. Hill*, *supra*, show that when the organization of a corporation never had any appearance of validity, the participants therein will be held liable as partners. The attempted organization of the corporation in this state under the supposed Tennessee charter was wholly illegal and without any semblance of authority. There is no law in this state, nor in Tennessee, so far as we are advised, to authorize such proceedings, and the claim of the existence of the corporation *de facto* under it is without support. Neither do we see that the appellant is estopped from proceedings against the appellees as partners. The fact that the note, indorsed to him before maturity, is executed by persons as president and secretary of the company, does not create a presumption that it was a corporation. *Clark v. Jones*, 87 Ala. 474; *Holloway v. Memphis, E. P. & P. R. Co.* *supra*. The body of the note indicates an unusual paper for a corporate body to make, and contains no recital that the company in whose name it was executed was a corporation. There is nothing sufficient to overcome the positive testimony of appellant that he did not know the company was a corporation, or claimed to be a corporation, when he received the note, which was before its maturity; nor does it appear that he contracted with or dealt with the company as a corporation so as to be estopped from gainsaying its existence as a corporation. The facts of the case do not bring it within the principle decided in *Booske v. Gulf Ice Co.* 24 Fla. 550, and *Jackson Sharp Co. v. Holland*, 14 Fla. 384, to the effect that one who contracts with an association as a corporation and exercising corporate powers is estopped to deny it.

Objections were made to the admission of certain evidence on the part of appellees, but as the trial was before the judge, without a jury, we have not considered the objections.

On all the evidence proper in the case our conclusion is, that the judgment was wrong, and must be reversed.

It is so ordered.

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina, *Respt.*,

v.

Joseph Benjamin GAYMON, *Appt.*

(.....S. C.)

Jurors cannot act upon their personal knowledge of the mental condition of one accused of perjury, in arriving at a verdict.

NOTE.—The right of jurors to act on their own knowledge of the facts in or relevant to the issue.

I. The general rule.

II. Modifications thereof.

a. In general.

b. As to intoxicating liquors.

c. As to witnesses.

The question of the right of a juror to be called as a witness will form the subject of a future note.

Upon the question of a juror impeaching his own verdict, see *notes* to *Bartlett v. Patton* (W. Va.) 5 L. R. A. 523 (1890); *Murphy v. Murphy* (S. D.) 9 L. R. A. 820 (1890), and *Hauk v. Allen* (Ind.) 11 L. R. A. 706 (1890).

This note does not include the question of a juror's right to rely upon his own opinion, judgment, and experience in questions involving the assessment of values and damages, but is confined to cases involving the right to consider matters of fact within his personal knowledge which are not disclosed by the evidence.

I. The general rule.

In ancient times the established doctrine in England was that without the production of any evidence whatever by the parties, a jury found their verdict upon their own private knowledge of the facts in controversy, and further had the right to be governed by such private knowledge as well as by the evidence of witnesses delivered in court on the trial, the oath of the jurors to find according to their evidence being considered to mean that they should do so to the best of their own knowledge. *Sam v. State*, 1 Swan, 61, 65 (1851).

The ancient doctrine was that jurors were to render the verdict as well upon facts within their personal knowledge as upon those derived from the testimony of the witnesses duly sworn and testifying in the case. *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray, 529, 535 (1854).

In the case of *Trial of Reading*, 7 How. St. Tr. 267 (1679), a jurymen was challenged because he was supposed to know something of the matter. The court stated that for that reason the juries were called from the neighborhood, because they should not be wholly strangers to the facts, but that if cause could be shown that such juror had already given his verdict by his discourse, and that the prisoner was already condemned in his opinion, that such might be a cause of challenge, but although he had discoursed with neighbors as others did, and might believe it, yet he was then to give his verdict upon what he heard upon oath.

The practice of taking jurors from the vicinage seems to have been adopted under the notion that they might thus be the better qualified from their personal acquaintance with the facts, the parties and their witnesses, to decide the case that might be brought before them. *Schmidt v. New York Union Mut. F. Ins. Co. supra*.

The reason for the English rule was that the jurors were liable to attain for a false verdict, but when the proceedings by attain fell into disuse and a new trial in case of a wrong verdict was introduced, a verdict founded upon the private

(June 27, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Clarendon County convicting him of perjury. *Affirmed*.

The exceptions upon which the case was taken to the supreme court were as follows:

"(1) That his honor, the presiding judge, erred in overruling defendant's motion for a

knowledge of the jury was excluded and the opposite doctrine obtained, whereby the verdict of the jury must be found upon the evidence delivered to them in court in the presence of the judge and of the parties. *Sam v. State, supra*.

At the present day it is thought a greater object and more likely to secure the due administration of justice, to submit cases to impartial and unbiased jurors, and that those are less likely to be so who have come from the immediate neighborhood of the parties and have been either eyewitnesses to the facts, or have had their minds imbued with the popular feeling as to the merits of the controversy. *Schmidt v. New York Union Mut. F. Ins. Co. supra*.

An essential element in the trial by jury is that the verdict shall be rendered according to the facts of the case lawfully produced to the jury, who are sworn to give their verdict according to the evidence, and if they find without evidence or against the evidence, a new trial will be granted, and the jury cannot even render a verdict upon knowledge within their own breasts, and therefore a jurymen having knowledge of facts pertinent to the issue must be sworn. *Mitchum v. State*, 11 Ga. 615, 633 (1852).

In *Clarke v. Robinson*, 5 B. Mon. 55 (1844), the court stated that it never was the practice of jurors to act upon their own view of things about which the controversy was had where it was a thing personal, though it was sometimes the case in controversies about real property, but at that time they were triers of the facts, not upon their own knowledge as was previously the case, but upon the testimony of others delivered before them, subject to cross-examination and the scrutiny of the court and jury.

The evidence admitted to the jury should be the sworn evidence submitted in open court, under the safeguards of the law, and open to be sifted by cross-examination liable to be made by countervailing proof on the part of the party who may be affected by it, and such is the rule in both civil and criminal cases. *Wade v. Ordway*, 1 Baxt, 229 (1872), where a new trial was granted upon the ground that new evidence obtained by one of the jury was imparted by him to his fellows after the retirement of the jury to consider the verdict.

The theory of the jury trial is that all the parties and witnesses are to be heard in open court, in the presence of and under the direction of the presiding judge, and of such cardinal doctrine the law is extremely tenacious and looks with distrust and aversion upon any departure in practice from its strictness. *Heffron v. Gallupe*, 55 Me. 563, 567 (1868).

The oath of the juror is to decide according to the law and the evidence, given to him according to the rules of evidence in open court, and with the parties face to face, and does not mean evidence given to a juror outside of the court-room to be read and pondered upon in secret, and given to his fellows in deliberation upon the verdict. *Ibid*.

A jury are by their oaths obliged to go according to the evidence, that is, the evidence given in court; and if a jurymen be prepossessed it is good cause of challenge, which seems to be a proof that

new trial, based on alleged error of his honor in charging the jury, in substance, that they could not communicate to one another facts known by any of them, but not brought out on the witness stand, going to show that the defendant was not of sound mind or memory at the time the offense is said to have been com-

mitted, and in charging the jury, to wit: 'I charge you that you have no right to make communications to one another of a fact bearing upon the case, either in regard to the competency of the defendant or any other fact. . . . You can't, if you knew the defendant to be perfectly sane at that moment, or if you

a juror ought not to give of his own knowledge. *Smith, Dormer, v. Parkhurst, Andr. 315, 321.*

If a juror does indeed know anything material in the cause he ought to acquaint the court therewith and be sworn as a witness that he may be cross-examined, otherwise he may go upon insufficient and improper evidence. *Ibid.*

And this is so, for the reason that to permit them to take into consideration evidence not produced upon the trial and without the knowledge or consent of the opposite party is subversive of all rules which govern the admissibility of testimony, and of the right of a fair and impartial trial by jury. *Stewart v. Burlington & M. R. R. Co. 11 Iowa, 62, 64 (1860).*

Although the weight and credit to be given to the evidence should be judged of by the jury in the light of their own experience, yet that should be done without any addition to, or modification of, it, arising out of the peculiar scientific acquirements or actual knowledge of the facts in controversy by any one or more of their number. *People v. Zeiger, 6 Park. Crim. Rep. 355 (1865).*

Jurors can undoubtedly, and must, use their judgment more or less concerning documents laid before them, and have it in their power to rely on their own views very much if they see fit, but the law presumes they will act on testimony chiefly, if not entirely, and it will not be presumed that they all have equal knowledge or skill in such inquiries, or that when they consult together the opinions of one would not have more influence than those of another, when the opinions operate as facts in the cause; and if a verdict were formed on statements of material facts by one juror to his fellows, such a verdict is a violation of their oaths, and when opinions are such as to stand in the same light the result is not less dangerous. *Re Foster's Will, 34 Mich. 21 (1876).*

A case is not to be tried upon the *ex parte* statement of a juror made where contradiction and explanation are impossible. *Simpson v. Kent, 9 Phila. 30 (1871).*

Questions of fact are to be decided according to the evidence introduced, and the personal knowledge of a juror cannot constitute a part of the evidence. *Gibson v. Carreker, 91 Ga. 617 (1883); Schmidt v. New York Union Mut. F. Ins. Co. 1 Gray, 529, 535 (1854); Wood River Bank v. Dodge, 36 Neb. 708, 715 (1893); Richards v. State, 36 Neb. 17 (1893).*

No evidence can be admitted, but what is or might be under the examination of both parties. *Gass v. Stinson, 3 Sumn. 98, 104 (1837).*

The jury must not add to the evidence admitted by the court upon their own motion after they have retired to their room. *Kruidenier Bros. v. Shields, 70 Iowa, 428, 432 (1896).*

Jurors cannot go in search of evidence privately, or act upon evidence thus obtained. *Winslow v. Morrill, 68 Me. 332 (1878).*

The jury may not take into consideration facts known to them personally outside of the evidence produced. *Close v. Samm, 27 Iowa, 503, 508 (1869).*

So, the jury cannot be permitted, by adding evidence, to make a case different from that which they took with them to their room. *Griffin v. Harriman, 74 Iowa, 436, 439 (1888).*

If a juror has knowledge of facts not in evidence, the jury have no right to consider them in making up a verdict, and before they can take such facts into

consideration the juror should be sworn and testify to the fact precisely as any other witness. *Ottawa Gaslight & C. Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263 (1862).*

And such evidence cannot be heard in private by them, either to refresh their memory as to what passed at the trial, or as to any new matter which may arise during their deliberations, for if it is the verdict will be invalid and a *venire de novo* must be awarded. *Stewart v. Burlington & M. R. R. Co. 11 Iowa, 62, 64 (1860).*

Any fact pertinent to the issue which the jury are called upon to try cannot be considered unless it is found in the testimony adduced, even though such fact may be known to some one or all of the jury. *State v. Jacob, 30 S. C. 131, 136 (1888); State v. Jones, 29 S. C. 233 (1888).*

A juror who, after the jury have retired to their deliberations, avails himself of the opportunity of adding to or detracting from the evidence by means of his own peculiar knowledge of the circumstances attending the case submitted, violates his duties and is utterly unfitted for the position. *People v. Zeiger, 6 Park. Crim. Rep. 355 (1865).*

The oath of a juror will not permit him to find a verdict on what he may think he knows himself. *Green v. Hill, 4 Tex. 465, 467 (1849).*

Subsequent representations made by jurymen after their departure from the bar ought to be totally disregarded in arriving at a verdict. *Rex v. Thirkell, 3 Burr. 1696 (1765).*

For the reason that when a juror is to give testimony he must do it in open court. *Re Foster's Will, 34 Mich. 21 (1876).*

Where a juror knows of a fact material to the issue he must disclose and testify to it in court. *Parks v. Boston, 15 Pick. 198, 209 (1834); McKain v. Love, 2 Hill, L. 506, 508, 27 Am. Dec. 401 (1834); Sam v. State, 1 Swan, 61, 65 (1851).*

In *Benner v. The Hundred of Hartford, Style, 233 (1650)*, it was said that if a juror desired to give evidence of something in his own knowledge, he should be examined openly in court upon oath, and not privately by his companions in the jury room.

And this is so for the reason that a juror has no right to give testimony or state facts outside of the case made in court to his fellow jurors after their retirement and for their consideration in making up the verdict in the case. *Hall v. Robison, 25 Iowa, 91, 93 (1868).*

In *Trial of Anderson, 7 How. St. Tr. 874 (1680)*, it was stated that it was not the business or the duty of the court to give any evidence of any fact that they knew of their own knowledge, unless they would be sworn for that purpose, for though they did know it in their own private conscience to be true, yet they were obliged to conceal their own knowledge unless they would be sworn as witnesses.

In *Smith v. Hollings, decided in the year 1791*, found in a note in 6 How. St. Tr. 1012 (1870), it was stated that where a jurymen has knowledge of any matter of evidence in a cause which he is trying, he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge and thereupon be examined and subjected to cross-examination as a witness.

If the juror knows of any particular material fact he ought to be publicly sworn so that his evidence like that of other witnesses may first be scrutinized as to its competency and bearing upon the issue,

knew him not to be perfectly sane at that time, you can't tell the other jurors so in the jury room: nor you can't, if you knew him to be a man who had no memory, or had knowledge of right and wrong, you can't say so in the jury room, except what you saw upon the stand.' (2) That his honor erred in overrul-

ing defendant's motion for a new trial based on alleged error in charging the jury, in substance, that they could not let their personal knowledge of the defendant, or of any fact other than what was proved on the stand, enter into their judgment, save their personal knowledge of the character of the witnesses,

for the reason that the court and the parties may know upon what evidence the verdict is rendered. *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529, 535 (1854).

And this rule holds as well upon the ground that the testimony may go to his brethren under the sanction of an oath, as upon the ground that the party against whom it bears may have the privilege of cross-examining, and that the counsel and the court respectively may be informed of the evidence on which the jury is to act and make such use of it as their respective duties may require. *Patterson v. Boston*, 20 Pick. 159, 166 (1838); *Murdock v. Sumner*, 22 Pick. 156, 158 (1839).

Such evidence should be so stated in order that the court may judge of its competency, and in order that the court and counsel may have under their consideration the whole of the evidence upon which the verdict was founded. *Murdock v. Sumner*, *supra*.

If a jury give a verdict upon their own knowledge, they ought so to state to the court. *Wright v. Crump*, 7 Mod. 1, 2 (1702).

The same rule, and the reason thereof, hold in the case of a juror having any scientific conclusions bearing upon the controversy and important for the other jurors to know. *People v. Zeiger*, 6 Park. Crim. Rep. 355 (1865).

The custom of allowing jurors to rely on their own supposed knowledge of facts, or the knowledge of any number of them without being given in evidence, is wrong in principle and exceedingly pernicious in its tendency, as it affords a pretense for disregarding the evidence and relying on their own supposed personal knowledge of the facts disclosed by passion and prejudice. *Green v. Hill*, 4 Tex. 465, 467 (1849).

Generally a verdict founded on facts first disclosed in the jury room would be bad, although the facts were known to one of the jury, for the reason that it would be unfair not to give the party against whom they operate an opportunity of repelling or explaining them. *M'Kain v. Love*, 2 Hill, L. 506, 508, 27 Am. Dec. 401 (1834).

Whatever chances and accidents may enter into the determination of causes by jurors, improper outside influences, no matter from what motives they may proceed, cannot be enumerated among the evidence submitted in open court. *Simpson v. Kent*, 9 Phila. 30 (1871).

Courts should distinctly charge the jury in criminal cases that they must look alone to the testimony adduced in the evidence before them on the trial, and should not permit one of their number to communicate to them any facts in his knowledge not deposited to in court. *Morton v. State*, 1 Lea, 498 (1878).

And under the Constitution of Tennessee it has been held that what a juror knows of the defendant ought to be proposed and offered in court, and if admissible there rendered in order that it may be observed upon by the defendant's counsel, and a contrary course would be directly against and repugnant to the Constitution of the state, which provides, art. 2, § 9, that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel, and to meet the witnesses face to face." *Booby v. State*, 4 Yerg. 111, 114 (1833). And the ruling of the court in the case of *Sam v. State*, 1 Swan, 61, 65 (1851), is to the same effect, and applies the rule equally to civil and criminal cases.

31 L. R. A.

It is the duty of the jury to be governed by the evidence introduced on the trial and the instructions of the court, otherwise, in case of an erroneous verdict it would be impossible to review the same. *Wood River Bank v. Dodge*, 36 Neb. 708, 715 (1893).

In *Potter v. Chicago & N. W. R. Co.* 21 Wis. 372, 374, 94 Am. Dec. 548 (1867), which was an action to recover damages for the death of the plaintiff's intestate through the defendant's negligence, it was stated that the verdict must be based upon the evidence. The Wisconsin statutes (Rev. Stat. chap. 135, §§ 11, 12) were peculiar and much must be left to the sound judgment and discretion of the jury.

The rule excludes jurors from communicating to each other, for the purpose of influencing their conclusions, the knowledge of any facts and the existence of any scientific opinions bearing upon the questions submitted to their decision. *People v. Zeiger*, 6 Park. Crim. Rep. 355 (1865).

Under Me. Rev. Stat. chap. 82, § 68, the jury were sworn in all cases betwixt party and party committed to them to give a true verdict therein according to the law and evidence given them. *Bowler v. Washington*, 62 Me. 302 (1873).

It is not for the jury to believe from other sources that a debt is unsatisfied, but they must found their belief upon the acknowledgment and its references. *Finch v. Elliot*, 4 Hawks, 61 (1825).

In *State v. Cain*, 1 Hawks, 352 (1821), it was held that where a bill was found by the same grand jury that made the presentment, upon the testimony of some of their own body not sworn as witnesses, such proceedings were in opposition to N. C. act 1797, chap. 2, § 3, and that the bill must be quashed.

So, in order to vitiate a verdict in such a case it is not for the prisoner to show affirmatively that he was prejudiced by the improper evidence received by the jury, but it is enough that he may have been prejudiced, and the law will so presume. *Sam v. State*, 1 Swan, 61, 65 (1851).

And where the facts do not inhere in the verdict itself, they will be sufficient to justify the court in receiving the affidavit of jurors to overthrow or set aside the verdict. *Perry v. Bailey*, 12 Kan. 539 (1874); *Johnson v. Husband*, 22 Kan. 277 (1879).

In the case of *Imprisonment of Bushell*, 6 How. St. Tr. 999, 1012 (1870), Vaughan, 135, error was assigned from the judgment of the common bench, the issue being whether feoffment was made. One of the jury in conferring upon the verdict showed to the rest an "escrow *pro petentibus*" not given in evidence by the parties, *per quod*, they found for the demandant. It was held such evidence could not be received and showed misconduct on the part of the juror.

II. Modifications thereof.

a. In general.

A distinction has been taken as to a juror applying his own general knowledge and experience to the examination of the case in estimating the weight of the evidence and in assessing damages, and while to this extent a juror may properly call to his aid his personal knowledge, learning, and experience, yet he cannot act upon his knowledge of a particular fact known only to himself and not a matter of common observation or general knowledge. *Schmidt v. New York Union Mut. F. Ins. Co.* 1 Gray, 529, 535 (1854).

If a given fact has become sufficiently notorious to be taken judicial notice of without proof, jurors

and in charging the jury as follows: 'You are not governed by personal knowledge, but by the testimony adduced on the stand.'

Mr. M. C. Galluchat, for appellant:

Under the doctrine of "Jury from the vicinage" our courts allow the juror's individual

knowledge of character to enter into his judgment in determining the credibility of witnesses.

If, then, the juror is allowed to let his individual knowledge of character—the moral condition of the spirit—enter into his judgment, surely he should be allowed to let his individ-

may act upon it without proof. *State v. Maine C. R. Co.* 86 Me. 309, 312 (1894).

A jury must in some degree act on their own knowledge of the parties and their witnesses. *M'Kain v. Love*, 2 Hill, L. 506, 508, 27 Am. Dec. 401 (1834).

It is proper for the jury to apply to the facts proved their general knowledge as intelligent business men, and they must test the truth and weight of evidence, and what it proves by their knowledge and judgment derived from experience, observation, and reflection. *Kitzinger v. Sanborn*, 70 Ill. 146 (1873).

In *King v. Sutton*, 4 Maule & S. 582 (1815), upon an information for publishing a malicious and seditious libel, it was held it was not a misdirection if the judge referred the jury to their own knowledge of any facts which had been proved as matters of illustration only, and not as matter of evidence.

The general rule that a jury is not at liberty to consider any fact pertinent to the issue, unless it is found in the testimony adduced, even though such fact be known to some one of them, does not forbid a juror, in weighing the credibility of the testimony, from taking into consideration his own knowledge of the character of the witness delivering such testimony. *State v. Jacob*, 30 S. C. 131, 136 (1888).

Again, in construing and applying testimony, reasonable inferences and deductions may be made by the jury, and conclusions may be reached that lie quite beyond the mere letter of the evidence. *White v. Hammond*, 79 Ga. 182 (1887).

It has been held that the statement of a member of a jury to other jurors, that the defendant had previously been in the penitentiary, will not, in the absence of a showing that the remark prejudiced the defendant, be a ground for the reversal of the judgment. *Parker v. State (Tex.)* 30 S. W. 553 (1895).

So, important inferences may be drawn when there is no direct proof of the fact, and the distinction is between mere conjectures and inferences which the facts and circumstances naturally suggest; and it is no more the duty of the jury to refrain from supplying missing links in the testimony by mere conjecture than it is to draw such inferences as arise naturally and satisfactorily out of the facts and circumstances in proof. *Smith, P. & Co. v. Jernigan*, 63 Ala. 256 (1887).

And where the statements made in the jury room among the jurors had no relation to the merits of the case, and were not of a character which would influence a conscientious juror, it was held they had no effect upon a verdict such as would ground a motion for new trial. *State v. Cowan*, 74 Iowa, 53 (1878).

Again, where in an action to determine the right to the possession of a certain drug stock under a chattel mortgage the court instructed the jury that the description in the mortgage "was sufficiently specific to cover and embrace all property or goods sold by the plaintiff which were of the kind, nature, and description usually and ordinarily kept in a drug stock, and that the plaintiffs could not recover under the mortgage any furniture or fixtures, or for any goods or property not ordinarily and usually understood as being included in the term "drug stock," the court held that it was a matter of common observation that such articles as were

enumerated in the invoice produced in the case were usually kept for sale in connection with drugs in retail drug stores, and that the jurors might, in such a case, act upon matters of common knowledge. *Kern v. Wilson*, 82 Iowa, 407 (1891).

In *State v. Intoxicating Liquors*, 73 Me. 278 (1882), it was held that the initials C. O. D. when affixed to packages sent by a common carrier meant collect on delivery, or, more fully stated, delivered upon payment of the charges due the seller for the price and the carrier for the carriage of the goods, and that such initials had a fixed and determinate meaning which courts and juries might recognize from their general information, and that such letters being notorious needed no proof.

An instruction to the jury that in considering the evidence they might bring to its consideration, in determining the weight to be given to it, such general practical knowledge as they might have upon the subject, would not transgress the rule of law applicable to the case. *Douglass v. Trask*, 77 Me. 36 (1885).

The habits and general characteristics of domestic animals, such as are liable to take fright and run away, are matters of which a jury may act upon their common observation and general knowledge. *State v. Maine C. R. Co.* 86 Me. 309, 312 (1894).

So, the fact that horses are liable to be frightened by locomotive engines and moving trains of cars, and that collisions at highways are often caused thereby, are facts sufficiently notorious to be taken judicial notice of; and it is not error in the trial of a cause for an injury so received to instruct the jury that in weighing the evidence and determining what was the real cause of the accident, they may call to their aid their observation and general knowledge of such matters. *Ibid.*

Therefore in an action against a railroad company for negligently causing death at a railroad crossing by frightening the deceased's horse by the company's locomotives, the jury cannot make use, in arriving at their verdict, of any knowledge that they may have of that particular accident, but they can make use of their general knowledge of the character and habits of horses and how such accidents are liable to be produced. *Ibid.*

An instruction to the jury that in determining the questions of fact upon the evidence before them, they may apply their own practical knowledge upon such subjects, is not error, as it does not permit them to rely upon facts not in evidence or to decide the matters at issue upon their own private knowledge, but simply as men of affairs to judge of the questions of fact in issue in the light of their own experience. *Johnson v. Hillstrom*, 37 Minn. 122 (1887).

In *Swain v. Fourteenth Street R. Co.* 93 Cal. 179 (1892), it was held that the fact that street cars were easily and readily stopped was one of common knowledge which the jury might properly consider without any other evidence of its existence in an action against a street-car company for negligence, and the instruction in that case, which left the jury entirely free to draw from the fact alluded to, such inference as they thought proper, and contained no expression or intimation of the opinion of the court as to the weight which should be accorded to it in their deliberation, was not error.

In an action for seduction, it was held competent for the jury to use their knowledge of human

ual knowledge of sanity or insanity—the mental condition of the spirit—enter into his judgment also.

M'Kain v. Love, 2 Hill, L. 506, 27 Am. Dec. 401.

Mr. Joseph F. Rhame, for respondent:
The law in its wisdom places no reliance upon unsworn testimony. Two of the main

securities which the law provides for the truth of testimony in judicial proceedings are that it be delivered, first under the religious or moral sanction of an oath, affirmation, or declaration, and next at the risk of a prosecution for perjury.

2 Taylor, Ev. pt. 3, § 1878.

Receiving evidence out of court is improper

nature and of the customs of society in their efforts to interpret conduct, and judge of its indications, and it was further held that they could and ought to use their knowledge in passing on the question whether a particular woman was virtuous, but had no right to use it to determine what a virtuous woman was, as that question was not for their decision. *O'Neill v. State*, 85 Ga. 383, 410 (1890).

Where, upon an indictment for bigamy, one of the jurors stated in the jury room that he knew the accused had at least three wives, and such statement was proved by the affidavit of a party to whom the jury told it after the conviction, stating at the same time that the statement procured the conviction, the court held that however improper it might be for jurymen to discuss in their deliberations anything outside of the testimony, it would be erecting too high a standard and would result in a defeat of justice to set aside their verdicts because they would do so, and the surmise of the juror in that case that the facts stated by him had caused the conviction could not be considered by the court. *Taylor v. State*, 52 Miss. 84, 87 (1876).

So, it has been held that the court will not reverse a judgment, even in a criminal case, upon the ground of misconduct of the jury in the matter of receiving information derived from particular jurors. *State v. Schaefer*, 116 Mo. 96 (1893).

An instruction upon a trial for murder "that a juror could neither consider any fact which comes within his personal knowledge, nor could he communicate it to the other jurors without being in contempt of court and violating his solemn oath," is correct, as the whole context shows that the judge's remarks apply only to some facts alleged to have been known to one of the jurors. *State v. Jones*, 29 S. C. 201 (1888).

Where the error assigned was that, after the jury had retired from the bar to consider their verdict upon an indictment for murder, one of their number made a statement as to his own knowledge to his fellow jurors, to the effect that the prisoner was a violent man, and had stabbed other persons and should not be turned loose upon the community, the court held there was no error, and affirmed the judgment, the statement being verified by the affidavit of the prisoner alone. *Nolen v. State*, 2 Head, 520 (1859).

In *Austin v. State*, 42 Tex. 355 (1875), a statement by one juror to one of his fellow jurors after their retirement, with respect to the accused's character, was held not such misconduct as fell within the provisions of the Texas statutes regarding new trials, as in order to bring the case within the provisions of the article of the statutes it must be shown that the defendant had not received a fair and impartial trial by reason of the juror's conduct. The article in question is §137 of Paschal's Digest, subdvs. 7, 8.

Where the statement of a juror to one of his fellow jurors "that he knew more about that at the time than such juror did, there was a regular nest of them," meaning cattle thieves, was not shown to have created in the mind of such juror such prejudice against the defendant as would deprive him of a fair and impartial trial, such statement was held not a sufficient ground for reversal of the judgment. *Ray v. State* (Tex.) 33 S. W. 869 (1896).

31 L. R. A.

And where the defendant moved for a new trial upon the ground that one of the jurors gave information of his own knowledge after they had retired, to the effect that he had heard both from the defendant and plaintiff that the defendant was not to be allowed anything for the services of her son, which was the claim and set-off which he had attempted to prove on a trial, the new trial was refused, the court being of opinion that substantial justice had been done between the parties. *Cherry v. Sweeny*, 1 Cranch, C. C. 530 (1808).

So, where in a criminal prosecution it is essential to prove the particular value of an article, the jury may use that general knowledge which any man can bring to the subject, but if any of the jurors have a particular knowledge on the subject arising from his being in the trade he ought to be sworn and examined as a witness. *Rex v. Rosser*, 7 Car. & P. 648 (1836).

Evidence to the effect that during the progress of the trial some of the jury had gone into the rotunda of the postoffice and made certain measurements by "stepping" with a view of ascertaining the distance between the points from the place witness testified they were standing and the place they alleged defendant was standing when he mailed the circulars in question, and that they imparted such information to the other jurors, is not sufficient to support an application for a new trial, or to impeach the verdict, and does not come within §§ 3400, 3402, of the Compiled Laws of Utah. *People v. Ritchie* (Utah) 42 Pac. 209 (1895).

But if a given fact has not become sufficiently notorious to be taken judicial notice of without proof, jurors cannot be allowed to act upon it without proof although the fact may be known to one or more of the panel. *State v. Maine* C. R. Co. 86 Me. 300, 312 (1894).

The courts will not proceed further than to allow the jury to take notice of whatever ought to be generally known within the limits of their jurisdiction, and a rule which would leave the jury at liberty to supply defects in the case of the prosecution or defense from their own knowledge, has no authority to sustain it. *Lenahan v. People*, 3 Hun, 164, 5 Thomp. & C. 285 (1874).

An instruction to a jury should be so modified as to exclude their right to act upon facts not in evidence but within their own knowledge, and so as to limit their action to their general knowledge and experience derived from observation and reflection, and an instruction which authorizes them to apply special circumstances and facts connected with the case is erroneous. *Ottawa Gaslight & C. Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263 (1862).

In a case where one of the jurors was familiar with the facts of the case and, by reason of the suppression of the fact of such acquaintance, procured himself to be accepted as a juror, and in the jury room asserted such knowledge and assumed the role of both witness and advocate, and so procured a verdict, the verdict was not allowed to stand, upon the ground of prejudice. *Harris v. State*, 24 Neb. 803, 810 (1888).

And where a juror testified in a jury room to facts within his own personal knowledge which directly affected the issue, such misconduct was held sufficient to set aside the verdict. *Griffin v. Harriman*, 74 Iowa, 436, 439 (1888).

conduct in jurors, and will, if influential, vitiate their verdict.

12 Am. & Eng. Enc. Law, 876, title *Jury and Jury Trials*; *Anechicks v. State*, 6 Tex. App. 524.

Although a juror may apply to the subject before him the general knowledge which

every man may be supposed to have, yet if he be personally acquainted with any material fact he is not permitted to mention the circumstance privately to his fellows, but he must submit to be publicly sworn and examined.

2 Taylor, Ev. pt. 3, § 1379; 1 Greenl. Ev. § 364; Best, Ev. § 187.

In that case one of the jurors made statements from his own personal knowledge, in regard to the quality of the land in controversy, which tended directly to support the defendant's case, the value of the use of the land depending upon its quality and being a material issue.

Where, in reference to a material point necessary to be established by the prisoner in order to justify a conviction, there had been apparently conflicting evidence submitted to the jury on the trial, the proper effect and weight of which it was their province to determine, and, after leaving the bar to consult and determine upon their verdict, and while in the act of doing so, they received fresh evidence from one of their number, the effect of which must have conduced in some degree to their verdict against the prisoner, the verdict given under such circumstances cannot stand. *Sam v. State*, 1 Swan, 61, 65 (1851).

So, where a juror made reference to another offense alleged to have been committed by the prisoner, and stated that he was a bad man anyhow, it was held to be sufficient to cause a reversal of the judgment and to show that such juror was biased and disqualified from serving as a juror, as it was shown that he afterwards acknowledged that such imputation influenced his fellow jurors. *Martin v. State*, 25 Ga. 494 (1858).

Where during the progress of the trial one of defendant's witnesses conversed with one of the jurors relating to matters connected with the case on trial, and after the jury had retired to their room such juror stated the facts to his fellows as within his personal knowledge, the court ordered a new trial, the verdict being rendered on the side advocated both by the witness and the juror. *Simpson v. Kent*, 9 Phila. 30 (1871).

Where the jury, in arriving at their verdict and in estimating the amount of damages caused by a fire, were influenced by statements made by one of their number, to the effect that he had had a similar claim against the company, and that the company had paid him a certain amount per rod as damages, which amount was greater than the damages sustained by the plaintiff, and before such statement was made the jury had not rendered a verdict nor fully agreed thereon, and the statement made was an argument to convince the jurors that the amount finally agreed upon was not too much, the court held that the jury were influenced and granted a new trial. *Atchison, T. & S. F. R. Co. v. Bayes*, 42 Kan. 609 (1899).

And where the jury were instructed that they must be satisfied from the evidence, beyond a reasonable doubt, that the second story or chamber of the premises where intoxicating liquors were alleged to be kept and deposited was a part of a store, and that they would judge from the evidence in the case, with their knowledge or experience as practical men, as to how rooms or stores on the ground floor and rooms above in the second story were generally used by merchants; whether the said second story or chamber was in point of fact a part of said store,—the court held such instruction was erroneous as being susceptible of a construction which would authorize and perhaps require the jury to act upon their own knowledge or experience as evidence in the case, and therefore granted a new trial. *State v. Bartlett*, 47 Me. 368, 365 (1890).

81 L. R. A.

Again, where, in an action of assumpsit on an account, while the cause was on trial and before the verdict was rendered, the foreman of the jury spent the Sunday with, and was shown the subject-matter of the action by, the defendant, who held a conversation with him upon it and such information was imparted to the other jurors the condition of the articles which had been shown him being described but not exhibited to the jury, the court set aside the defendant's verdict. *McIntyre v. Hussey*, 57 Me. 493 (1870).

So, where one of the jurors visited the place of the accident, held conversations with the inhabitants, and afterwards communicated to his fellow jurors the information so acquired, the court set aside the verdict. *Bowler v. Washington*, 62 Me. 302 (1873).

And where the juror visited the defendant's shop, investigated its location as to the steam, drain, and water supply, about which there was conflicting testimony, and imparted such supposed knowledge thus obtained to his fellow jurors, together with the fact that he had examined the premises himself, the court sustained a motion for a new trial. *Winslow v. Morrill*, 68 Me. 302 (1878).

Again, it has been held in an action for breach of warranty for the soundness of a horse, the alleged unsoundness being a curb which caused lameness, that an instruction for the jury to find the nature, cause and time of development of the curb from such personal knowledge as they might have in relation to matters of that kind, was error, the subject not being one of general knowledge and observation, but one of science upon which no witness not specially qualified as an expert could testify, it not appearing that any juror upon the panel was qualified as an expert to testify or give his opinion upon the subject under consideration, a verdict thus given not being according to the evidence. *Douglass v. Trask*, 77 Me. 35 (1885).

Where, in an action for deceit in the sale of a pair of oxen, the jury were instructed that they had a right to call into requisition in a case of that sort their practical experience and knowledge, if they had any, relating to cattle of that kind, it was held such instruction was erroneous and prejudicial to the plaintiff's right for the reason that there was no knowledge that the instruction did not thus injuriously influence the jury. *Page v. Alexander*, 84 Me. 83 (1891).

In a case involving the genuineness of a will, which was to be determined mainly upon opinions in the nature of expert evidence as to the handwriting of the testator, the court held that such a matter could not be left to be settled by an inquest and inspection in the jury room, where the opinions of fellow jurors who might not be qualified to give such opinion, and whose qualifications were not investigated, might stand for more than the sworn testimony of the most careful and skilled expert. *Re Foster's Will*, 34 Mich. 21 (1876).

So, where there was conflicting evidence between the witnesses of the plaintiff and defendant as to certain structures upon the property in question, and one of the members of the jury without the knowledge or consent of either party to the action, or the attorneys, examined such structures and made use of the knowledge thus obtained which knowledge was considered by his fellow jurors in arriving at the verdict, the court granted a new

Gary, J., delivered the opinion of the court:

The defendant was convicted of perjury at the June, 1894, term of the court of general sessions for Clarendon county, and thereon made a motion before the presiding judge for a new trial, which was refused. He was then

sentenced to one year at hard labor in the state penitentiary. The appeal to this court is based upon two exceptions, which will be incorporated in the report of the case, and raise the single point whether his honor, Judge Norton, erred in charging the jury that they must not allow their personal knowledge of defend-

trial. *Garside v. Ladd Watch Case Co.* 17 R. I. 601, 605 (1892).

And an instruction to the jury giving them power to act upon simple unsworn evidence of the existence of a material nature which was not of common knowledge, is error as in direct violation of the well-settled rules of law. *Lenahan v. People*, 8 Hun, 164, 5 Thomp. & C. 265 (1874).

Where the evidence of the prosecution showed that the place where the assault was committed was generally deserted at the hour of the night at which the crime was alleged to have taken place, an instruction that the jury had a right, of their own knowledge, to take notice of the circumstance that at the time no part of the street was more likely to be deserted, even as early in the night as the time at which the offense was said to be committed, than that part of the street, was held error, the fact not being one of general notoriety. *Ibid.*

In *Bradley v. Bradley*, 4 U. S. 4 Dail. 112, 1 L. ed. 763 (1792), a new trial was granted upon the ground that when the jury withdrew two of them testified to the other jurors that although the defendant had bought land, yet the bonds given for the purchase money were unpaid when the purchaser intermarried with the testator, and that the testator had been obliged to discharge them, and upon such representation several of the jurors, who were previously in favor of defendant's title, concurred in finding a verdict for the plaintiff.

So, a new trial was ordered where the jury retired and conferred together for some time without coming to a decision, and then broke up, and before they met the next morning one of the jurors applied for information upon a particular point, and, having obtained it, communicated it to his fellow jurors. *Brunson v. Graham*, 2 Yeates, 166 (1796).

Where the grounds for granting a new trial were that after the jury had retired to their room one of them stated to the rest of the jury, which was regarded as evidence, that the defendant had stolen a hog, and made other statements from what he had heard, and verified before them, which were not given in evidence upon the trial, and which were a strong inducement, and partly the cause, of the verdict against the defendant, the court held that although the act of the juror in making such statements, and that of the others, being influenced by them was very irregular, improper, and contrary to law, and although it did not appear on the face of the evidence that there was any malice or ill design actuating them to make the disclosure, and it might have proceeded from ignorance and even a belief that in conscience he was bound to tell all he knew or heard about the defendant,—yet the evident tendency of such remarks was to injure the defendant, the affidavit showing that result; and was a strong inducement and partly the cause for the finding of a verdict against the defendant. *Booby v. State*, 4 Yerg. 111, 114 (1833).

Where the prisoner, indicted for horse stealing, was convicted upon the testimony of one witness, who proved the commission of the offense, and it appeared that one of the jurors had stated to the jury in the jury room, after their retirement, without having been examined in court, that he had heard such witness examined by the grand jury that found the indictment, and that he then made the same statements that he made before the traverse jury, and that such statements had a powerful in-

fluence upon the jury in finding the verdict of guilty, the court refused the judgment and ordered a new trial. *Donston v. State*, 6 Humph. 275 (1845).

Where, while the jury were considering the verdict, one of the jurors stated to his fellows "that the prisoner had heretofore stolen sheep, money, and other things from his father," the court held that such conduct was reprehensible and prejudiced the accused, and arrested the judgment and remanded the prisoner. *Morton v. State*, 1 Lea, 498 (1878).

Where the judge instructed the jury as follows: "I am not familiar with the custom of merchants in settling with insurance offices, or what are the liabilities of insurers in case of partial loss. I see on the jury planters and merchants who doubtless are familiar with transactions of this kind; you will apply the rules of the same to the nature of this kind of transaction,"—the court held that such charge was objectionable for the reason that so far as the transaction was governed by law it belonged to the judge to declare the law, and so far as the question rested on particular custom that custom was a fact to be given in evidence to the jury, and not dependent on the knowledge which any particular juror might have of such custom, as, if such were permitted, each juror might assume to know of his personal knowledge what the custom was and no two of them agree. *Green v. Hill*, 4 Tex. 465, 467 (1849).

And where, in a prosecution for rape, a new trial was sought, upon the ground that the jury, after retiring to consider their verdict, received and were influenced by the testimony of one of their number as to a matter of fact which was not adduced at the trial, to the effect that such juror knew one of the witnesses for the defense, and that such witness was kept by the defendant and was unworthy of belief, the court held that such verdict should be set aside and a new trial granted. *Anschicks v. State*, 6 Tex. App. 524 (1879).

A material point upon which the court were influenced in granting a new trial in the above case was the fact that the juror who made such statement had lived in the county in which the crime was said to have been committed, and that the venue had been changed from that county because of prejudice against the defendant.

In *Lucas v. State*, 27 Tex. App. 322 (1889), a new trial was granted upon the ground of misconduct of two of the jurors in stating to the jury, while the case was being considered by them, that they knew one of the witnesses who testified on behalf of the defendant, and that such witness was a chicken thief and in their opinion unworthy of credit, and had often lied to them, one of the jurors making affidavit that the statement did not influence his verdict, but might have had some influence upon the verdict, as one of the jurors had said that such remarks had influenced him.

Where the jury asked the court: "Can we judge the witness just by what he says on the stand and not by what we know of him privately?" to which question the court made no reply but instructed the jury upon the rules which govern them as to the weight of testimony, it was held there was error for the reason that the court had no authority further than to answer their question and instruct them that they must give their verdict upon the evidence adduced upon the trial, as the question,

ant's mental condition to enter into their judgment in arriving at a verdict. The question as to the mental condition of the defendant was not a collateral circumstance, but a material fact in issue, upon which the jury were called upon to pass. Under these circumstances, it would be extremely dangerous to allow the jury to find a verdict upon facts first communicated to them by jurors in the jury room. Such a verdict would be contrary to that part of their oath where they swear to give a true verdict according to the evidence. The practice for which the appellant contends would deprive a party to the cause of the very

important right of cross-examination. This is not a case involving the right of a juror to state facts in the jury room touching the credibility of a witness, as was the case of *McKain v. Love*, 2 Hill, L. 506, 27 Am. Dec. 401, in which the distinction herein stated was pointed out by the court, which used the following language: "The oath usually administered to the jurors in the common pleas, well and truly to try the issue joined between the parties, 'and a true verdict give according to the evidence,' contains a very correct summary of the law on this subject. The jury are bound to give their verdict according to the evidence, and what is

suggested the fact that some of the jurors had knowledge of facts touching the credibility of some of the witnesses, which facts were not given in evidence. *Wharton v. State*, 45 Tex. 2 (1876).

b. *As to intoxicating liquors.*

In *Freiberg v. State*, 94 Ala. 91 (1892), the defendant was convicted of unlawfully selling liquor to a minor, and it was held there was no error in the court's refusal to charge the jury that they were not to infer that whiskey was a spirituous, vinous, or malt liquor until it was proved by the evidence, for the reason that whiskey was a spirituous liquor within the common knowledge of all men, and for the further reason that the courts take judicial notice of what everybody else is presumed to know, and juries are permitted to find such facts without specific proofs being adduced in its support.

But where the instruction was that the jury were to use their own knowledge and science, if they possessed any, and the question was whether lager beer was an intoxicating liquor, the court held that such instruction was clearly error for the reason that it might improperly influence the conclusions of the jury. *People v. Zeiger*, 6 Park. Crim. Rep. 355 (1865).

c. *As to witnesses.*

So, it has been held that the credibility of testimony is a question exclusively for the jury, and a juror cannot exclude from his mind his own knowledge of the character of the witness; and the question is, What impression does the testimony make upon the minds of the jurors, and that impression must necessarily be affected by their own knowledge of the character of the witness from whom such testimony proceeds. *State v. Jacob*, 30 S. C. 131, 136 (1886).

In a case where the credibility of one of the plaintiff's witnesses was a subject of inquiry, and one of the jurors stated a fact that he had heard derogatory to her character, but stated it as a rumor without giving it his own sanction, the court held that, however it might deprecate the introduction of such new matter into the jury room, yet to exclude such a matter would be to strip the trial by jury of the right of weighing the credibility of the witnesses. *McKain v. Love*, 2 Hill, L. 506, 508, 27 Am. Dec. 401 (1844).

Where on trial the court charged the jury that they had the witnesses before them and must consider the man himself, judge of his intelligence, his manner of testifying on the stand, and his integrity and uprightness, character for veracity "if they know what this is,"—the court held there was no error in such instruction. *Anderson v. Tribble*, 66 Ga. 584 (1881).

So, where the court charged the jury, with reference to the credibility of witnesses, to consider their manner of testifying, their intelligence, their means and opportunity of knowing the facts to which they testified, their character for integrity and veracity, if they know it, their interest in the

case or their business, if they have any, the court held there was no error. *Head v. Bridges*, 67 Ga. 227, 236 (1881).

And it is not error for the court to charge the jury that in arriving at their verdict they have a right to act upon their personal knowledge of the witnesses. *State v. Jacob*, 30 S. C. 131, 136 (1886).

Where in an action for commission in effecting a sale the question of the credibility of witnesses arose the jury were instructed, *inter alia*: "And you may also, in considering whom you will or will not believe, take into consideration your experience and relation among men," the court held that there was no error in such instruction, stating that the value of experience is not to be given up when a man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon. *Jenney Electric Co. v. Branham (Ind.)* 41 N. E. 448 (1895).

But where, upon an action against a railroad company to recover damages for personal injuries, the jury were charged as follows: "In determining any material point in the case, it is the province of the jury to take into consideration, in determining the weight and value of the evidence, the manner of the witnesses on the stand, the character of each witness, if you know it, the interest or want of interest they take in the case, the opportunity of each witness to know the facts about which he testifies," which charge was objected to upon the ground that the court used the words "the character of each witness if you know it,"—it was held that such instruction was error. *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 285, 293 (1892).

So, it is error, in charging upon the credibility of witnesses, to instruct the jury: "You may even consider their character for truth and veracity, if it be known to you." *Pettyjohn v. Liebecher*, 92 Ga. 149 (1898).

And where the evidence did not absolutely require the verdict, the accused was held entitled to a new trial for error in the charge of the court, to the effect that the jury in weighing the evidence might consider the character of the witness, if known to them personally. *Collins v. State*, 94 Ga. 394 (1894).

So, where the jury, deliberating upon their verdict, were divided in their opinion, and one or more of the jurors professed to have some personal knowledge of a certain person connected with the case, his pecuniary condition, residence, etc., and stated to his fellow jurors what he professed to know about such person, and also what he professed to know in relation to the habits, situation, and business relations of one or more of the plaintiff's witnesses, and various other matters connected directly or remotely with the case, the parties and the witnesses, which statements were false, the verdict was set aside and a new trial granted. *Darrance v. Preston*, 18 Iowa, 306, 402 (1865).

E. W.

or is not competent evidence belongs to the court, and not to the jury, to determine. Generally speaking, therefore, a verdict founded on facts, first disclosed in the jury room, would be bad, although the facts are known to one of the jury, because it is unfair not to give the party against whom they operate an opportunity of repelling or explaining them. In

an *Anonymous Case*, in 1 Salk. 405, ¶ 3, it is said that "if a juror know, of his own knowledge, anything material to the matter in issue, the fair way is to tell the court, so that he may be sworn as a witness." See also *State v. Jones*, 29 S. C. 201.

It is the judgment of this court that the judgment of the court below be affirmed.

SOUTH DAKOTA SUPREME COURT.

ADAMS & WESTLAKE COMPANY,
Resp't.,
v.

C. E. DEYETTE *et al.*, Appts.

(.....S. D.)

***The assets of a corporation for profit being a trust fund for its creditors**, and its officers, in anticipation of insolvency, being unauthorized to diminish its capital and release its stockholders from liability in a manner that will inevitably defeat the rights of bona fide creditors, a judgment confessed in favor of persons who loaned to its directors money for the purpose of, and with actual knowledge that the funds advanced were to be used in, the purchase of shares in itself, is void as to such creditors, because: (a) When insolvency occurs, a corporation has no authority to prefer creditors; (b) a corporation, as such, has no power to create a debt by borrowing money with which to purchase its own stock.

(December 23, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Brown County in favor of plaintiff in an action brought to set aside certain judgments which had been confessed by the Hicks-Trask Hardware Company in favor of Deyette and Lewis. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank A. Luse, for appellants:

There being no allegation in the complaint, nor any findings of fact as to any defect in form, the judgments must be held good unless there was fraud or collusion in obtaining them.

Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527.

The fraud must be actual, and not constructive.

Story, Eq. Jur. 25; *Patch v. Ward*, L. R. 3 Ch. 203; *Cuyce v. Powell*, 20 Tex. 767, 73 Am. Dec. 211.

Even if he had made an agreement with the corporation which was beyond the power of the corporation to make and therefore void, yet if he had paid it money on it he could recover the money paid.

Beach, Corp. § 425; *Slater Woolen Co. v. Lamb*, 148 Mass. 420; *Parish v. Wheeler*, 22 N. Y. 495; *White v. Franklin Bank*, 22 Pick. 181; *Wright v. Hughes*, 119 Ind. 324.

*Headnote by FULLER, J.

Money loaned to a corporation to be used for a purpose beyond the power of the corporation, with knowledge that it is to be so used, can be recovered.

Thompson v. Lambert, 44 Iowa, 239; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

Even money loaned with knowledge that it is to be used for an illegal purpose,—a purpose contrary to a penal statute,—can be recovered.

Tracy v. Talmadge, 14 N. Y. 162, 67 Am. Dec. 132; *Webber v. Donnelly*, 33 Mich. 473; *Dater v. Earl*, 3 Gray. 482; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Kreiss v. Seligman*, 8 Barb. 439; *Anheuser-Busch Brewing Assn. v. Mason*, 44 Minn. 318, 9 L. R. A. 506; *Feinman v. Sachs*, 33 Kan. 621, 52 Am. Rep. 547.

No creditor is precluded, by reason of the fact of his being an officer of a corporation, from pursuing the usual remedies to collect his debts, but merely from using his official position to obtain a preference in fraud of other creditors.

Morawetz, Priv. Corp. § 787; *Planters' Bank v. Whittle*, 78 Va. 737; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Whitwell v. Warner*, 20 Vt. 425; *Gordon v. Preston*, 1 Watts, 385, 26 Am. Dec. 75; *Ashhurst's Appeal*, 60 Pa. 290; *Central R. & Bkg. Co. v. Claghorn*, 1 Speers, Eq. 545; *Smith v. Skeary*, 47 Conn. 47; *Catlin v. Eagle Bank*, 6 Conn. 233; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Wassatch Min. Co. v. Jennings*, 5 Utah, 243.

On rehearing.

The statute gave them the right to buy said stock with the consent of its stockholders.

Comp. Laws, 2917.

There is no finding that Deyette knew that this consent was never had, therefore it must be presumed, in favor of the legality of his judgment and the legality of his claim, that he did not know it.

Greenhood, Pub. Pol. Rule 130, and cases cited; *Gorder v. Plattsmouth Canning Co.* 36 Neb. 548; *Bank of United States v. Dandridge*, 25 U. S. 12 Wheat. 70, 6 L. ed. 554; *School Dist. No. 61 v. Alderson*, 6 Dak. 145; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Swann v. Swann*, 21 Fed. Rep. 299; *Curtis v. Gokey*, 68 N. Y. 804; *Wait*, Fraud Con. § 433; *Campbell v. Argenta Gold & S. Min. Co.* 51 Fed. Rep. 1; *Herrey v. Illinois Midland R. Co.* 28 Fed. Rep. 169.

So far as the validity of the contract of load-

NOTE.—For review of authorities on the right of a corporation to prefer creditors, see *note* to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 22 L. R. A. 802. See also later cases, *Corey v.* 31 L. R. A.

Wadsworth (Ala.) 23 L. R. A. 618; *Warren v. First Nat. Bank* (Ill.) 25 L. R. A. 746; *Ballin v. Merchants' Exch. Bank* (Wis.) 27 L. R. A. 357, and *Schufeldt v. Smith* (Mo.) 29 L. R. A. 830.

ing is concerned, its legality or illegality is fixed at the time it is made, and subsequent events cannot change it.

Hardy v. Stonebraker, 31 Wis. 640.

All that the findings show is that Trask knew that the company was borrowing the money for a purpose that might or might not be lawful, according to the way they proceeded. Such a contingency cannot make the contract void.

Greenhood, Pub. Pol. Rule 30; *Com. v. Delaware & H. Canal Co.* 43 Pa. 295.

If the money had been wasted by the company or paid out in any illegal manner, it has none the less had the benefit of it, and must account to Deyette for the same.

Thompson v. Lambert, 44 Iowa, 239; *Parish v. Wheeler*, 22 N. Y. 495; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

National banks are forbidden to loan money on real estate securities, but if they do so loan they can enforce the contract.

Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 108 U. S. 104, 26 L. ed. 561; *Swope v. Leffingwell*, 105 U. S. 3, 26 L. ed. 939; *Reynolds v. First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733; *Bond v. Terrell Cotton & W. Mfg. Co.* 82 Tex. 309.

Mr. John H. Perry, for respondent:

Persons dealing with corporations do so upon the faith that its property and all its assets, of whatsoever nature, are vested in trustees or managers, to be held by them as a fund which shall be primarily liable for its debts.

Martin v. Zellerbach, 88 Cal. 300; *Morawetz*, Priv. Corp. § 715.

Persons dealing with a corporation and with its officers must take notice of the limitations placed upon their authority by the act of the corporation.

Pearce v. Madison & I. R. Co. 62 U. S. 21 How. 441, 16 L. ed. 184; *Alexander v. Caldwell*, 83 N. Y. 480; *Union Nat. Bank v. Douglass*, 1 McCrary, 86.

A confession of judgment in favor of an officer by an insolvent corporation is void.

Adams v. Cross Wood Printing Co. 27 Ill. App. 313; *Bradley v. Farrell*, Holmes, C. C. 443; *Hopkins's Appeal*, 90 Pa. 69; *Adams v. Kehlor Mill. Co.* 35 Fed. Rep. 433; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Smith v. Putnam*, 61 N. H. 632; *Smith v. Lansing*, 22 N. Y. 521; *Butts v. Wood*, 37 N. Y. 317; *Corbett v. Woodward*, 5 Sawy. 403; *Hope v. Valley City Salt Co.* 25 W. Va. 807; *Stout v. Yaeger Mill. Co.* 13 Fed. Rep. 802; *Sweeney v. Wheeling Grape Sugar & Refining Co.* 30 W. Va. 443.

And the directors must at their peril take notice of the company's financial condition in dealing with its assets.

Corbett v. Woodward, *supra*; *Jones v. Arkansas Mechanical Agri. Co.* 38 Ark. 17.

On rehearing.

Appellants knew that the transaction for which they were loaning the money—the purchase of Trask's stock—would not benefit the corporation in the least; and knew at that time, when they sought repayment, that the assets would then be diminished to the detriment of the creditors.

Parish v. Wheeler, 22 N. Y. 494.

R. A.

The capital of a corporation cannot be used to purchase shares of its own stock.

Morawetz, Priv. Corp. § 793, cases cited; *Green's Brice*, *Ultra Vires*, 2d ed. pp. 769, 770; *Re London, H. & C. Exch. Bank*, L. R. 5 Ch. 444; *Weber v. Spokane Nat. Bank*, 50 Fed. Rep. 735; *Tracy v. Talmadge*, 14 N. Y. 179, 67 Am. Dec. 182.

Fuller, J., delivered the opinion of the court:

This case, now before us on rehearing, is reported in 59 N. W. 214,* where the unassailed substantive facts are stated as follows: "On the 9th day of May, 1888, the Hicks-Trask Hardware Company, a corporation, being insolvent, confessed judgments against itself in favor of each of the defendants C. E. Deyette and W. W. Lewis, amounting to \$1,469.26; the Deyette judgment being for \$649.84, and the Lewis judgment for \$819.42. After entry of the above judgments, and on the 12th day of the same month, said defendant confessed numerous other judgments, among which there was one in plaintiff's favor for \$1,319.47. Executions issued in succession, and the property of the defendant corporation was levied upon in the order above indicated, and in the order in which the respective judgments were entered and docketed; and the property of the corporation was found to be insufficient to satisfy the judgments which preceded that of the plaintiff. The referee made, among others, the following findings of fact: "(14) That the consideration of the confession of judgment in favor of Charles E.

*The material part of the former opinion is as follows:

The pleadings in this case raised an issue of fraud on the part of the corporation in purchasing its own stock, in borrowing money for such purpose without authority, and in confessing judgments upon obligations thus incurred. The referee found as matters of fact that defendants Deyette and Lewis had actual knowledge, at the time they loaned the money, that the same was to be used in the purchase of the Trask stock, and that the defendant Lewis was a director and secretary of said corporation at and prior to the confession of these judgments, and as such secretary joined in their execution on behalf of said corporation, and at a time when he was chargeable with a knowledge of its insolvency and inability to pay its obligation to this plaintiff. In the absence of an opportunity to examine the evidence, and without indulging unwarranted presumptions in favor of the correctness of the conclusions of law and judgment of the court, we are disposed to believe that the action of the corporation and its officers under the circumstances was unwarranted in law, and constituted a fraud upon the plaintiff, and justified the court in declaring the judgments of defendants void, so far as they interfered with the rights of this plaintiff. The property and capital of a corporation gives it financial standing, because it is primarily liable for its debts. Persons extending credit to such corporation do so upon the faith that its officers and agents will conduct its affairs in a manner consistent with business principles; and when such officers devote the corporate assets to their individual use and benefit to the exclusion of creditors, courts without hesitation characterize such acts, as to creditors, fraudulent and void. Independently of the question of actual fraud in the case under consideration, the immediate effect of the purchase of the Trask stock at a time when the corporation was financially embarrassed, if not, indeed, insolvent, was to increase its liability, without adding anything to its resources to which plaintiff could look for the security or payment of its claim, and such conduct is contrary to the spirit, if not the letter, of our statute, and is not upheld by the courts. Comp. Laws, §§ 2217, 2222. In Cur-

Deyette was as follows: \$514.60, money loaned to the Hicks-Trask Hardware Company on January 20, 1888, was borrowed by said company for the purpose of using the same to purchase the stock of said company held by Trask, and on account of the indebtedness of \$184.22, owing to said Deyette by said corporation for work and labor done by said Deyette for said corporation. (15) That the defendant Deyette had actual knowledge of the purpose and intent of the said corporation to use the same in the purchase of stock. (16) That the consideration of the judgment of the defendant Lewis was \$514.60, money loaned to the said corporation by him about January 20, 1888, and borrowed by said company for the purpose of using the same in the purchase of stock of said corporation held by Trask; and the sum of \$304.07, due Lewis from said corporation on account of services rendered by Lewis to said corporation. (17) That defendant Lewis knew of the purpose and intent for which said money was borrowed by said corporation. (18) That the defendant Lewis, at the time of and prior to the making of said confession of judgment to himself, was a director of said corporation, and secretary thereof, and signed said confessions as secretary on behalf of said corporation. (19) That the defendant Deyette, at the time of said confessions of judgment by said corporation to himself, was not a director. (20) That no written consent of the stockholders of the Hicks-Trask Hardware Company was ever had to the purchase of stock from Trask by said corporation. (21) That on May 12, 1888, executions were

issued from the district court upon the said judgment of said plaintiff to the sheriff of Brown county, in which said defendant the Hicks-Trask Hardware Company had its place of business. (22) That executions issued from the clerk of the district court of Brown county on each of the judgments of the defendants Foster, Deyette, and Lewis, and were by him levied on the personal property of the Hicks-Trask Hardware Company, and all thereof; and the said sheriff sold the same and holds the money realized from said sale, to be applied on said executions according to the decree of this court. (23) That the proceeds arising from said sale are not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff. Upon these findings of fact the following conclusions of law were based: (2) That the judgment of the defendant Deyette, as to the sum of \$514.60, money loaned to the said corporation for the purpose of purchasing stock, is invalid, for the reason the Hicks-Trask Hardware Company, and the officers thereof, had no power to borrow money for the purchase of its stock; and the defendant, having loaned said money knowing of the illegal purpose for which it was to be used, cannot recover the same from said corporation. (3) That as to the sum of \$184.25, included in the judgment of said Deyette, the same is valid, and should stand, and be enforced for said sum of \$184.25. (4) That judgment of the defendant Lewis is invalid for the reason that the confession of the same made by him and obtained by him when he was a director

rier v. Lebanon Slate Co. 56 N. H. 262, the court says: "The funds of an insolvent corporation cannot be taken to buy a portion of its capital stock."

It would be grossly inequitable to the other stockholders, and a fraud upon creditors." From Crippin v. Greenlees, 38 Ohio St. 275, 43 Am. Rep. 425, we quote the following: "The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities. But nevertheless we think the decided weight of authority, both in England and in the United States, is against the existence of the power, unless conferred by express grant or clear implication. It is true, however, that in most jurisdictions where the right of a corporation to traffic in its own stock has been denied an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity which arises in order to avoid loss."

If a corporation, to the injury of creditors, can borrow money for the purchase of one share of its stock, or the stock held by one member, it can borrow money with which to purchase the shares of all its members, and thus destroy its very existence, as no corporation like the defendant can have an existence in this jurisdiction without stock and without stockholders. The doctrine is well established that a purchase of shares in itself by a corporation is against public policy, and *ultra vires*, whenever such purchase diminishes its ability to pay its debts, or lessens the security of its creditors. German Sav. Bank v. Bank of Wulfeckuhler, 19 Kan. 60; Gill v. Ballis, 72 Mo. 424; Barton v. Port Jackson & N. F. Pl. Road Co. 17 Barb. 397; Clapp v. Peterson, 104 Ill. 23; 1 Spelling, Priv. Corp. 168, and cases there cited. By confessing judgments when insolvent, and for debts incurred in the purchase of its stock without authority, and in favor of the defendants, who had actual knowledge at the time of loaning the money that the same was to be thus used, the corporation attempted to give such defendants a preference over other creditors, and to defeat the collection of the plaintiff's claim, which was confessedly valid and subsisting. Without going into an extended discussion concerning the

powers of and limitations upon corporations, we are satisfied that the judgment should be sustained upon the broad principles of justice and equity, and upon the doctrine that an insolvent corporation is without power to prefer its creditors in cases like the present; and, in our opinion, its action in that regard was fraudulent in law, and ineffectual for every purpose.

In Ford v. Flankington Bank, 87 Wis. 370, Newman J., speaking for the court, says: "The law applicable to the question is well settled. The corporation, being only a fictitious body, can act only through agents, called 'directors.' The directors manage the business for the stockholders. But when insolvency of the corporation happens, then the duty and function of the directors are changed. Then they become trustees for the creditors of the corporation, of all the corporate property and rights. They are trustees for all the creditors, and are bound to preserve and administer all the corporate property in the interest impartially of all the corporate creditors. Being trustees for all the creditors, they are incapable of making any preference of their own claims, or of giving preference to the claims of any creditor." While the defendant Deyette was not a director at the time the judgment was confessed in his favor, he had been in the employ of the corporation, and had actual knowledge, at the time he loaned the money, that the same was being borrowed for the purpose of buying the stock of the corporation; and, in the absence of a finding that he actually knew that the written consent of the directors had not been obtained as required by statute, he is charged with a knowledge of the law requiring such consent, and is presumed to have known that the purchase was being made without authority. In any event, he was in possession of sufficient facts to put him on inquiry, which, if prosecuted in good faith, would have placed him in full possession of such knowledge. In our opinion, the judgment is sustained by the findings of fact, and, as the judgments of defendants as confessed by the corporation are fraudulent and void as to this plaintiff, no rights can exist under them antagonistic to plaintiff, and the judgment of the trial court is affirmed.

of said corporation was an illegal preference as against the creditors of said corporation, and that the relief prayed by plaintiff should be granted as against said Lewis. (5) I further find as to the judgment of the defendant Lewis that as to the sum of \$514.60 it is invalid for the reason that, as to said amount, the consideration was for money loaned to said corporation by Lewis for the illegal purpose of purchasing stock in said corporation." Judgment by the court was accordingly entered on motion of plaintiff's counsel, and defendants Deyette and Lewis appeal therefrom."

In order to affirm the contention of appellants' counsel and disaffirm our former conclusion, we must adopt and proclaim a rule by which a corporation without surplus profits or unemployed capital may, in contemplation of insolvency, borrow money with which to purchase shares in itself, and, when insolvency occurs, give a preference to the persons from whom the loan was made, by confessing judgments in their favor for an amount equal to the corporate assets, at a time, for the purpose of, and in such a manner that the rights and claims of bona fide creditors are entirely defeated. In determining the rights of these parties, rules of law and statutory provisions bearing upon the questions presented must be viewed in the relation that each bears to the other; and all must be considered with reference to an enlightened public policy, upon which is based a strong and wholesome rule of law, prohibiting a corporation from distributing its capital among shareholders by the purchase of stock in itself to the inevitable detriment of creditors. As observed by Mr. Thompson in the second volume of his recent Commentaries on the Law of Corporations, at pages 1555, 1556: "Stringent precautions to prevent the reduction of the capital of a limited company without due notice and judicial sanction would be idle if the company might purchase its own shares wholesale; and, if it were otherwise, the result would be that the shareholders would receive back the money subscribed, and there would thus pass into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock, available to meet the demands of their creditors. . . . The purchaser of the stock must be one who succeeds to a liability, distinct from and in addition to that of the corporation." Mr. Spelling, after conceding that the foregoing rule is supported by the irresistible weight of authority, and in connection with a suggestion that he can see no valid reason why shares in itself might not be purchased by a corporation, provided always that by so doing its capital stock is not diminished and its creditors are not injured, states the rule as follows: "A purchase of shares in itself by a corporation would be *ultra vires* wherever and whenever the effect would be to diminish its capital and lessen the security of creditors." 1 Spelling, Priv. Corp. § 168. Mr. Morawetz says [§ 112] that "no verbiage can disguise the fact that a purchase by a corporation of shares in itself really amounts to a reduction of the company's assets. . . . The fact that such a transaction may not necessarily be injurious to any person is not a sufficient reason for supporting it. It

is contrary to the fundamental agreement of the shareholders, and is condemned by the plainest dictates of sound policy. To allow the directors to exercise such a power would be a fruitful source of unfairness, mismanagement, and corruption. It is for these reasons that a shareholder cannot be allowed to withdraw from the corporation with his proportionate amount of capital, either by a release and cancellation before the shares have been paid up, or by a purchase of the shares with the company's funds."

Cases almost innumerable are cited by each author in support of the foregoing rule, based upon the equitable principle that the assets of a corporation are a trust fund for its creditors, — a doctrine that so completely pervades and enters into the warp and woof of the law of corporations that no literary effort, by whatever degree of legislative sanction or judicial sagacity aided, can destroy the immutable principles of justice and considerations of public policy from which the doctrine emanates, and upon which the rule is based. For the reason that creditors of a corporation cannot, as in case of a partnership, ultimately look to those who constitute the membership for the payment of their claim, the law requires corporations for profit, as a condition precedent to the commencement of business, and for the protection and security of creditors, to have capital stock and shareholders, and to hold that they may, upon the strength of their capital, incur debts in the prosecution of legitimate corporate business, and then destroy their assets and the credit of the corporation by borrowing money with which to purchase shares in themselves, and defeat their creditors by confessing preferred judgments in favor of those who had loaned the money with a knowledge of the purpose for which it was to be used, would be to sanction a fraud and judicially approve a vicious species of legerdemain.

Commencing at page 5115 of the fifth volume of his Commentaries, Judge Thompson approves in a vigorous manner the rule adopted by all recent text-writers, which asserts and emphasizes the proposition that the assets of a corporation are a trust fund for its creditors; and, after stating that it is the only doctrine worthy of any respect, proceeds to discuss at length the fallacy by which courts have been led to hold that a corporation anticipating insolvency has the power of a private individual to deal with its assets, and under like circumstances to prefer creditors; and at page 5121 he concludes his observations in part as follows: "It is thus perceived that the courts which have adopted the doctrine that an insolvent corporation may prefer its creditors have jumped at the conclusion by reasoning that, in the absence of statutory prohibitions, a corporation has the same power in disposing of its property that an individual has. But in adopting this hasty conclusion they have overlooked the fact that the analogy between an insolvent individual and an insolvent corporation wholly fails in this: That, although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he merely hinders and delays them; he does not, by that act, destroy

himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and disposes itself of all its property, it destroys itself, and becomes *ipso facto* dissolved, and, in fact, is regarded as a dissolved corporation for many purposes having reference to the rights of creditors. An assignment for the benefit of creditors is, in point of fact and experience, an end of the corporation; and to this statement there is not one exception in a thousand cases, as every lawyer and judge knows. The corporation, after such a catastrophe, not only has nothing more for its unpreferred creditors, but it never will have anything more for them. Its act of exhausting its assets in preferring particular creditors deprives the others of all remedy, unless in those cases where the law has left them the remedy of proceeding against its stockholders." In determining whether a corporation, organized for the purpose of dealing in hardware at wholesale, has power to borrow money with which to traffic in its own shares, and thereby relieve its stockholders from liability, the question of intent is of no importance, when the inevitable result must bring disaster to honest creditors. As between them and the money lender, in case of insolvency, a knowledge of the purpose for which the funds were borrowed is sufficient to at least postpone his claim until they have been paid in full; otherwise it would be a popular scheme for a corporation to incur debts, limited in extent only by its ability to engender confidence, and then, in contemplation of suicidal dissolution, borrow money from some trusted friend, with which to purchase its entire stock, upon the assurance that by its last official act, and by a judgment timely confessed, the proceeds of the entire assets of the company shall be turned into the pockets of the man who loans the money with a knowledge of such fraudulent purpose, and to the exclusion of honest persons who extended credit, believing that the assets of a corporation are a trust fund for the benefit of creditors. A corporation, as such, has no power, under the statute, to enter into any obligation or contract except such as are necessary and essential to the transaction of the ordinary business for the prosecution of which it was organized; and in recognition of the trust-fund doctrine the directors are expressly prohibited from diverting, withdrawing, or paying to stockholders any part of the capital stock, and are in their individual and private capacity made jointly and severally liable to the creditors of the corporation to the full amount so "divided, withdrawn, paid out, or reduced, or debt contracted." Comp. Laws, §§ 2917, 2928. Section 2917 is as follows: "Unless otherwise provided, a corporation may purchase, hold, and transfer shares of its own stock, from its surplus profits, or as provided in the article on the assessment of stocks, or by the unanimous consent in writing of all its stockholders, in such manner and for such price or consideration as the said stockholders may unanimously decide upon." Although by enabling a corporation to purchase shares

of its own stock from its surplus profits our legislature has to that extent encroached upon the otherwise invariable rule by which all such traffic is prohibited, the foregoing section, construed, as it must be, with other statutory provisions relating to the same subject, is not sufficient to empower a corporation, through the agency of its directors, to "divide, withdraw, or pay to stockholders, or any of them, any part of the capital stock," or to increase its liability by borrowing money with which to purchase shares in itself. This is obvious, because it is "otherwise provided," and because the power is, by the law of corporations, expressly withheld from directors and officers as such, as well as by that portion of section 2917 which authorizes no purchase of stock in any manner, except from surplus profits, or by virtue of the law of assessment, unless the purchase be made by and through the unanimous consent and united individual action of all the stockholders, evidenced by a stipulation in writing, signed by every member and specifying the consideration to be paid, and the manner of and the means by which the purchase is to be effected. Without such written consent, the corporation cannot be bound; and in the total absence of express or implied power to borrow money with which to purchase shares in itself, and in the face of the fact that the lenders thereof had actual knowledge of the extraordinary use to which the funds were to be applied, their claims are *ultra vires*, and must not be asserted to the detriment of creditors. *Cheerack Lime Works v. Diamukes*, 87 Ala. 344, 5 L. R. A. 100. Actual notice on the part of one who loans money to a mercantile corporation that the funds so loaned are to be used for the purchase of stock in itself is sufficient to charge him with knowledge that such an unauthorized act works an immediate fraud upon creditors, and is therefore against public policy, and prohibited by the law of the land. These promissory notes upon which the Deyette and Lewis judgments were confessed, being *ultra vires* because the corporation was, under the circumstances, powerless to make them, it follows, of course, that the judgments were void to the extent of the money loaned for a purpose beyond the scope and object for which the corporation was created. *Currier v. Lebanon Slate Co.* 56 N. H. 262; *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *Pearce v. Madison & I. R. Co.* 62 U. S. 21 How. 441, 16 L. ed. 184; *Pennsylvania R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 371, 33 L. ed. 157.

We are fully aware that numerous cases may be found in which judges, though standing upon an eminence, have been unable to observe or unwilling to concede that the assets of an insolvent corporation are a trust fund for the benefit of all bona fide creditors, none of whom, at the hands of a corporation, are entitled to a preference; but a careful research discloses no case which goes to the extent of holding that a corporation apparently in failing circumstances can borrow money with which to purchase shares in itself, and give to the persons from whom the money is borrowed a preference over all other creditors. Manifestly, a transaction so inconsistent with every consideration of common honesty and public

policy, and so disastrous to the credit of corporations, as well as to the rights of those with whom they transact business, cannot receive the stamp of judicial approval. Adhering substantially to the views expressed in our former opinion, *the judgment of the trial court is affirmed.*

Kellam, J., dissenting:

I feel compelled to dissent from the conclusions of the court upon the main propositions discussed in the foregoing opinion. It is always a matter of interest to the general student of the law to know the views of eminent text-writers upon any legal question, but it must always be a matter of more particular interest to a court to know what its own legislature has made and established as the law of that jurisdiction; and so, when I find that the statute law of this state expressly allows a corporation to purchase shares of its own stock (Comp. Laws, § 2917), I conclude that the wisdom or unwisdom of such policy is not a question for discussion or settlement by the courts of this state. At all events, it is gratifying to know that, however bad the law may be, or however vicious its policy, it is not original with a Dakota legislature. It is the law of many of the states. It was broadly declared as a general rule of law in the Field Commission Code; and in *Columbus City Bank v. Bruce*, 17 N. Y. 507, Judge Selden said: "I am not aware of any common-law principle which forbids it." Be that as it may, our statute says that it may be done, and it does not seem to me allowable for this court to say that what the statute authorizes is contrary to the policy of the law.

I think, too, that the argument of the opinion is predicated almost entirely upon assumed premises, to wit, that the corporation was insolvent, or in contemplation of insolvency, when it borrowed the money with which to buy this stock. The only finding is that it was insolvent when it confessed these judgments, nearly four months afterwards. For aught that appears in the record, its then insolvency may have resulted from causes entirely occurring after the money was so borrowed, and that at the time of the loan both borrower and lender may not only have thought, but known, that it was in a solvent and prosperous condition, and even that it then had "surplus profits" equal to the amount used in the purchase of this stock. I do not suppose that the fact that the corporation borrowed money would prove that it did not at the time of such borrowing have surplus profits, for such profits would not necessarily be in money on hand. A condition or relation shown to exist will be presumed to continue, but the presumption does not also reach backward. I think, therefore, that there is no warrant in the findings for treating the corporation as insolvent when the loan was made, but that the same is purely an assumption.

If this case is rightly decided upon the facts found, it is because a note given by a perfectly solvent corporation, for money borrowed to purchase shares of its stock, the purpose being known to the lender, is invalid and unenforceable unless the subsequent purchase of such stock is made by the corporation under the con-

ditions named in the statute, or else that such note, good when made, becomes invalid by the subsequent insolvency of the corporation. The last proposition seems utterly indefensible. It cannot be that a note, valid when made, becomes invalid by a change in the financial condition of its maker. If it is the intention of the court to rest its decision upon the first proposition, I am unable to understand how it can so confidently reach the conclusion it announces, without at least some consideration of the question whether Deyette's knowledge of the purpose for which the money was borrowed would invalidate his note. There is certainly a very respectable, not to say formidable, line of authorities firmly holding that money loaned to a corporation for a confessedly *ultra vires* purpose is recoverable, although the lender knew that the money was to be so used. Some of these cases are collected in 27 Am. & Eng. Enc. Law, under head of *Ultra Vires*. *Ex parte Credit Foncier*, L. R. 7 Ch. 161, would seem from the general statement of facts, to be much like the case now in hand. Company A loaned money to Company B. "Company B had authority to borrow money, but not to buy up their own shares. Both companies were subsequently wound up. It was held that Company B was not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that it was consequently entitled to prove against the estate of Company A under the winding up." As this question is not discussed in the majority opinion, I only refer to it here so that I may not be understood as assenting to the view which the court seems to have adopted without discussion.

In determining the rights of the parties respectively upon the facts found in this case, the first question would seem to be, Did the transaction of January 20 create a legal and enforceable claim in favor of Deyette against the hardware company for the repayment of the money so loaned. Respondent claims, and this court holds, that it did not, because the money was advanced knowing it was to be used for an illegal purpose, to wit, the purchase by the company of the Trask stock. The purchase of the stock, however, was not necessarily illegal. It would be illegal if the stockholders all consented in writing. Comp. Laws, § 2917. It is found that such consent was not obtained. It is not found that Deyette knew or had notice that it was not obtained. Was it required of him, in order to make his loan valid, to know or see to it that the purchase of the stock was made under such conditions as would make it a permissible and legal transaction? The money was loaned to accomplish a purpose that might be legal or it might be illegal, depending upon conditions not connected with the loaning of the money, but with the purchase of the stock. There are many cases holding that contracts made to actively aid in the violation of the law are unenforceable, and that money advanced and used for such a purpose cannot be recovered. The cases go upon the ground of guilty knowledge upon the part of the lender, making him *in pari delicto* with the immediate perpetrator of the wrong. But here there was no guilty knowledge on the part of Deyette, unless the law imputes it from the

facts proved. It was not found that he loaned the money for the purpose of, or knowing that it was to be used for, buying this stock under unlawful conditions. All that the proved facts show upon this point is that he loaned the money to the company for the purpose of, and to be used in, buying this stock, and that he did not know that the consent of the stockholders had been or would be obtained, so as to make the purchase permissible, and such use of the money loaned lawful. Respondent contends, and our former opinion favors the thought, that as, under ordinary conditions and generally, the purchase of the stock would be in violation of the law, it was incumbent on Deyette to know; that the conditions existed which would make the purchase allowable under the law. I think this is going too far. It is, in effect, presuming guilt from facts which are entirely consistent with innocence. The law punishes the lender by denying to him the right to enforce repayment, because he has knowingly participated in and willingly aided the violation of the law. If, as is found in this case, this money was borrowed for the purpose of buying this stock, the borrowing preceded the actual purchase; and, if any presumption is charged against or credited to Deyette, it ought to be that the company would proceed in a lawful manner in effecting the purchase. Suppose the traffic in intoxicating liquors is generally prohibited by law, and is only legal when the party so trafficking has first obtained a license therefor. A applies to a bank for a loan of money to enable him to put in a stock of liquor for sale, and the bank makes the loan knowing the money is to be used for that purpose, is it therefore to be charged with the presumption that A intended to engage in an illicit trade, instead of that he would do what was necessary to make his business legal? It is against the policy of the state as announced in its Constitution (art. 17, § 7) for a corporation "to take or hold any real estate, except such as may be necessary and proper for its legitimate business." A bank or other party loans money to a corporation, knowing that it is to be used in the purchase of real estate. Must the loan contract be presumed to be invalid until the lender establishes affirmatively that the real estate so purchased was actually "necessary and proper" for the legitimate business of the corporation? There may be authorities so holding, but I have found none. The rule is that, the corporation proving authority to borrow money, it will be presumed that it did it legitimately, and in the exercise of its corporate powers. 4 Am. & Eng. Enc. Law, p. 222. It would seem a freak in logic to say that after a thing is done it will be presumed that it was done regularly, but, that before it is done it must be presumed that it will be done irregularly. The loan contract was valid or invalid when made. If invalid, it was because of some knowledge, actual or imputed, upon the part of the lender, that he was aiding and participating in a violation of the law. Such knowledge is the very essence of his wrong, and ought in some way to be reasonably proved, rather than presumed, and that, too, against the established presumption that men will not ordinarily do unlawful things. The presumption applies as well in

civil as in criminal matters. It will never be presumed that the law has been or will be violated, but the contrary will be presumed. 19 Am. & Eng. Enc. Law, p. 42. If this is a safe presumption for courts to rest their judgments upon, it ought to be safe for individuals to act upon. Suppose in a proper judicial proceeding complaint were made that this company was about to purchase shares of its own stock. Would not the court of whom relief was asked say at once it may legally do so under certain conditions, and it cannot be presumed against it that it will do it illegally? If a court will presume in its favor that it will act within the law, is there any good reason why a stranger dealing with it may not indulge the same presumption?

The findings in this case are entirely consistent with absolute moral and legal innocence on the part of Deyette: entirely consistent with an honest belief on his part, when he loaned the money, that the consent of the stockholders had been or would be obtained. And a simple finding that it was not obtained is quite insufficient, in my judgment, to charge him with a knowledge that the law was to be violated in the purchase of the stock. In his argument respondent assumes that Deyette was in the employ of the company, and must have had knowledge of what was and was not done, and therefore should be held to know that the Trask stock was bought without the consent of the stockholders being first obtained. There is nothing in the record showing that he had any relations with the company except that of creditor on account of this loan, except that included in the judgment confessed was \$184 for work and labor. In what capacity this was performed is not shown or suggested. He might have been a clerk in the store, with some knowledge of its business and financial condition, or he might have been a drayman or laborer outside, with no knowledge of its affairs. We cannot presume either. We must get the facts from the record, and not from the briefs of counsel. I am unable to discover anything in the findings that militates against the validity of Deyette's claim. Placing this conclusion upon the ground that no guilty knowledge is found upon his part, furnishes an additional reason why it is unnecessary for me to discuss the mooted question of whether knowledge alone, if he had had it, that the stock was to be bought in violation of law, would, without participation by him in the unlawful transaction, other than loaning the money, be sufficient to render his loan contract invalid and unenforceable; and as, in the view I take of this case, this question is not involved, I reserve the expression of any opinion for future examination when presented. It follows that in my opinion the Deyette judgment in respect to its consideration was good and valid. This was the very question upon which the case turned in the trial court. It held the judgment invalid because the consideration was invalid. This is evident, not only from its conclusion of law upon this point, but from the fact that it held the judgment good as to the claim for services.

In our former opinion, now adhered to by a majority of the court, we went further, and said that the judgment ought not to be enforced,

because it was an effort on the part of an insolvent corporation to prefer Deyette as a creditor, and that an insolvent corporation could not do this. The same cause and the same reason would condemn the entire judgment, as well for services as for money loaned; but upon further reflection and a more thorough examination of the question I am unable to concur in the opinion that a corporation, by becoming insolvent merely, *ipso facto* loses its right to pay or secure one creditor in preference to another. We have declared the right of an individual debtor to make such preferences. *Sandwich Mfg. Co. v. Max* (S. D.) 24 L. R. A. 524. We said the right of a debtor to prefer one creditor over another was guaranteed to him by the express words of the statute. Section 4654. A corporation or a partnership becomes a debtor under the same circumstances as an individual. If the so called "trust fund doctrine" will prevent a corporation debtor from so preferring one creditor to another, I am unable to see why it should not have the same effect, and for the same reason, in case of a partnership. A corporation becomes insolvent just when the partnership or the individual becomes so,—when it is unable to pay its debts from its own means as they become due. Comp. Laws, § 4661. Is it well, then, unless required by prevailing authority, to adopt the rule that a private corporation, unable to meet its debts as they mature, has no right to pay one creditor until or more than it pays all others? It is often said in the books that the assets of an insolvent corporation are a trust fund for the payment of its debts, but this is also true of a partnership, and really of an individual; and for the same reason. Pomerooy says this doctrine of trust is just as applicable to a partnership and its assets as to a corporation and its assets, and that in either case the relation can only be so named by way of "analogy or metaphor." He further says: "It is plain that no constructive trust can arise in favor of the creditors unless the partners or directors, through fraud or a breach of fiduciary duty, wrongfully appropriate the property and acquire the legal title to it in their own names, and thus place it beyond the reach of creditors through ordinary legal means." 2 Pom. Eq. Jur. § 1046. If the rule of disability applies to an insolvent corporation on the ground of its trust relations to its assets, it would seem that it should also apply to an insolvent partnership; but in *Sandwich Mfg. Co. v. Max*, *supra*, we sustained the right of Max & Baisch, an insolvent partnership, to make such preferences. I cannot see why, in the case either of a corporation or a partnership, the mere fact of insolvency, without more, should of itself change the character of what was the absolute property of the corporation or partnership into trust funds. Insolvency creates a condition which justifies a court with equity powers in laying hold of assets, and then so treating and disposing of them. While the assets remain undisturbed in the hands of the corporation or partnership, solvent or insolvent, it owns and may dispose of them as an individual owner may, in any manner not fraudulent as to its creditors, including stockholders in case of a corporation. Nearly all commercial credit is given to the individual,

the partnership, or the corporation on the strength of its own assets, and in reliance upon a prudent management and an honest appropriation of them to the payment of its debts. In this sense the property of every debtor is a trust fund, with himself as trustee, for the payment of his debts. It is no more so simply because the debtor is a corporation, so long as it continues its active functions as such, and retains absolute control of its property. At no time does the trust attach to the property because it belongs to a corporation; but when the corporation becomes insolvent and unable to continue its active life it is so far civilly dead that its assets become subject to the administration of the courts. From that time on the assets coming into the hands of the court are treated as a trust fund for the benefit of creditors and stockholders, for they then constitute an estate to be administered. In *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106, the learned Judge Bradley said: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his."

This trust doctrine, as applied to the assets of corporations, solvent and insolvent, was fully discussed by Judge Brewer in *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, and the construction of the court is thus stated in the headnote in 14 Sup. Ct. 127: "The expression, often used, that the property of a corporation constitutes a 'trust fund' for its creditors, only means that when the corporation is insolvent, and a court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders; but as between a corporation itself and its creditors, the former does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor." In *Van Alstyne v. Cook*, 25 N. Y. 489, the court, in speaking of the assets of an insolvent, limited partnership, said: "They are trust funds when the courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property." The supreme court of Illinois declares the same doctrine in *Roseboom v. Whittaker*, 132 Ill. 81: "The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceeding establish a specific lien upon the property seized by attachment or execution. Such lien, when perfected, will doubtless entitle the creditor acquiring it to a preference over other unsecured creditors. After the aid of a court of equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive; and

it will proceed, in administering the insolvent estate, upon the maxim that equality is equity." See also the later case of *Peterson v. Brabrook Tailoring Co.* 150 Ill. 290. In *Town v. Bank of River Raisin*, 2 Dougl. (Mich.) 530, it was held that a corporation has the same right to prefer one creditor over another than an individual has. This was followed in *Kendall v. Bishop*, 76 Mich. 634, and again in the recent case of *Bank of Montreal v. J. E. Potts Salt & L. Co.* 90 Mich. 845, where it was held that "a corporation may, in the absence of legislative restriction, deal with its property precisely as an individual may, and may prefer one creditor over another; and hence that the assets do not become a trust fund for *pro rata* distribution among all its creditors, until such time as steps are taken under the 'winding-up act.'" This "trust fund" doctrine is luminously discussed by Judge Mitchell in *Hospes v. Northwestern Mfg. & Car. Co.* 48 Minn. 174, 15 L. R. A. 470, who demonstrates that, unless prohibited by statute, an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund," in any proper sense of that term. In *Ang. & A. Corp.* 843, it is laid down as an unqualified proposition of law that "the mere insolvency of a corporation neither impairs its power to manage its affairs nor converts its property into a trust fund for the benefit of its creditors." Almost precisely the same thing was said in *Catlin v. Eagle Bank*, 6 Conn. 233, and reiterated by the same court in *Pondville Co. v. Clark*, 25 Conn. 97. In the former case the court discussed the question at great length. In the course of its opinion, it says: "The cases of an individual and of a corporation in the matter under discussion, it appears to me, are not merely analogous, but identical, and I discern no reason for the slightest difference between them. . . . The insolvent banking corporation is just as much a trustee of the creditors, and no more, as the insolvent individual is the trustee of his creditors."

The same doctrine as to when the assets of an insolvent corporation become trust funds was declared by the supreme court of Missouri in *La Grange Butter Tub Co. v. National Bank of Commerce*, 122 Mo. 154. The court said: "In case of an insolvent corporation, a court of equity will make distribution of the corporation assets *pro rata* among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense, and upon this principle, that the assets are trust funds. They are trust funds when a court of equity is appealed to in behalf of any member of the corporation or creditor to protect and distribute the assets upon equitable principles." And again, in *Alberger v. National Bank of Commerce*, 123 Mo. 313, Judge Barclay, in speaking of the notion that insolvency transforms the assets of a corporation into a trust fund, said: "This theory seems to have a singular fascination to some learned jurists, but, in our opinion, it is wholly untenable as applied to the facts of such a case as that before us, under the law of Missouri;" and, after a very thorough and instructive discussion of the question, he concludes that "the

creditor of a corporation has the same right to secure, by superior diligence or persistency, and to retain, a preference for his claim against a private corporation, that he would have were his debtor an individual engaged in the same line of business, provided, always, that the transaction is honest,—that is to say, not a mere cover to a purpose to hinder, delay, or defraud other creditors of the failing debtor." Such is also the declared law in New Jersey. In *Wilkinson v. Bauerle*, 41 N. J. Eq. 640, the court said: "If there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvency, no reasons can be given why such transaction should be invalidated, which would not also invalidate the like transactions of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors although it is insolvent, unless such conduct is prohibited by law." The supreme court of Arkansas in the recent case of *Worthen v. Griffith*, 59 Ark. 562, holds the same way, and that "it is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation, that its assets may in this state be properly said to be a trust fund for its creditors." The same question as to the right of an insolvent corporation to make preferences was before the court in *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680. Judge Caldwell said that it was the settled law in Arkansas—from which state the case came—that it might lawfully do so, and added this significant statement: "The established rule in that state is in harmony with the general, though not quite uniform, current of authorities in this country on the question." After referring to a large number of supporting authorities, he adds: "The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation in effect dissolves it, and makes the directors mere trustees to distribute its assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no more than that the property of the corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of any of its bona fide debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making preferences among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by statute or by judicial proceedings." In his opinion Judge Caldwell refers to the following authorities, none of which I have cited, as sustaining his conclusion: 2 Morawetz, Priv. Corp. § 802; *Allis v. Jones*, 45 Fed. Rep. 148; *Coeert v. Rogers*, 38 Mich. 363, 31 Am. Rep. 319; *Coats v. Donnell*, 94 N. Y. 168; *Dana v. Bank of United States*, 5 Watts & S. 223; *Warner v. Mower*, 11 Vt. 380; *Whitwell v. Warner*,

20 Vt. 426; *Stratton v. Allen*, 16 N. J. Eq. 229; *Wilkinson v. Bauerte*, 41 N. J. Eq. 685; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190, 88 N. Y. 1; *Harts v. Brown*, 77 Ill. 226; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516 (opinion by Judge Dillon); *Garret v. Burlington Plow Co.* 70 Iowa, 697; *Smith v. Skeary*, 47 Conn. 47; *Planters' Bank v. Whittle*, 78 Va. 737; *Ashhurst's Appeal*, 60 Pa. 314; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Hallam v. Indianola Hotel Co.* 56 Iowa, 178.

The supreme court of Alabama is equally pronounced against this "trust-fund" doctrine, and in a very able and elaborate opinion, filed as recently as April of the present year, it expressly repudiates such doctrine, and overrules a number of cases in which its existence had been recognized by that court. The learned judge who writes the opinion says: "There is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relations to the creditors of such corporations as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the circumstances and under the same conditions in the first case as in the latter two." *O'-Bear Jewelry Co. v. Volfer* (Ala.) 28 L. R. A. 707. In the still more recent case of *Thomson-Houston Electric Light Co. v. Henderson Electric & G. L. Co.* (N. C.) 21 S. E. 951, the North Carolina supreme court deliberately rejected the "trust-fund" theory, and declared generally that the relation between a corporation creditor and the corporation, whether solvent or insolvent, is simply that of creditor and debtor, and that the creditor had no equitable claim upon the corporation assets either because it was a corporation or because it was insolvent. The supreme court of Indiana has lately made the same expression in emphatic terms in *First Nat. Bank v. Dove-tail, B. & G. Co.* (Ind.) 40 N. E. 810, and in the same further held (bearing upon the first question discussed in this opinion) that "the fact that one lending money to a corporation knew that it was to be used by the directors for a purpose involving a breach of trust does not impair the validity of the judgment against the corporation in his favor for the amount loaned, entered by the corporation's consent, with the purpose of creating a preference." In Burrill, Assignm. 5th ed. § 64, it is said: "It has been objected . . . that on the happening of its insolvency the corporation and its agents became trustees for the creditors, who were entitled to a ratable payment out of the trust fund in proportion to the amount of their debts. This position however, has not been sustained, and, apart from statutory provisions, no distinction exists between an individual and a corporation in regard to the exercise of the power of conferring preferences."

Without quoting from other cases, in which very wise and thoughtful judges have announced similar views, I am satisfied to say that to me they seem right in principle. If, for any reason, there should be a discrimination between different classes of debtors in respect to the right to make preferences among their creditors, as said by Judge Dillon in *Buell* 31 L. R. A.

v. Buckingham, *supra*, the rule should be declared by the legislature, which has the constitutional power to make and change the law, and not by the courts, which have no such power. It may be remarked, however, that as to some of the cases cited generally in support of the contrary doctrine they were controlled by local statutes which unfortunately are not mentioned, or at least not made prominent, in the opinion. For instance both Ohio and Texas cases are cited as opposed, and *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493, 5 L. R. A. 378, and *Lyons & Thomas Hardware Co. v. Perry Stone Mfg. Co.* 86 Tex. 143, 22 L. R. A. 802, do so read, but in each state there was a statute declaring that any transfer of property as a preference by a debtor who is insolvent "or in contemplation of insolvency" shall not be valid as against an assignment then in contemplation for the benefit of creditors. What influence, if any, this declared policy of the state law had upon the treatment of the general question by the courts we do not know. I have read with interest what Mr. Thompson says upon this question in his recently published work on Corporations. He is an author of acknowledged learning and ability. Upon all matters he expresses his personal views positively and clearly, and usually courteously and dispassionately; but his treatment of this question, his characterization of the deliberately declared opinions of eminent courts and judges as "the mouthings of judges" with "low conceptions," "destitute of a sense of justice," and other similar flippancies, evince such a degree of morbidity upon this subject as greatly to compromise the value of his opinion. He says (§ 6496) the "fallacy" of the conclusion to which these thoughtless judges have "jumped" is in overlooking "the fact that the analogy between an insolvent individual and an insolvent corporation wholly fails in this: That although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may, by so doing, hinder and delay the others, yet he merely hinders and delays them: he does not, by that act, destroy himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and disposes itself of all its property, it destroys itself, and becomes *ipso facto* dissolved." In his zeal to demonstrate the "fallacy," has not the learned author allowed himself to start from unstable premises? Is it entirely safe to build upon a foundation that when a corporation becomes insolvent, "and disposes itself of all its property, it destroys itself, and becomes *ipso facto* dissolved?" In § 6482 of the same book he has told us that "the assignment by a corporation of all its property for the benefit of its creditors does not extinguish it as a corporation, or disable it from maintaining an action, unless the subject-matter of the action passed from it by the assignment." In this latter statement he seems well supported by authority, though Judge Story, in a dissenting opinion in *Beaton v. Farmers' Bank*, 37 U. S. 12 Pet. 138, 9 L. ed. 1031, intimated a contrary opinion. See Bur-

rill, Assignm. 5th ed. § 64; Ang. & A. Corp. § 770, and cases cited by each of these authors. The law is generally recognized to be, as stated by Mr. Thompson, that neither the insolvency of nor a general assignment by a private corporation works its dissolution. An individual debtor, stripped of his means for satisfying his debts, "still lives," but it is just as true of a corporation. Each is still a living debtor without present ability to pay his or its debts. It is probably true that an individual debtor is more likely to "get on his feet again," but that is incidental merely, and does not prove or tend to prove any difference in their legal status. The possession of property is no more essential to the existence of a corporation than it is to the existence of a man. If a corporation becomes insolvent, there is nothing to prevent its members, until its dissolution is legally declared, from furnishing more funds, and proceeding to use its corporate powers. *Morawetz, Priv. Corp.* § 1010, and citations. My conclusion is that the hardware company, although insolvent, might legally prefer Deyette as a creditor, and that his judgment, founded on a good consideration, was not invalid or unenforceable on account of such preference.

As to Lewis and his judgment, the facts established by the findings are the same, except that at the date of his judgment and before—but how long before is not found—he was a director and secretary of the company. He, too, loaned money to the company for the purpose of buying the Trask stock, and, it not being shown that at the time of such loaning and purchase he had any connection with the company, he, as a creditor, would stand upon the same footing as Deyette, except that when his judgment was confessed he was a director and officer of the company. On the 9th day of May the company confessed these judgments,—one to Deyette, already considered; one to Foster, over which there seems to be no controversy; and one to Lewis, now in hand. Lewis himself executed these confessions as secretary of the company. Executions were issued on these judgments, and levied upon the personal property of the hardware company, but when issued or when levied does not appear. On the 12th, execution was also issued on respondent's judgment. The property was sold, and the proceeds, which are "not sufficient to pay the judgments against the Hicks-Trask Hardware Company prior to the judgment of plaintiff" (respondent), are held by the sheriff "to be applied on said executions according to the decree of this court." It not appearing that executions were issued on other judgments than those named, we understand from the language of the findings that the proceeds are insufficient to pay the three judgments first named. The Foster and the Deyette judgments being good, and entitled to be paid, the contest is over the balance in the hands of the sheriff, and between Lewis and the respondent. While the findings do not expressly show—as we wish they did—when the execution on the Lewis judgment was issued or levied, it must have been prior to the issuance of respondent's execution, for the property appears to have been sold under the Lewis, Foster, and Deyette executions. The fact that the company was insolvent, that

it confessed these three judgments on the 9th, and that three days thereafter it confessed judgment to quite a number of other creditors, including respondent, and that executions were issued and levied on the first three judgments either prior to or on the 12th, the date of the subsequent judgments, and before respondent's execution, issued immediately upon obtaining its judgment, is very convincing, though perhaps not incontestible, evidence that it was intended that Foster, Lewis, and Deyette should be given a preference over other creditors. I have no doubt that it was so designed. So that the question now in hand is, Could the company legally prefer Lewis, a director, and one of its managing officers, on account of an indebtedness not contracted on the strength of such preference, but for a general antecedent indebtedness? I think we can hold that it could not, consistently with what I have already said in respect to the right generally of an insolvent corporation to prefer creditors. While the directors and officers of a corporation, solvent or insolvent, are not in any proper sense the trustees of the creditors, they do occupy a relation to them demanding the utmost good faith on their part in the handling of the corporation assets. To their honest and fair dealing with the property, and to their just and prudent management of the business, the creditors must look for their continued security. As in the case of others occupying a fiduciary position, they cannot innocently sacrifice the interests of those who trust them to their own personal advantage. As managers of the corporation and its property, they owe a duty to those dealing with them, which they violate when, to the detriment of those who confide in them, they make themselves preferred beneficiaries in the disposition of assets which, without such preference, would be available alike to all creditors. They hold in their hands the property of the corporation to which creditors must look for satisfaction of their claims, and come within the just principle that one who has possession and control of property for the benefit of others besides himself may not dispose of it for his own special advantage, to the injury of others, for whom it is also held.

The judgment in this case was confessed. Lewis himself as secretary of the company executed the confession to himself. It was not a hostile proceeding against the company in which he acted as a creditor only, but was a voluntary effort on the part of the company, executed through and by him as its secretary, to give himself an advantage over creditors generally, with no equities to justify such preference, except that he was a general creditor on account of an antecedent indebtedness. I do not think such a preference should be sustained.

In many of the states which recognize the general right of an insolvent corporation to make preferences among its creditors, such preferences in favor of its own directors on account of antecedent indebtedness, in the absence of special equities, are not sustained. See *Gottlieb v. Miller*, 154 Ill. 44, where a preference was sustained as to outside creditors, and set aside as to directors. See also *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577,

where a large number of cases are cited to the point that directors and managing officers cannot be preferred. *Montgomery v. Phillips* (N. J.) 31 Atl. 622, followed in *Mallory v. Kirkpatrick* (N. J.) 38 Atl. 205; *Henderson v. Indiana Trust Co.* (Ind.) 40 N. E. 516; *Corey v. Wadsworth*, 99 Ala. 68, 23 L. R. A. 618. See also upon this a valuable note to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) in 22 L. R. A. 802, in which the editor's conclusion is thus stated: "On examination of the decisions, it is clear that the weight of authority is overwhelmingly in favor of the legality of preferences to ordinary creditors, except as restricted by statute, and overwhelmingly against the validity of such preferences when made in favor of directors."

The trial court held the Lewis judgment invalid, both because of the invalidity of its consideration and because it was the result of an attempt to give preference to a director. For reasons stated early in this opinion, I think the first ground untenable. As to the second ground, I am of the opinion that he, being a director and one of the managing officers of the company, ought not to get any advantage in the nature of a preference, but that the court was wrong in holding his judgment void and in denying him participation in the distribution of the proceeds of sale in the hands of the sheriff. This seems to be the policy of our statute. If, by a general assignment, this preference had been attempted in

favor of Lewis, the preference would have failed, but he would still have been entitled to share ratably with other creditors. Comp. Laws, § 4660. I think there is much in the majority opinion that is sentimentally good and wholesome, but that the text from which it is elaborated cannot be found anywhere in the facts returned by the trial court, or of which we have any judicial knowledge.

Finally, I cannot quite understand how the court, having deliberately declared that the assets of this corporation, being insolvent, constitute a fund for ratable distribution among its creditors without preference, can affirm this judgment, which gives to this respondent creditor practically the entire assets of the corporation, in the face of the record showing other creditors, whose judgments were confessed at the same time and which must go unpaid. This is an equitable action in the nature of a creditor's bill in behalf of this plaintiff only, and the remark of Judge Thayer in *Walker v. Miller*, 59 Fed. Rep. 871, seems pertinent: "If this trust-fund theory is to be adopted to prevent the corporation from granting a preference because of its insolvency, we know of no reason why it should not be invoked to keep attaching creditors at bay, and thus relegate the disposal of the fund so far as judicial proceedings are concerned, to a court of equity." See also *Mallory v. Kirkpatrick*, *supra*.

OREGON SUPREME COURT.

A. R. HEINTZ *et al.*, Appts..

v.

Joseph BURKHARD, Resp't.

(.....Or.....)

An oral contract to manufacture and furnish ironwork for a brick building according to special designs and measurements suitable only for use in that particular building is not within the statute of frauds as a sale of personal property.

(February 24, 1896.)

APPEAL by plaintiffs from a judgment of nonsuit entered by the Circuit Court for Multnomah County in an action to recover damages for breach of contract to purchase ironwork for a building. *Reversed*.

The facts are stated in the opinion.

Mr. William T. Muir, for appellants:

An agreement to manufacture and furnish materials, according to certain specifications, is not within the statute of frauds, when, without the special contract, the articles to be manufactured and furnished thereunder would not have been manufactured at all, or would not have been manufactured in the particular manner, shape, or condition provided for in such contract. Such a contract is essentially

one for special skill, labor, or workmanship, and need not be in writing.

Towers v. Osborne, 1 Strange, 506; *Meincke v. Falk*, 55 Wis. 427, 42 Am. Rep. 722; *Finney v. Appar*, 31 N. J. L. 266; *Phipps v. McFarlane*, 3 Minn. 109, 74 Am. Dec. 743; *Hight v. Ripley*, 19 Me. 187; *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Swall v. Fitch*, 8 Cow. 215; *Eichelberger v. McCauley*, 5 Harr. & J. 213, 9 Am. Dec. 514; *Rentch v. Long*, 27 Md. 188; *Spencer v. Cone*, 1 Met. 283; *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256; *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517; *Allen v. Jarvis*, 20 Conn. 38; *Pratt v. Miller*, 109 Mo. 78; *Cason v. Cheely*, 6 Ga. 554; *Edwards v. Grand Trunk R. Co.* 48 Me. 379; *Bird v. Muhlinbrink*, 1 Rich. L. 199; *O'Neil v. New York & S. P. Min. Co.* 8 Nev. 146; *Abbott v. Gilchrist*, 38 Me. 260; *Mead v. Case*, 33 Barb. 202; *Bagby v. Walker*, 78 Md. 239; *Turner v. Mason*, 65 Mich. 662; *Vulicovich v. Skinner*, 77 Cal. 239; *Browne*, Stat. Fr. § 307. *Lee v. Griffin*, 1 Best & S. 272, is based on the amended statute called Lord Tenterden's act, 9 Geo. IV.

The intimation of our court is, however, in accord with the doctrine of the decisions above cited.

Galvin v. MacKenzie, 21 Or. 184.

Defendant was bound to execute the written agreement, failing which an action would lie because of such refusal.

Pratt v. Hudson River R. Co. 21 N. Y. 305.

Meers, Paxton & Beach, for respondent: An agreement, the result of which, when

NOTE.—For distinction between sales of personality and agreements for work and labor, see note to *Flynn v. Dougherty* (Cal.) 14 L. R. A. 230. 31 L. R. A.

carried out, is the sale and transfer of personal property from one person to another for a price not less than \$50, is a contract within the statute of frauds, and therefore void, unless in writing signed by the parties to be charged. This is especially true where the essential consideration of the purchase is the product itself, rather than the work and labor to be performed thereon.

Lee v. Griffin, 1 Best & S. 272; *Smith v. Surman*, 9 Barn. & C. 568; *Garbutt v. Watson*, 5 Barn. & Ald. 614; *Atkinson v. Bell*, 8 Barn. & C. 280; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55; *Brown v. Sanborn*, 21 Minn. 402; *Russell v. Wisconsin, M. & P. R. Co.* 39 Minn. 145; *Atwater v. Hough*, 29 Conn. 508, 79 Am. Dec. 229; *Pratt v. Miller*, 109 Mo. 78; *Clark v. Nichols*, 107 Mass. 547; *Waterman v. Meigs*, 4 Cush. 499; *Gardner v. Joy*, 9 Met. 179; *Finney v. Appgar*, 31 N. J. L. 270; *Pucel-ski v. Hargreaves*, 47 N. J. L. 337, 54 Am. Rep. 162; *Edwards v. Grand Trunk R. Co.* 48 Me. 380; *Edwards v. Grand Trunk R. Co.* 54 Me. 110; *Galvin v. MacKenzie*, 21 Or. 184; *Browne*, Stat. Fr. 4th ed. § 308a; 2 Benjamin, Sales, Rev. ed. 121; *Gorham v. Fisher*, 30 Vt. 428.

Bean, Ch. J., delivered the opinion of the court:

This action was brought to recover damages for the breach of a contract to furnish the ironwork for defendant's building, and comes here on an appeal from a judgment of nonsuit. For the purposes of this appeal, it is sufficient to say that the evidence tended to show that in August, 1894, the plaintiff and defendant entered into an oral contract, by the terms of which the plaintiff was to manufacture, and furnish to the defendant, the ironwork for a brick building about to be erected by him, according to certain plans and specifications, for the sum of \$2,825, but that defendant subsequently, and before any work was performed, wrongfully refused to allow plaintiff to proceed with the execution of its contract. The ironwork referred to was not to be of the kind manufactured by the plaintiff in the usual course of business, or for the trade, but of special designs and measurements, suitable only for use in the construction of defendant's building. The court below ruled that the contract was "an agreement for the sale of personal property," within the meaning of subdivision 5, § 785, of Hill's Annotated Laws, and void because not in writing, and this ruling presents the only question to be determined on this appeal.

To determine whether a given contract concerning personal property, which does not exist in specie at the time it is entered into, but must be manufactured and brought into being under the contract, comes within the statute of frauds, is not without difficulty, and the decisions are by no means reconcilable. The chief difficulty in all such cases is encountered in determining when the contract is substantially for the sale of personal property, to be executed in the future, and when for work and labor and material only. If the former, it is within the statute. If the latter, it is not. Thus far, the authorities, except in the state of New York, are substantially agreed; but there have been numerous decisions, and much

diversity and even conflict of opinion, in relation to a proper rule by which to determine whether a contract is in fact for the sale of personal property, and therefore within the statute, or for work and labor and material furnished, and so without the statute. There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in *Lee v. Griffin*, 1 Best & S. 272, that "if the contract be such that, when carried out, it would result in the sale of a chattel the party cannot sue for work and labor, but, if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered." In that case the action was brought by a dentist to recover £21 for two sets of artificial teeth made for the defendant's testatrix. The court held the contract to be for the sale of chattels, and within the statute. But this decision seems to stand alone, and is in direct conflict with the previous decisions of the English courts. *Towers v. Osborne*, 1 Strange, 506; *Clayton v. Andrews*, 4 Burr. 2101; *Rondeau v. Wyatt*, 2 H. Bl. 63; *Cooper v. Elston*, 7 T. R. 14; *Groves v. Buck*, 3 Maule & S. 178; *Garbutt v. Watson*, 5 Barn. & Ald. 618; *Smith v. Surman*, 9 Barn. & C. 574. It is said to have been the result of Lord Tenterden's act, which expressly extended the statute to all contracts of sale, notwithstanding the goods "may not at the time of such contract be actually made, procured or produced or fit or ready for delivery, or some act may be required for the making or completing thereof to render the same fit for delivery." *Meincke v. Falk*, 55 Wis. 432, 42 Am. Rep. 722; Benjamin, Sales, 6th ed. 108. In this condition of the English authorities, we are not prepared to go to the full extent of *Lee v. Griffin*. It is an extreme case, and, unless the decision was made to conform to Lord Tenterden's act, it antagonizes the opinions of some of the most eminent jurists of England, and is open to the objection that it practically permits the fraud which theoretically the statute seeks to prevent. To say that a contract of a dentist to manufacture and furnish a set of false teeth for his customer is "an agreement for the sale of personal property," within the meaning of the statute, is certainly giving it the widest possible operation, and has not found general recognition in this country, as a correct exposition of the doctrine, although the simplicity of the rule has commended it to many of the judges. In New York the rule prevails that a contract concerning personal property not existing *in solido* at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer and the like, is not within the statute. *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Downs v. Ross*, 23 Wend. 270; *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep.

517; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Higgins v. Murray*, 73 N. Y. 252. But this rule seems to be peculiar to that state. By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for the trade, or as the result of a special order, and for special purposes. If the former, it is regarded as a contract of sale, and within the statute. If the latter, it is held to be essentially a contract for labor and material, and therefore not within the statute. Thus, it is held that an agreement to build a carriage of a certain design is not within the statute (*Mixer v. Howarth*, 21 Pick. 206, 32 Am. Dec. 256), but that a contract to buy a certain number of boxes of candles at a fixed price, which the vendor said he would thereafter finish and deliver, is a contract of sale, to which the statute applies. *Gardner v. Joy*, 9 Met. 177. The result of the decisions in that state has recently been stated thus: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser and upon his special order and not for the general market, the case is not within the statute." Ames, J., in *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. And this doctrine seems to be the one most widely adopted in this country. As to the latter part of the

rule, relating to goods made on special orders, there is little if any conflict in the American cases. *Baker, Sales*, § 96; 2 *Schouler*, Pers. Prop. § 448; *Browne*, Stat. Fr. § 308; 8 Am. & Eng. Enc. Law. p. 707; note to *Flynn v. Dougherty* (Cal.) 14 L. R. A. 280; *Meincke v. Falk*, 55 Wis. 427, 42 Am. Rep. 722; *Finney v. Appgar*, 81 N. J. L. 266; *Phipps v. McFarlane*, 3 Minn. 109 (Gil. 61), 74 Am. Dec. 748; *Hight v. Ripley*, 19 Me. 187; *Cason v. Cheely*, 6 Ga. 554; *Abbott v. Gilchrist*, 88 Me. 260.

Until legislation shall assert itself more positively, the courts are put to their election as between these three rules, which, though each has its own merits, are not to be reconciled with one another. In the absence of a statute substantially the same as Lord Tenterden's act, we are unwilling to go to the extent of the doctrine of *Lee v. Griffin*, 1 Best & S. 272; and in this case it is unnecessary for us to give a preference to either the New York or Massachusetts rule, because the contract in question is valid under either. It would be excluded from the operation of the statute by the rule adopted in New York, because the subject-matter of the contract did not exist *in solido*, or at all, at the time it was made; and it is not within the statute under the Massachusetts rule and the generally accepted American doctrine, because the ironwork was to be manufactured especially for the defendant, and upon his special order, according to a particular design, and was not such as the plaintiffs, in the ordinary course of their business, manufactured for the general trade. It follows that under either view the court below was in error in holding that the contract was void because not in writing.

The judgment must therefore be reversed, and a new trial ordered.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Respts.*,
v.

ADELPHI CLUB of the City of Albany,
Appt.

(149 N. Y. 5.)

- 1. The construction placed upon a statute** penal in character by public officers charged with the duty of executing its provisions, for many years, may properly be considered in determining the legislative intention.
- 2. The distribution of intoxicating liquors to members of a social club** upon the written order of a member at a price fixed by the officers of the club, designed to cover the purchase price and disbursements in serving, where the club was incorporated for a legitimate purpose to which the furnishing of liquors to its members is merely incidental, does not constitute a sale within the meaning of N. Y. Laws 1892,

chap. 401, prohibiting sales of such liquors without a license, but making no provision whereby such a club can obtain a license.

(April 7, 1896.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Court of Quarter Sessions for Albany County convicting defendant of selling liquor without a license. *Reversed.*

The facts are stated in the opinion.

Messrs. Matthew Hale and Albert C. Tennant, with *Mr. David Muhlfelder*, for appellant:

Incorporated clubs organized in good faith, solely for social intercourse, and which in the privacy of their rooms, as a mere incident to the enjoyment of their corporate privileges dispense liquors without profit, to their own

NOTE.—In respect to the sale of intoxicating liquors by clubs, see also, in favor of the lawfulness of the sale, *Barden v. Montana Club* (Mont.) 11 L. R. A. 593; *State, Bell, v. St. Louis Club* (Mo.) 26 L. R. A. 573, and *State v. Austin Club* (Tex.) 30 L. R. A. 500.

For cases denying the lawfulness of such sales, L. R. A.

see also *People v. Soule* (Mich.) 2 L. R. A. 494 (annotated); *State v. Horacek* (Kan.) 3 L. R. A. 687; *People v. Andrews* (N. Y.) 6 L. R. A. 128 (annotated); *State v. Easton Social, L. & M. Club* (Md.) 10 L. R. A. 64; *State v. Neils* (N. C.) 12 L. R. A. 412 (annotated), and *State v. Boston Club* (La.) 20 L. R. A. 185.

limited and selected members, are not within the provisions of the excise law.

This statute, being penal in its nature, must be strictly construed.

Bonnell v. Grinbold, 80 N. Y. 128; *People v. Rosenberg*, 138 N. Y. 410.

It cannot be extended by implication or construction to include persons not within its provisions.

Verona Central Cheese Co. v. Murtaugh, 50 N. Y. 314; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 339.

The most natural exposition of a statute is said to be to read and construe one part by another and to give an interpretation to one part by the meaning furnished by other provisions.

Sutherland, Stat. Constr. § 239; *People, Gilmour, v. Hyde*, 89 N. Y. 11; *People, Mason, v. McClave*, 99 N. Y. 89; *Bell v. New York*, 105 N. Y. 139; *Smith v. People*, 47 N. Y. 330; *People, Westchester F. Ins. Co., v. Davenport*, 91 N. Y. 574.

In construing statutes a thing within the letter of the statute is frequently held not within the statute unless it be within the intent of the lawmakers.

Delafield v. Brady, 108 N. Y. 524; *Lake Shore & M. S. R. Co. v. Roach*, 80 N. Y. 339.

The statutes are intended for the restriction and regulation of grog-shops, and, properly considered, have no application to the management of clubs organized by gentlemen for social or other purposes.

Black, Intoxicating Liquors, p. 183, note; *Com. v. Carey*, 151 Pa. 368; *Downes v. Johnson* [1895] 2 Q. B. 203.

The defendant being a bona fide and duly incorporated club, organized for a lawful purpose, the distribution of liquors owned by it, without profit, to its own members as a mere incident to the enjoyment of their corporate privileges, is not a sale within the meaning of N. Y. Laws 1892, chap. 401, § 31.

State, Bell, v. St. Louis Club, 125 Mo. 308, 26 L. R. A. 573, 11 Am. & Eng. Enc. Law, p. 727; *Black, Intoxicating Liquors*, § 142; *Graff v. Evans*, L. R. 8 Q. B. 373; *Com. v. Ewig*, 145 Mass. 119; *Com. v. Pomphret*, 137 Mass. 564; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *Piedmont Club v. Com.* 87 Va. 541; *State, Columbia Club, v. McMaster*, 35 S. C. 1; *Burden v. Montana Club*, 10 Mont. 330, 11 L. R. A. 593; *Koenig v. State*, 33 Tex. Crim. Rep. 367; *Newell v. Hemingway*, 16 Cox, C. C. 604.

Contemporary construction and official usage for a long period by the persons charged with the administration of the law are among the legitimate aids in the interpretation of statutes.

Sutherland, Stat. Constr. § 309; *People, Williams, v. Dayton*, 55 N. Y. 367; *Potter's Dwarrr*, Stat. 183; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079.

The excise law of 1892, if construed according to the claim of respondent, is void because in violation of provisions of the Constitution of the state of New York and the Constitution of the United States.

N. Y. Const. art. 1, §§ 1, 6; U. S. Const. art. 14, § 1; *Wynehamer v. People*, 13 N. Y. 378.

31 L. R. A.

Messrs. Eugene Burlingame and John T. Cook, for respondents:

The title to all this property was vested in the corporation as such. A purchasing member did not receive the liquor as a partial division or distribution of the liquor among its members for he paid of his individual money the price or value of the liquor delivered to him, and the money which he delivered to the club became part of its assets in place of the liquor he received from the club. So that in any event it was a sale pure and simple.

People v. Andrews, 115 N. Y. 427, 6 L. R. A. 123; *People v. Bradley*, 83 N. Y. S. R. 582; *People v. Luhrs*, 7 Misc. 503; *People v. Sinell*, 34 N. Y. S. R. 898; *Marmont v. State*, 48 Ind. 21; *Martin v. State*, 59 Ala. 34; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494; *State v. Horacek*, 41 Kan. 87, 3 L. R. A. 687; *State, Newark, v. Essex Club*, 53 N. J. L. 99; *State v. Neis*, 108 N. C. 787, 12 L. R. A. 412; *State v. Mercer*, 32 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *State v. Easton Social, L. & M. Club*, 73 Md. 97, 10 L. R. A. 64; *Kentucky Club v. Louisville*, 92 Ky. 309; *United States v. Wittig*, 2 Low. Dec. 466; *State v. Ascher*, 54 Conn. 299; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287.

The statute under consideration uses clear and positive language, and there can be no doubt but what the legislature intended to make an absolute prohibition of the sale of either strong or spirituous liquors by any person (including corporations) without having a license granted in pursuance of law.

Smith v. Williams, 2 Mont. 198; *King v. Stoke Damerel*, 7 Barn. & C. 563; *King v. Poor Law Comrs.* 6 Ad. & El. 7; *King v. Burrell*, 12 Ad. & El. 468; *Tamond v. Eiffe*, 3 Q. B. 910; *Everett v. Wells*, 2 Scott, N. R. 531; *Newell v. People, Phelps*, 7 N. Y. 97; *Bidwell v. Whitaker*, 1 Mich. 469; *Bosley v. Mattingly*, 14 B. Mon. 89; *United States v. Fisher*, 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

Sales are only permitted to certain persons, under certain prescribed conditions, who have been granted the license to sell. The license is a mere temporary permit to do what otherwise would be unlawful. Without a license permitting it no person may sell. That is the command of the statute.

Metropolitan Bd. of Excise v. Barrie, 34 N. Y. 657; *People, Presmeyer, v. Brooklyn Police Comrs.* 59 N. Y. 92; *Crown v. Stoddard*, 97 N. Y. 271; *People v. Meyers*, 95 N. Y. 225; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Adler v. Whitbeck*, 44 Ohio St. 539; *State v. Frame*, 39 Ohio St. 399.

The prohibition or regulation of the sale of intoxicating liquors is within the police power of the state, a power vested entirely in the legislative branch of the government and to be exercised in such manner as the legislature may deem proper.

Cooley, Const. Lim. p. *581; *Black, Const. Law*, 304; *Boston Beer Co. v. Massachusetts*, 97 U. S. 23, 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205.

In the *St. Louis Club Case*, 125 Mo. 308, 26 L. R. A. 573, the court holds that under their statutes the word "person" does not include a corporation. But in New York the contrary is the rule.

LaFarge v. Exchange F. Ins. Co. 22 N. Y. 352; *People v. New York C. & H. R. R. Co.* 74 N. Y. 302.

This is not a case where the omission of the officers of the law to enforce its plain command, or where the long and continued violation of the law by clubs without being prosecuted, can be relied upon as a legitimate argument that usage or custom or practical construction should be regarded by the court as any advantage in determining the meaning of this statute.

Re Manhattan Sav. Inst. 82 N. Y. 142; *Van Loon v. Lyons*, 61 N. Y. 22; *Merritt v. Cameron*, 137 U. S. 551, 34 L. ed. 775; *United States v. Graham*, 110 U. S. 219, 28 L. ed. 126.

Haight, J., delivered the opinion of the court:

The offense of which the defendant stands convicted is that of selling strong and spirituous liquors to be drunk upon the premises, without a license, in violation of § 31, of chap. 401, of the Laws of 1892.

On the 28th day of January, 1895, one Leopold M. Stark made a written order upon a piece of paper for five glasses of liquor, and delivered the same to the steward of the defendant, who filled the order from the stock of liquors belonging to the club, and the same was served to Stark and his associates, who drank it upon the premises. They were all members of the club. The following evening Stark paid the steward therefor 50 cents, which went into the treasury of the club.

The defendant was regularly incorporated on the 10th day of February, 1881, as a social club, to establish and maintain a library, reading and assembly rooms, and to promote social intercourse among its members. It is managed by a board of trustees with a membership limited to one hundred and fifty persons of full age and residents of the city of Albany. A person can be admitted as a member only when proposed by some member to whom he is personally known, and upon the recommendation of the board of trustees, and by an election by the members at a regular meeting of the club by a two-thirds vote. The initiation fee is \$50, and the annual dues \$30.

The defendant maintains a clubhouse at the corner of Division and South Pearl streets, in the city of Albany, in which there are parlors, a ballroom, diningroom, kitchen, library, cardrooms, billiard, pool and storerooms, with apartments for the janitor. Meals, cigars and liquors are served to members of the club upon their written orders at a price fixed therefor by the house committee of the board of trustees which is charged to the member, who pays therefor monthly. The money so paid in by the members, together with the annual dues, is used in defraying the general expenses of the club, its library, reading-rooms, servants, lights and fuel, and in keeping up its stock of provisions, cigars, and liquors. Its business is conducted solely for the entertainment and recreation of its members, and not for the purpose of deriving a profit beyond the defraying of its expenses. Residents of the city of Albany may be introduced to the club by any member thereof once a year. Nonresidents may in like manner be introduced, not to ex-

ceed ten times a year. A member introducing a visitor is required to register his name in a book kept for that purpose, and to be responsible for his conduct while in the club-house. From ten to twelve entertainments,—social, literary, musical, and dramatic,—are given annually, to which the female friends of members are invited.

The statute under which the defendant was indicted provides as follows: "Any person who, without having a license granted to him in pursuance of a law of this state permitting him to sell either strong or spirituous liquors, wines, ale, or beer, shall sell strong or spirituous liquors, wines, ale, or beer in quantities of less than five gallons at a time, or shall sell any strong or spirituous liquor, wine, ale, or beer in quantities of five gallons or more at a time to be drunk or used on the premises where the same shall be sold, or in any garden or enclosure communicating with such premises, or in any public street or place contiguous thereto, shall be guilty of a misdemeanor."

Upon the trial the defendant asked the court to direct the jury to find a verdict of acquittal on the grounds: First, that the facts proved do not constitute a crime. Second, that the facts proved do not show that the defendant has violated § 31, chap. 401, of the Laws of 1892 or any of the provisions of said chap. 401 of the Laws of 1892. The court refused to so direct, and an exception was taken by the defendant.

The court was then asked by the defendant to charge that "the disposing of wines and liquors by the defendant is not a sale of the same within the meaning and intent of the provisions of chap. 401, Laws of 1892, or of the laws amendatory or supplementary thereto, and that the furnishing of wines and liquors by the defendant to its members, as shown by the evidence, is not a violation of § 31, chap. 401, Laws of 1892, nor a violation of any of the provisions of said act." This was refused and an exception was taken.

Much has already been written with reference to the liability of social clubs under excise laws. An impression has prevailed that they were not brought within the provisions of the statute, and, consequently, thousands of clubs have been organized all over the country, by hotel and saloonkeepers who had been refused a license, for the purpose of evading the laws with reference thereto. The devices adopted by these so-called clubs were numerous, and in many instances ingenious. It, however, has not been difficult to ascertain the true purpose and intent of their organization. And the courts thus far have not failed to unmask such schemes, and hold the organizers thereof responsible for a violation of the law. But this defendant is conceded to be a legitimate club, regularly organized, of many years' standing, and conducted for the purposes mentioned in its articles of incorporation.

The first question is, Has the liability of such a club ever been determined by this court? Upon this question the counsel for the respective parties differ with reference to what was decided in the case of *People v. Andrews*, 115 N. Y. 427, 6 L. R. A. 128. In that case the general term held that social clubs, organized for legitimate purposes, were authorized by

the statute; that the property of the club was in effect the joint property of the members, and that the furnishing of liquors of the club to its members by the steward was not a violation of the statute. There was evidence, however, in that case tending to show that the club was a fraudulent concern, organized for the purpose of evading the law by a saloon keeper who had been refused a license; that any person could join the club upon the payment of 50 cents, which was returned to him upon his withdrawal, and that the only object and purpose of the organization were the sale of strong and spirituous liquors. The general term reached the conclusion that the trial court should have submitted to the jury the question as to whether the organization was a scheme or a device to evade the excise law. 50 Hun, 592, 595.

Upon this question the court of appeals differed with the general term, holding that the question of sale under the statute depended upon the character of the act. The opinion calls attention to the evidence in much detail, tending to show the fraudulent character of the organization; that the sales were made for cash, and the business conducted in every respect as in an ordinary saloon,—and then concludes: "Whatever may be the merits of the scheme prescribed by the organization it has no effect here. It did not control or govern the parties."

We are aware that it has been generally understood that this court in that case intended to hold clubs liable under the statute, and that the general terms in several instances have subsequently so held, resting their decisions upon that case. *People v. Sinell*, 34 N. Y. S. R. 898; *People v. Bradley*, 33 N. Y. S. R. 562; *People v. Luhrs*, 7 Misc. 503. But such was not the intention of this court, and to that extent its determination has been misunderstood. The question here presented must therefore be regarded as undecided and still open for consideration.

In 11 Am. & Eng. Enc. Law, p. 727, it is said that "the distribution of liquors by a bona fide club among its members is not a sale within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it, and the law prohibiting the sale of liquor on Sunday does not apply to such a club. It is otherwise, however, where such club is simply a device resorted to as a means of evading the statute."

Black on Intoxicating Liquors, at §142, after referring to the authorities in the different states upon the subject, concludes as follows: "Upon the whole, therefore, notwithstanding some conflicting rulings, the rational conclusion is that the intent must govern. On the one hand, if the object of the organization is merely to provide the members with a convenient method of obtaining a drink whenever they desire it, or if the form of membership is no more than a pretense, so that any person, without discrimination, can procure liquor by signing his name in a book or buying a ticket or a chip, thus enabling the proprietor to conduct an illicit traffic, then it falls within the terms of the law. But on the other hand, if the club is organized and conducted in good faith with a limited and selected mem-

bership, really owning its property in common, and formed for social, literary, artistic, or other purposes, to which the furnishing of liquor to its members would be merely incidental, in the same way and to the same extent that the supplying of dinners or daily papers might be, then it cannot be considered as within either the purpose or letter of the law."

In *Graff v. Evans*, L. R. 8 Q. B. Div. 373, the appellant was a manager of a club under the supervision of trustees, in whom all the property of the club was vested. The club was not licensed for the sale of intoxicating liquors, but these were supplied at fixed prices to members for consumption, the money produced thereby going to the general fund of the club. The manager in the course of his employment supplied liquors to a member. It was held that it was not a sale within the meaning of the licensing act. Field, J., in delivering the opinion of the court, says: "The question here is, 'Did Graff, the manager who supplied the liquor to Foster, effect a sale by retail? I think not. I think Foster was an owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whiskey supplied to him as a member at a certain price.'"

In *State Bell, v. St. Louis Club*, 26 L. R. A. 573, 125 Mo. 308, it was held that the distribution of wines or other liquors among the members of a social club which is a bona fide organization with limited membership, admission to which is only on a vote of the governing board, and with common ownership of property, is not a sale of liquor within the meaning of the Missouri dramshop act. This is a recent case, and the opinion contains a review of all of the decisions upon the subject.

The courts in our sister states are in conflict upon the question discussed in the above cases. Many of the decisions are based upon local statutes differing materially from our own, and other cases are disposed of upon the ground of the fraudulent character of the organization. Attention is called to *Com. v. Ewig*, 145 Mass. 119; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Tennessee Club v. Dwyer*, 11 Lea, 462, 47 Am. Rep. 298; *Piedmont Club v. Com.* 87 Va. 541; *State, Columbia Club, v. McMaster*, 35 S. C. 1; *Barden v. Montana Club*, 10 Mont. 330, 11 L. R. A. 593; *Koenig v. State*, 33 Tex. Crim. Rep. 367; *People v. Soule*, 75 Mich. 250, 2 L. R. A. 494; *State v. Horacek*, 41 Kan. 87, 3 L. R. A. 687; *State, Newark, v. Essex Club*, 53 N. J. L. 99; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *State v. Price*, 103 N. C. 787, 12 L. R. A. 412; *State v. Mercer*, 32 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *State v. Easton Social, L. & M. Club*, 73 Md. 97, 10 L. R. A. 64; *Kentucky Club v. Louisville*, 92 Ky. 309; *Newell v. Hemingway*, 16 Cox, C. C. 604; *Com. v. Pomphret*, 137 Mass. 564-567.

For a full and elaborate discussion of the cases we refer to *Black on Intoxicating Liquors*, § 142, and to *State. Bell, v. St. Louis Club, supra*. A further discussion of them here we do not deem necessary or profitable, for the question presented must be determined upon a construction of our own statute. It first provides for the creation of boards of excise in towns and cities, prescribes their powers and duties, and then, in § 19, provides that "a board of excise may, when authorized by law, and not otherwise, grant," etc., a license. It then specifies the cases in which a license may be granted: First, to the keeper of an inn, tavern or hotel; second, to the keeper of a saloon; third, to the keeper of a saloon for the sale of ale and beer only; fourth, to the keeper of a store; and fifth, to the keeper of a drug store. The statute contains no provision authorizing the issuing of a license to a club or an organization of the character of the defendant. And it was conceded on the part of the learned district attorney upon the argument that the defendant was not an inn, tavern, or hotel, a saloon, store, or drug store within the meaning of the act which permitted boards of excise to issue a license to it. We are thus brought to a consideration of the provisions of § 31, under which the defendant was indicted. It is prohibitory as to form and character of the sale of strong and spirituous liquors wines, ale, or beer by a person without having a license. It provides that a person offending shall be guilty of a misdemeanor. This section doubtless must be considered in connection with § 19, which, as we have seen, regulates the sale of strong and spirituous liquors by requiring persons who engage in that business to first procure a license, and specifies the kinds of license which the board of excise may issue. The fact that clubs of the nature of the defendant are not included within its provisions has an important bearing upon the meaning to be placed upon the provisions of § 31. In this connection the construction placed upon a statute penal in character, by public officers charged with the duty of executing its provisions for many years, may properly be considered in determining the legislative intention. *Potter's Dwarrr. Stat.* 183, 184; *People, Williams, v. Dayton*, 55 N. Y. 367-378; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079. Upon this subject the evidence shows that clubs in this state have existed for a long period, that they have not

31 L. R. A.

been required to take out a license, and yet it is a well-known fact that they have kept on hand stocks of liquors which they distributed to their members. Was it then intended that the distribution of liquors by a club among its members should be a sale within the contemplation of the statute? If so commissioners of excise, police officers and district attorneys have for many years neglected their official duties.

As we have seen, the defendant is a social club organized under the statute for a legitimate purpose, to which the furnishing of liquors to its members is merely incidental and is not unlike the supplying of diners or articles which the member may desire for his own comfort and entertainment. The defendant has a limited and selected membership. And while the property and supplies are technically owned by the club, each member is, in equity, an equal owner in common. It was not organized for the purpose of engaging in a business for profit, or for the traffic in liquors. It engages in no business other than that which pertains to the maintenance of its library, reading-rooms, and the social intercourse and comfort of its members. Liquors, as well as other supplies, are distributed to its members upon the written order of the member at a price fixed by the officers of the club designed to cover the purchase price and disbursements in serving. These orders pass to the steward or treasurer of the club and are charged against the member, who settles therefor monthly. We think that the transaction with Stark did not amount to a sale within the meaning of the statute. It was but a distribution among the members of the club of the property that belonged to them. The fact that a payment was made does not change the character of the act, for it was but the means adopted by which each member could receive his own and not that belonging to his fellow member. The payment went into the treasury to ultimately restore that which he had taken.

We think the court erred in refusing to charge as requested that the act charged against the defendant was not a violation of the statute, and that the judgment of the General Term and Court of Sessions should be reversed, and the defendant discharged.

All concur.

WISCONSIN SUPREME COURT.

STATE of Wisconsin, *Resp't.*,James S. DUKET, *Appt.*

(90 Wis. 272.)

1. **The power of the legislature over the subject of marriage** as a civil status is unlimited and supreme except as restricted by the Constitution.
2. **A statute providing that a sentence to imprisonment for life shall operate as an absolute dissolution of the marriage** of the party does not violate the provision of Const. art. 4, § 24, that the legislature shall never grant any divorce.
3. **The reversal of a sentence to imprisonment for life** on account of error, but not for want of jurisdiction, does not operate to restore the marriage relation of the convict, which had been dissolved by the sentence, under Rev. Stat. § 2385.

(April 23, 1895.)

NOTE.—The effect of a conviction and sentence of either husband or wife upon the marriage relation.

- I. *In general.*
- II. *Necessity of a conviction.*
- III. *Effect of an appeal from conviction.*
- IV. *Effect of commutation of the sentence or of a pardon.*
- V. *Conviction in another state.*
- VI. *Retroactive effect of statute.*
- VII. *Allegation of infamous crime.*
- VIII. *Where crime is prior to marriage.*
- IX. *Conviction as desertion.*
- X. *Classed with cruelty.*
- XI. *Conviction as a bar to divorce by the party convicted.*

As to civil death in the United States, see note to Davis v. Laning (Tex.) 18 L. R. A. 82.

I. *In general.*

At common law, independent of statutory enactment, the conviction and sentence of either husband or wife was not a ground for divorce or an annulment of the marriage relation.

In most of the states of the Union, however, such conviction and sentence have been made a statutory ground for a decree *a vinculo*.

There are some few states, however, which make the commitment and sentence a ground for an absolute annulment of the marriage without any proceedings by way of divorce or otherwise. This will be found to be the case in Maine, Michigan, Rhode Island, and Wisconsin.

In Alabama imprisonment in any state penitentiary for two years, the sentence being for seven years or longer, is a ground for divorce. Civil Code, ed. 1886, § 2322, p. 523.

And in Arizona conviction of a felony after marriage, and imprisonment in any prison, are a ground for divorce, but cannot be prosecuted until six months after conviction, provided that one is not convicted on the evidence of the other, and a pardon does not take away the right. Rev. Stat. ed. 1887, § 2111, p. 374.

So, in Arkansas, conviction of felony or other infamous crime entitles the innocent party to a divorce. Dig. Stat. ed. 1884, chap. 52, § 2558, p. 580.

And in California the conviction of a felony is 31 L. R. A.

APPEAL by defendant from a judgment of the Circuit Court for Ashland County, convicting him of adultery. *Reversed.*

Statement by **Pinney, J.:**

This case comes before the court upon exceptions under § 4720, Rev. Stat. from which it appears that the defendant was tried and convicted in the circuit court for Ashland county upon an information charging him with having on the 6th of May, 1893, at the county of Ashland, and thence continuously up to October 3, 1893, committed adultery with Lucy French, then and there the lawful wife of William G. French, who was then and there still alive, etc. The case was submitted to the jury on a stipulation of facts, namely: That William G. French and Lucy M. French were married about the year 1875, and are both still living; that in June, 1891, William G. French was convicted of murder in the first degree, and sentenced to imprisonment for life, and said sentence was executed; that May 22, 1893, the supreme court of Wisconsin reversed such

ground for divorce. Deer. Civ. Code, ed. 1886, § 92, p. 32.

By the Colorado statutes the conviction of a crime or infamous offense entitles the innocent party to a divorce. 1 Mills' Anno. Stat. chap. 43, p. 1035, § 1562.

So, in Connecticut among the statutory grounds for which divorce may be granted will be found, sentence to imprisonment for life, and the conviction of an infamous crime involving a violation of conjugal duty, subjecting the offender to imprisonment in the state prison. Gen. Stat. ed. 1888, p. 612, § 2802.

So, under the Revised Code of the District of Columbia of 1857 sentence of imprisonment for life or for seven years or more was a statutory ground for divorce, but it would seem that by the act of June 19, 1860, chap. 158, and June 1, 1870, chap. 116, the same is not now a ground of divorce. Rev. Stat. § 738, p. 88.

And under the laws of Delaware the conviction in or out of the state after marriage, of a crime made such under the state law, no matter whether such crime was perpetrated before or after marriage, is a ground of divorce. Del. Laws, ed. 1893, chap. 75, § 1, p. 595.

In Georgia, under the Code, a sentence of imprisonment for two or more years for an offense involving moral turpitude is a ground for total divorce. Code, ed. 1882, p. 395, § 1712, subd. 8.

So, in Idaho the conviction of a felony entitles the innocent party to a divorce under the laws of that state. Rev. Stat. ed. 1887, § 2457, p. 304.

So, the Revised Statutes of Illinois make the conviction of felony or other infamous crime a ground of divorce. 1 Starr & C. Anno. Stat. ed. 1885, p. 885, chap. 40, ¶ 1, § 1.

And the Revised Statutes of Indiana make the conviction after marriage in any country, of either party, of an infamous crime, a ground. 1 Rev. Stat. Myer's ed. 1888, § 1033.

In Iowa the conviction of felony after marriage works a divorce under the Code. 1 McClain's Anno. Code, ed. 1888, p. 891, § 3414.

And in Kansas the conviction of felony and imprisonment therefor subsequent to the marriage is made a ground of divorce. 2 Gen. Stat. ed. 1889, p. 1563, § 4749.

sentence, and granted a new trial; that on May 6, 1893, said Lucy M. French and the defendant were married, and lived together as man and wife up to the time of his arrest for this offense; that before such marriage the defendant had been advised by counsel that the conviction and sentence of William G. French constituted a legal separation, without further judicial proceedings, entitling him to marry her without the intervention of a decree of divorce; that the marriage was consummated on said facts and advice, and had no reference to proceedings in the supreme court; that the defendant at the time of the marriage knew of the proceedings then pending in such court for a new trial; and that, after the reversal of the sentence, defendant was advised by counsel that such reversal did not restore William G. French and Lucy M. French to their marital rights, and that the defendant would testify that such marriage was made by him in good faith. The prosecution and defense thereupon rested. Defendant moved the court to direct a verdict in his favor, on the ground that the state had failed to prove a case, but the court refused such direction. The court charged the jury: (1) That

if they found the facts stipulated against the defendant by him to be true, and they were satisfied therefrom of defendant's guilt, they should convict him; (2) That if the conviction and sentence of William G. French had been legal, it would have been a complete defense, but the supreme court reversed the judgment of sentence, and held the same to be invalid; (3) That as a matter of law, the conviction of William G. French being illegal, it was no defense which would be of any avail or benefit to the defendant. Exceptions were taken to the refusal to instruct the jury as requested, and for giving each of the several instructions stated.

Messrs. Tomkins & Merrill, for appellant:

The provision of the statute is that on the happening of a certain event then the marriage tie shall be dissolved, that is, the relation of husband and wife shall cease to exist. This relation is not a contractual relation but a status.

Bishop. Mar. & Div. § 667; Cooley, Const. Lim. § 182.

Under the General Statutes of Kentucky condemnation for felony in that state or elsewhere is a ground. Stat. ed. 1894, chap. 66, art. 2, § 2117, p. 768.

So, in the Louisiana Code condemnation to an infamous punishment, or where the party, being charged with an infamous offense, flees from justice, is made the ground for a divorce from bed and board. Rev. Code, ed. 1889, title 5, art. 138, p. 68.

And by article 139 of the same, married persons may claim reciprocally a divorce for the causes named in the prior section, but except where, *inter alia*, there have been a conviction and sentence no divorce can be granted unless a judgment of separation has been decreed and a year has expired without reconciliation.

Under Maine Rev. Stat. ed. 1883, chap. 60, § 1, p. 520, the sentence of either party to imprisonment for life and confinement under it dissolves the marriage without legal process.

The Public Statutes of Massachusetts make provision for a divorce when either party has been sentenced to confinement at hard labor for life, or for five years or more in the state prison, or in a jail or house of correction, and also declare that a pardon granted to the guilty party after such a divorce will not restore the conjugal rights. Pub. Stat. ed. 1887, chap. 146, § 2, p. 813.

Under the Revised Statutes of Michigan the sentence of imprisonment for life in any prison, jail, or house of correction absolutely dissolves the marriage without a divorce, and a pardon does not restore the party's rights. 2 How. Stat. ed. 1882, title 23, chap. 237, § 6227, p. 1621.

And in Minnesota the sentence of imprisonment in a state prison subsequent to the marriage is a ground for divorce, and a pardon does not restore the conjugal rights. 1 Gen. Stat. ed. 1878, chap. 62, title 1, §§ 6, 7, p. 823.

And a similar provision is contained in the Mississippi Code, which makes the sentence to the penitentiary a ground for divorce, provided the guilty party is not pardoned before being sent there. Anno. Code, ed. 1892, chap. 36, § 1562, p. 419.

So, the Revised Statutes of Missouri make the conviction and sentence during marriage of a felony or infamous crime a ground for divorce. 1 Rev. Stat. ed. 1880, chap. 53, § 4501, p. 1029.

And the Montana Code provides for a divorce upon the conviction of felony or other infamous

crime without subsequent cohabitation. Comp. Stat. ed. 1887, chap. 58, p. 919, § 999.

Under the statutes of Nebraska the sentence of imprisonment in any prison, jail, or house of correction for three years or more is a ground for divorce, and no pardon restores the conjugal rights. Consol. Stat. ed. 1893, chap. 13, § 1422, p. 410.

And under the same section imprisonment for life is also a ground, and a pardon has no effect. *Ibid.*

The Nevada laws provide for divorce in case of conviction for felony or infamous crime.

So, under the General Laws of New Hampshire the conviction of either party of crime punishable in that state with imprisonment for more than a year is made a ground for divorce, provided the guilty party be actually imprisoned under such conviction. Pub. Stat. ed. 1881, chap. 175, § 5, p. 496.

And conviction for a felony is a ground for divorce in North Dakota. Rev. Code, ed. 1895, § 2737, p. 611.

So, the Revised Statutes of Ohio make the imprisonment of either party in a penitentiary under sentence thereto a ground for divorce where the petition is filed during the imprisonment. 2 Rev. Stat. ed. 1896, title 1, div. 7, chap. 6, § 5680, p. 1426.

The conviction of felony is also made a ground of divorce under the General Laws of Oregon. 1 Hill's Anno. Laws, ed. 1892, chap. 5, title 7, § 495, p. 452.

And under the laws of Pennsylvania of May 8, 1854 (Pamph. Laws, 644), the sentence of either party for a felony to the county prison for any term exceeding two years or to the penitentiary for a life term entitled the innocent party to a divorce.

And now by the act of June 1, 1891 (Pamph. Laws, 142), the conviction of forgery or other infamous crime either theretofore or thereafter, within or without the state, and sentence to any term exceeding two years, provided that if convicted out of the state the crime be one punishable within the state by imprisonment for two years or more, is a ground for divorce.

The Public Statutes of Rhode Island provide for divorce in case either party be deemed or treated to be civilly dead by reason of the commission of a crime. Pub. Stat. 1882, title 20, chap. 167, § 1, p. 423.

The statutes of Tennessee make provision for divorce upon the conviction of any crime which by

The court had jurisdiction of the party and of the cause of action and the sentence rendered was valid and binding on all parties interested and as such must be respected and enforced unless avoided by appropriate proceedings instituted for that purpose.

Freem. Judgm. § 116; *Cone v. Cone*, 58 N. H. 152.

The presumptions are in favor of innocence. Bishop, Mar. & Div. § 123.

Messrs. W. H. Mylrea and L. K. Luse, for the State:

Section 2355 is a violation of § 24, art. 4, of our Constitution, for the reason that it allows the legislature to accomplish indirectly that which it is prohibited from doing directly.

Civil death is unknown in this country.

1 Bishop, Crim. L. § 96.

The reversal of the sentence of imprisonment of French for life related back to the time of sentence.

Crouch v. Crouch, 30 Wis. 667; *R—— v. R——*, 20 Wis. 332; *Everett v. Everett*, 60 Wis. 200.

Pinney, J., delivered the opinion of the court:

The exceptions present questions of some difficulty and of great importance, namely: (1) In respect to the validity and effect of § 2355, Rev. Stat. which provides that "when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved, without any judgment of divorce or other legal process, and no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights." (2) Whether the marriage of the defendant with the former wife of French, which took place after his conviction and sentence to imprisonment for life, and while he was imprisoned under it, but before the reversal of the sentence, was rendered void by such reversal, and French was thereby restored to his former conjugal rights. The statute in question has been in force ever since the Revision of 1849, and has not hitherto been the subject of consideration in this court. Such or similar statutes exist in Michigan and Maryland, and perhaps in other states.

the laws of that state renders the party infamous, and also upon the conviction of any crime which by the laws of that state is declared a felony, whereof the offender has been sentenced to confinement in the penitentiary. Code, ed. 1884, § 3306, p. 611.

The Revised Statutes of Texas make provision for a divorce in favor of either one of the parties when the other has been convicted subsequent to marriage of a felony and imprisoned in the state prison, but provide that no such divorce shall be sustained on account of such conviction for felony until twelve months after final judgment of conviction, nor even then where the governor has pardoned the convict, provided the husband has not been convicted on the testimony of the wife, nor the wife on the testimony of the husband. 1 Sayles, Civ. Stat. chap. 4, art. 2861, p. 895.

So, the laws of Utah make provision for divorce upon the conviction of felony subsequent to marriage. Comp. Laws, ed. 1876, § 2, p. 375.

And the Revised Statutes of Vermont also contain provisions for divorce when either party has been sentenced to confinement at hard labor in the state prison for life or for three years or more, and is actually confined at the time, and no pardon restores the rights. Rev. Laws, ed. 1880, title, 16, chap. 123, § 2362, p. 477.

The Code of Virginia contains the provision for divorce when either of the parties is confined in the penitentiary (and a pardon does not affect the rights of the innocent party); and also where, previous to marriage, either the husband or the wife without the knowledge of the other has been convicted of an infamous crime; and also in cases where the party charged with an offense punishable with death or confinement in a penitentiary has been indicted and is a fugitive from justice absent for two years. Code, ed. 1887, p. 561, § 2267.

And under the Code of Washington imprisonment in the penitentiary entitles the innocent party to a divorce provided the petition is filed during the term of imprisonment. 2 Hill's Stat. & Codes, chap. 17, § 764, p. 363.

So, under the Code of West Virginia the sentence to confinement in the penitentiary and the conviction of an infamous offense prior to marriage, where such offense has been committed without the knowledge of the other party, is made a ground for divorce, and a pardon has no effect. Code, ed. 1891, chap. 64, § 5, p. 612.

And the Revised Statutes of Wisconsin make section 31 L. R. A.

tence of imprisonment for life a ground for the absolute dissolution of the marriage, without any judgment or decree, and declare a pardon of no effect to restore the conjugal relation, and also provide for divorce in case of sentence of imprisonment for three years or more, with a like result as to pardon. 1 Sanborn & Berryman, Anno. Stat. §§ 2355, 2356, p. 1365.

So, under the laws of Wyoming, sentence to imprisonment for felony in any prison is made a ground for divorce, and a pardon has no effect. Rev. Stat. ed. 1887, chap. 3, p. 419, § 571.

The Revised Statutes of New York (Birdseye's ed. vol. 2, p. 1416, § 5), provide that "a person sentenced to imprisonment for life is thereafter deemed civilly dead," and the same provision is found in § 708 of the Penal Code of that state.

And with respect to outlawry, it is provided in the same statutes (Birdseye's ed. § 6, p. 2142), that the defendant is thereupon deemed civilly dead, and forfeits to the people of this state during his lifetime, and no longer, all freehold estate in real property of which he was seised in his own right at the time of committing the treason, or at any time thereafter, and all his personal property; and the same provision is found in § 819 of the Code of Civil Procedure of that state.

In *Re Deming*, 10 Johns. 232, it was stated that the effect of a pardon was to acquit the offender of all the penalties annexed to the conviction, and to give him a new credit and capacity, the limitation of the operation on his antecedent rights being such that he could not divest any person of any right or interest which the law had permitted to be acquired and vested in consequence of the judgment, and therefore such pardon could not annul or affect the validity of a second marriage of the wife.

Although there is no direct statutory enactment in that state making the conviction and imprisonment for a crime a direct ground for divorce and annulment of the marriage, yet it would seem from the above case that such imprisonment would have the effect of annulling the marriage, although the proceedings in that case did not directly involve the question of the legality of the second marriage of the wife, the action being brought by the husband, after he was pardoned, to restore him to the rights and duties appertaining to his position as parent.

In *Johnson v. Johnson*, Walk. Ch. (Mich.) 300, 312, it was held that sentence to hard labor in any

Prior to the adoption of the state Constitution, the district courts of the territory had jurisdiction to grant divorces, on bills filed for that purpose, for specified causes (Territorial Stat. 1839, p. 140), and the territorial legislature exercised at the same time a power of granting divorces by special acts, twenty-four of which were granted at the last session of the territorial legislature. By § 24, art. 4, of the Constitution, it is provided that "the legislature shall never authorize any lottery, or grant any divorce;" and ever since the adoption of the Constitution the courts have had power to grant divorces from the bonds of matrimony for specified causes, and, among others: "When either party subsequent to the marriage has been sentenced to imprisonment for three years or more; and no pardon granted after divorce for that cause shall restore the party sentenced to his or her conjugal rights." Similar statutes to the last have existed from an early period in other states. The contention on the part of the state is that § 2355, Rev. Stat. is void, in that, in effect, in the case specified it grants a divorce, and that, if valid and operative, the

subsequent reversal of the sentence of French avoided the marriage of his wife with the defendant, which had taken place in the meantime, and restored French to his former conjugal rights, and rendered the subsequent cohabitation of the defendant with Lucy M. French criminal.

The relation of two married persons to each other is not a mere personal relation, or a mere contract between them, though it comes into existence in pursuance of a contract; but it is a status or legal condition established by law, involving, not only the wellbeing of the parties, but also the highest interests of society and the state, and having more to do with the morals and civilization of a people than any other institution. It has always been subject to the control of the legislature; and it has always been competent for the legislature, in the absence of constitutional restriction, to put an end to the relation in the interest of the parties as well as of the state. Subject to this qualification, and saving the rights of property already vested in either party, the state that created the relation can change or abrogate it; and, as it is not a

prison, jail or house of correction for three or more years was a good ground for divorce under the Michigan statute, and that upon the dissolution of a marriage by reason of such sentence, the wife was entitled to the possession of the property as though her husband were dead.

Where, in proceedings for divorce upon the ground of the husband's confinement in the penitentiary for horse stealing, the facts were proved, and in the record of conviction his name was stated differently, but in the divorce proceedings witnesses proved that he was one and the same man, the decree was awarded. *Utsler v. Utsler*, Wright (Ohio) 827.

In *Foy v. Foy*, 13 Ired. L. 96, it is stated that if a husband is accused of a crime, or if he is guilty of it, it is not sufficient cause for his wife to refuse to live with him, and she is not thereby justified in a violation of her marriage vow, as she agreed to take him for better or for worse.

The conviction of an assault with intent to commit a rape, will not authorize a divorce under the Pennsylvania act of June 1, 1890, making a conviction of an infamous crime a cause for a divorce. *Wheeler v. Wheeler*, 2 Pa. Dist. R. 567, 10 Lanc. L. Rev. 267.

And where, after the husband had been convicted and sentenced for the crime of adultery, the wife cohabited with him in prison with knowledge of the offense, it was held she was not entitled to a divorce. *Delliber v. Delliber*, 9 Conn. 233.

In *Lucas v. Lucas*, 2 Tex. 112, it was held that the word "outrage" as used in § 31 of the Texas statute of 1841, relating to divorce and alimony, could not be construed so as to include cases of alleged commission of theft or other crime which related solely to outrages to the person.

So, in *Wright v. Wright*, 6 Tex. 3, it was held that even the commission of a felony or other capital crime was not a cause for divorce under the Texas statute in the absence of some other finding of facts, such as murder of a child of the marriage, such murder being an outrage upon the feelings of the parent.

The fact that the husband had been convicted and sentenced for forgery was held not to be sufficient ground for divorce under the Texas statute, which granted divorce upon the grounds of adultery, intentional abandonment of three years, and such cases of cruel treatment or outrages of one towards the other as would render their living together insufferable, the court stating that the fact that he had committed forgery could not of itself raise the most remote presumption that he would inflict violence on the wife or do her bodily harm. *Sharman v. Sharman*, 18 Tex. 521.

II. Necessity of a conviction.

Before either of the parties can claim a dissolution of the marriage upon the ground of the commission of a felony, it must be shown that the party charged has been actually convicted. See the statutes of the several states, *supra*.

In *Thomas v. Thomas*, 51 Ill. 162, it was held that the commission of a larceny without conviction was no ground for a divorce under the Illinois statute.

So, in *Vinsant v. Vinsant*, 49 Iowa, 630, in order to secure a divorce upon the ground of a conviction of felony under § 2223 of the Iowa Code, it must be shown that such conviction is final and absolute, and it must further be shown that no appeal is pending or has been prosecuted.

In that case the court stated that the statute did not refer to a conviction from which an appeal had been prosecuted, and which was liable to reversal, but to a conviction which was final and absolute, either because of affirmance in the appellate court or because no appeal had been prosecuted.

And in *Handy v. Handy*, 124 Mass. 394, it was held that as soon as the husband had been convicted and sentenced the right of the wife to apply for an absolute divorce was complete.

And see *Foy v. Foy*, 13 Ired. L. 96, *supra*, 1.

III. Effect of an appeal from conviction.

It has been held that if a conviction is appealed from it cannot be regarded as a ground for divorce pending the appeal. *Vinsant v. Vinsant*, 49 Iowa, 630; *Rivers v. Rivers*, 60 Iowa, 378, 65 Iowa, 568.

Where a divorce was sought upon the ground of a felony committed by the defendant, and such divorce was refused upon the ground that an appeal had been taken from the conviction, it was held that such action was no bar to a subsequent action for divorce under the Iowa statute, upon the same ground, where the conviction was affirmed upon appeal, inasmuch as the ground for a divorce had no existence at the time of the institution of the first proceedings, as there was then no conviction which was a cause of divorce. *Rivers v. Rivers*, *supra*.

contract or a vested right, the law putting an end to the relation, and extinguishing the status of the parties as husband and wife, does not fall within the prohibition against the impairment of the obligation of contracts or the divesting of vested rights. The power of the state, within these limitations, over the civil status of its own citizens, is supreme and absolute, and the legislative will is a sufficient reason for its action. *Cookey, Const. Lim.* 111. 112; 1 *Bishop, Mar. & Div.* §§ 11-15, 1426 *et seq.* 1492; *Cook v. Cook*, 56 *Wis.* 207, 43 *Am. Rep.* 706; *Shafer v. Bushnell*, 24 *Wis.* 373; *Maynard v. Hill*, 125 *U. S.* 205, 31 *L. ed.* 657; *Pennoyer v. Neff*, 95 *U. S.* 734, 24 *L. ed.* 573; *Cronise v. Cronise*, 54 *Pa.* 255, 261; *Maguire v. Maguire*, 7 *Dana*, 181, 183; *Star v. Pease*, 8 *Conn.* 541; *Ditson v. Ditson*, 4 *R. I.* 87; *Noel v. Eving*, 9 *Ind.* 37. In *Niboyet v. Niboyet*, *L. R.* 4 *Prob. Div.* 11, Brett, *L. J.*, said that "marriage is the fulfilment of a contract satisfied by the solemnization of the marriage; but marriage, directly it exists, creates by law a relation between the parties and what is called a status of each. The status of an individual,

used as a legal term, means the legal position of the individual in or with regard to the rest of a community. That relation between the parties, and that status of each of them with regard to the community which are constituted upon marriage are not imposed or defined by contract or agreement, but by law." In *Maynard v. Hill*, *supra*, the same conclusion was reached, and it was there held that marriage is an institution of society, regulated and controlled by public authority, and that legislation affecting it and annulling the relation between the parties is not within the prohibition of constitutional provisions against the impairment of contracts by state legislation; and the validity of legislation, whether general or special, dissolving the relation on particular grounds, is within the competency of legislative authority, unless restrained by constitutional provisions. The opinion of the court in this case by Mr. Justice Field, is an elaborate and learned exposition of the law on the subject under consideration. The power of the legislature over the subject of marriage as a civil status is unlimited and supreme, subject only to the re-

But where the libel alleged and proved that the defendant was actually imprisoned in the state prison under a sentence for more than a year, it was held that the defendant's actual imprisonment under such judgment was a cause for divorce even though a bill of exceptions for the reversal of the judgment was pending, for the reason that the statute (*N. H. Gen. Stat. chap. 163, § 3*) did not recognize the reversible character of such judgments as a means for suspending their operation in divorce proceedings. *Cone v. Cone*, 58 *N. H.* 152.

See also, as supporting the same doctrine, the main case of *STATE v. DUKET*.

IV. Effect of commutation of the sentence or of a pardon.

With respect to the effect of a pardon, the statutes of most of the states make express provision that a pardon does not revive the marriage relation or restore conjugal rights, and such provisions will be found in the statutes of Arizona, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See *supra*, 1.

But in *Young v. Young*, 61 *Tex.* 191, under the Texas statute authorizing the granting of divorces in favor of either the husband or wife when the other had been convicted, after marriage, of a felony, and imprisoned in the state prison, provided that no suit for divorce should be sustained because of the conviction of either party of felony until twelve months after final judgment by conviction, nor then if the governor shall have pardoned the convict, and also provided that the husband had not been convicted on the testimony of the wife nor the wife on the testimony of the husband, it was held that the effect of the commutation of the punishment was not equivalent to a pardon of the party convicted, and therefore did not relieve such party from the consequences attached to the conviction.

See also *Re Deming*, 10 *Johns.* 232, *supra*, 1.

V. Conviction in another state.

In some few states the statutes make an express provision and declare that the conviction and sentence in another state or country is sufficient to found the divorce, such is the case in Delaware, Indiana, Kentucky, Michigan, Minnesota, Nebraska, Pennsylvania, and Wyoming. See *supra*, 1.

But the provisions of the Massachusetts statutes 31 *L. R. A.*

relating to divorce (*Pub. Stat. chap. 146, § 2*), do not apply to a case where the defendant has been committed and sentenced to imprisonment in the state prison of another state. *Leonard v. Leonard*, 151 *Mass.* 151, 6 *L. R. A.* 632.

The term "the state prison," when used without further description, in the Revised Statutes, as well as in the more recent legislation of the state of Massachusetts, has been held to mean the state prison of that commonwealth. *Beard v. Boston*, 151 *Mass.* 96.

So, it is no ground for a divorce under the New Hampshire statute, upon the ground of conviction of crime and actual imprisonment in the state prison, where the conviction and imprisonment are not within the jurisdiction of the court. *Martin v. Martin*, 47 *N. H.* 52.

And under the New Hampshire statutes it has been held that the term "the state prison" is limited so as to exclude the state prison of another state. *Ibid.*

In *Kluttz v. Kluttz*, 5 *Sneed*, 423, it was held that the Tennessee statute of 1842, chap. 133, § 3, did not apply to causes of conviction and sentence to a penitentiary out of the state, the express language of the statute being "that if any person, being husband or wife, has been, or shall be, convicted of any crime, which by the laws of this state is declared to be a felony, and sentenced to confinement in the penitentiary," the same shall be a good cause for a divorce from the bonds of matrimony.

In the above case the crime committed was felony by the laws of Tennessee as well as by the laws of Kentucky, where the conviction was had, and was punishable in both states by confinement in the penitentiary, and the court stated that although reason and policy would require the enlargement of the language of the act so as to extend to cases of conviction of felony in another state or country, yet the extension must be done by the legislature, and not by the courts.

Under the Pennsylvania act of June 1, 1891 (*Pamph. Laws* 142) *supra*, 1, it has been held that the fact that a husband was indicted, sentenced, and imprisoned for forgery in Kansas under two indictments for a period of one year on each indictment from the day of his reception by the warden of the penitentiary was no ground of divorce even though the concurrent sentence was cumulative, as it did not exceed two years. *Frantz v. Frantz*, 11 *Pa. Co. Ct.* 467, 1 *Pa. Dist. R.* 241.

striction in the Constitution that the legislature shall never "grant any divorce." This statute does not grant a divorce to any one, either absolutely or conditionally. It provides that "when either party shall be sentenced to imprisonment for life, the marriage shall be thereby absolutely dissolved without any judgment of divorce or other legal process;" that is to say, the termination of the matrimonial status is unconditional, for the reason that the party against whom it has been pronounced is no longer capable of performing the duties, public and domestic, of the matrimonial relation. The dissolution of the marriage is consequent upon the sentence, and results from the operation of a general law, acting uniformly, and affecting alike all persons under the conditions specified in the statute, and not by special grant, or in a particular instance. The legislature had the power to enact general laws prescribing the result of such a sentence upon the civil status of the defendant, as well as the matrimonial status of any one to whom he might be united in marriage. By the common law certain consequences resulted from judgment given in capital cases, namely, attainder, "by which the defendant was no longer of any credit or reputation. He cannot be a witness in any court, neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law." And the consequences of attainder were forfeiture and corruption of blood, which worked forfeiture of his real and personal estates. 4 Bl. Com. 380, 381. There is no such thing as civil death in this country, and no conviction in this state can work corruption of blood or forfeiture of estate. Const. art. 1, § 12. Yet by general laws in this as

well as other states, it has been provided that certain consequences shall result from conviction or sentence for crime. We are not aware that the power to enact such laws has ever been judicially questioned. Certainly we see no ground for doubting the validity of such acts so long as they relate only to subjects within the undoubted scope of legislative power. Constitutional disqualification to exercise the right of suffrage exists, as that no "person convicted of treason or felony shall be qualified to vote at any election unless restored to civil rights." Wis. Const. art. 3, § 2. This is a law, merely, in its operation, but is embodied in the Constitution to give it a sanction and permanency not incident to ordinary legislation, to secure the purity of the ballot box. And it is provided that laws may be passed excluding from the right of suffrage all persons who have been or may be convicted of any infamous crime, and depriving every person who shall make or become directly or indirectly interested in any bet or wager dependent upon the result of any election of the right to vote at such election. Const. art. 3, § 6; Rev. Stat. § 12, subd. 4. By § 4935 it is provided that, when any person sentenced to imprisonment in the state prison is holding at the time any office under the Constitution and laws of the state, such office shall be deemed vacated from the time of his commitment to prison, but, if the judgment is reversed, he shall be restored to his office, with its rights, etc., but not by reason of being pardoned. The intent of the constitutional provision that the legislature shall not "grant any divorce" was not to restrict the legislature in the enactment of appropriate general laws, but the mischief sought to be suppressed was the granting of divorces by the

And it has also been held under the same statute that even though the crime be punishable in the state of Pennsylvania by a sentence for two years or more, yet it was no ground of divorce where the sentence in the other state was only for two years or less. *Ibid.*

VI. Retroactive effect of statute.

In *Greenlaw v. Greenlaw*, 12 N. H. 200, it was held that the New Hampshire statute did not apply to a case where the conviction and imprisonment existed before the passage of the act, the court stating that a construction of the statute which would convert existent matter into a cause of divorce, when its origin furnished no grounds for a dissolution of the marriage, and its continuance was without the volition of the party, was, in effect, to give the statute a retrospective operation, which was not its true construction.

But it would seem that the Pennsylvania act of 1861, *supra*, I, relates to both past and future convictions.

VII. Allegation of infamous crime.

In *Polson v. Polson*, 140 Ind. 310, the complaint alleged that the defendant "was convicted of the crime of rape upon a little girl, the daughter of the plaintiff" and it was contended upon behalf of the defendant that such allegation was insufficient upon the ground that it did not charge that the crime was infamous, but the court held that the infamy was sufficiently apparent, and would support a decree in divorce under § 1044 of the Revised Statutes of Indiana of 1894, being § 1032 of the Revised Statutes of 1881.

31 L. R. A.

VIII. Where crime is prior to marriage.

Express provision is made in some of the state statutes upon the question; thus, in Delaware, Pennsylvania, and West Virginia a divorce will be granted whether the crime was before or after marriage. See the state statutes, *supra*, I.

Where at the time of a marriage the libelant knew or had good reason to believe that the libelee would be sentenced to imprisonment for life in the state prison upon a prior conviction of murder, it was held that the subsequent affirmance of such conviction raised no ground for divorce under the Vermont statutes. *Caswell v. Caswell*, 84 Vt. 557.

IX. Conviction as desertion.

It has been held that if the husband's desertion is not voluntary, but due to imprisonment or coercion, it is no ground for a divorce upon the ground of desertion. *Frantz v. Frantz*, 11 Pa. Co. Ct. 467, 1 Pa. Dist. R. 241.

So, the imprisonment of a husband does not amount to an obstinate and wilful remaining away from her within the meaning of the New Jersey statutes, for the reason that the husband was not able to return. *Wolf v. Wolf*, 38 N. J. Eq. 128.

In *Wolf v. Wolf*, *supra*, a divorce was refused where the husband had abused his wife and forced her to return to her parent's home where he followed her and shot at her, for which offense he was subsequently tried and convicted and sentenced to imprisonment and was released after divorce proceedings were instituted, the court holding that his absence since the date of his brutal treatment of the wife did not amount to wilful continuance and obstinate desertion within the meaning of the New Jersey statutes.

legislature in special instances, by special laws,—in view of the ease and facility with which such divorces might be procured, a power likely to be capriciously, improvidently, and sometimes unjustly exercised. By the Constitution of the state of Michigan, in 1836, it was provided that “divorces shall not be granted by the legislature, but the legislature may by law authorize the higher courts to grant them under such restrictions as they may deem expedient;” and under this provision an act was passed authorizing the circuit court in St. Joseph county to grant a divorce between parties named therein, under the general provisions of the statute, provided it should be made to appear satisfactorily that the wife had been for the term of five years preceding the time of filing the petitioner’s bill, and still continued to be, hopelessly and incurably insane; but before any decree was rendered the Constitution was amended, declaring that “divorces shall not be granted by the legislature,” and subsequently the divorce was granted pursuant to the act. It was held that the divorce, in effect, was a legislative one, though granted by the court, but this was upon the ground that the law in this special instance assumed that the power which it vested in the court was the power which the legislature itself was inhibited from exercising, and that it was equivalent to the granting of a divorce in a particular case, and for a particular cause for which no general law of the state authorized one to be granted. *Teft v. Teft*, 3 Mich. 67.

The constitutional provision that the legislature shall not “grant any divorce” must be construed with reference to and limited by the mischiefs against which it was evidently aimed,—the granting of divorces by special acts in particular cases,—and it was not intended to otherwise limit the power of the

legislature, or restrict it in the enactment of just and proper laws affecting all persons alike in their matrimonial status or condition. In considering the provision “with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed.” Coolsey, Const. Lim. 1st ed. 57. Says Marshall, Ch. J.: The framers of the Constitution, “and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.” *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 188, 6 L. ed. 68. When we examine the very clear and direct provision in question, we look in vain to find any expression or intimation forbidding or restraining the legislature from passing a law such as the one under consideration, general in its terms, operating alike upon all persons falling within its provisions, which does not grant or authorize the granting of any divorce, but which provides a general consequence attendant upon the life sentence of any married person, namely, that his marriage “shall be thereby absolutely dissolved.” It might with as much propriety be said that the statute prescribing the punishment for murder in the first degree was a statute to imprison French during the term of his natural life, as that the statute in question was a legislative divorce granted to him from the bonds of matrimony. If it was not such divorce, it is clearly established by the authorities referred to that the legislature might lawfully enact the statute, as a law affecting in the future the status of all married persons, citizens of the state, who should by life sentence of imprisonment be brought within its provisions.

2. The statute was self-executing. Upon sentence given, the marriage between French

1813 In *Townsend v. Townsend*, L. R. 3 Prob. & Div. 129, 42 L. J. Mat. 71, 20 L. T. N. S. 254, 21 Week. Rep. 964, a husband who, having committed several thefts, separated from his wife with her knowledge and consent for the purpose of avoiding arrest, was subsequently arrested and imprisoned, and, having committed other thefts after his release, was again imprisoned. While in prison, and also in the intervals between his imprisonments, he kept up a correspondence with his wife and made repeated endeavors to return to cohabitation, which she refused and never resumed. Upon the wife presenting a petition for a dissolution of the marriage on the ground of adultery coupled with desertion, the court held that there was no desertion the separation being involuntary on the part of the husband.

But in *Hews v. Hews*, 7 Gray, 279, the question was whether a divorce from the bond of matrimony could be granted for desertion for a term of five years consecutively under the Massachusetts statutes of 1838, chap. 126, where, during a part of such period, the guilty party had been several times committed to the house of correction, the first commitment being a few months after the first desertion, there being very short intervals afterwards between the terms of his imprisonment, and the court held that such desertion was wilful and within the provisions of the statute, as it was shown to have commenced before the imprisonment and to have extended during the intervals between the commitments.

In *Drew v. Drew*, L. R. 13 Prob. Div. 97, the result L. R. A.

spondent left his wife, stating that he was going for a week’s shooting, but in fact went to Australia in order to escape arrest for embezzlement, and there committed adultery. He was subsequently arrested, brought back to his native country, tried and sentenced to ten years’ penal servitude. It was held that the circumstances under which he left his wife constituted desertion which continued notwithstanding the fact that he was brought back to the country in custody and was prevented by his imprisonment from returning to his wife.

X. *Classed with cruelty.*

Where a husband commits a felony and is convicted and imprisoned, it revives the right to sue for a divorce *a vinculo matrimonii*, although condonation may have intervened, such an act of his by disgracing himself and family is a cruelty towards the wife and the reverse of conjugal kindness. *Hoffmire v. Hoffmire*, 3 Edw. Ch. 173.

XI. *Conviction as a bar to divorce by the party convicted.*

Where a husband has been convicted and sentenced to imprisonment at hard labor in the state prison for five years or more, which constitutes a ground of divorce under the Massachusetts statutes, chap. 107, § 6, he cannot sustain a petition for divorce against his wife on the ground of her subsequent adultery, since his conviction is classed with adultery and other causes which are grounds for a divorce from the bonds of matrimony, as an offense of the same class and degree as adultery. *Handy v. Handy*, 124 Mass. 304. E. W.

and his wife was "absolutely dissolved." Nothing whatever remained to be done to make the dissolution operative; neither judgment of divorce nor other legal process. It was not a dissolution of the marriage, *nisi*, dependent upon condition subsequent, express or implied, but was without restriction or condition. It did not suspend the conjugal relation, but extinguished it; and the language of the statute expressly excludes any implication that the reversal of the sentence might operate to restore the sentenced party to his or her conjugal rights, whatever might otherwise be the operation and effect of a reversal by the common law. The statute goes upon the ground that social and public necessities of the marriage relation, and the competency of parties to contract it, require the dissolution to be final, absolute. The statute having executed itself in the present case, French and his wife became in law as utter strangers to each other. The new status of each was the result of the statute, and was not dependent for continuance upon the continued existence of the sentence of French, as in the case of a judicial divorce. The reversal of the sentence cannot operate to restore the parties to their former matrimonial relations, as in the case of reversal of a valid judgment of divorce for mere error in its rendition. In states where sentence to imprisonment in the state prison for a term of years is made ground for an action of divorce, it has been held that as soon as the sentence has been given the right of the other party to apply for a divorce is complete (*Handy v. Handy*, 124 Mass. 394), and that such right is not suspended by a bill of exceptions, on which the conviction and sentence may be reversed (*Cone v. Cone*, 58 N. H. 152). The statute declares that "no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights." A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and, when the pardon is full, it releases the punishment, and blots out of existence the guilty so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . . If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. . . . But it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Ex parte Garland*, 71 U. S. 4 Wall. 333, 380, 18 L. ed. 866, 370. As a pardon granted could not restore French to his conjugal rights, manifestly it was not intended

that the reversal of his sentence should have that effect. Evidently the dissolution of the marriage freed both French and his wife from its obligations, and she was free to marry the defendant, and her subsequent marriage with him would not be in any way affected or invalidated by such reversal. It is understood that they were both citizens of this state at the time of the sentence, and subject, as to their matrimonial status, to its laws. Says Mr. Bishop: "Taking one party out of the marriage, by whatever means, leaves the other single. A husband without a wife, or a wife without a husband, is unknown to the law." 2 Bishop, Mar. Div. & Sep. §§ 1613, 1615. It was error for the court to instruct the jury that this court had held the sentence of French to be illegal or invalid. On the contrary, this court held that the court pronouncing sentence had jurisdiction of the subject-matter of the information against French, and of his person, and it denied his application to be discharged from imprisonment under the sentence, holding that the sentence was valid, and could be avoided only on writ of error. *Re French*, 81 Wis. 597. And the sentence was reversed for error and not for want of jurisdiction. *French v. State*, 85 Wis. 400, 21 L. R. A. 402. Until it was so reversed, it was a valid and operative sentence. The cases relied on to show that the reversal of the sentence restoring French to his former conjugal rights were all cases where the validity of the second marriage depended upon the validity of a former decree of divorce, and, with a single exception, the decree relied on was a nullity for want of jurisdiction in the court granting it, or was void by reason of gross fraud practiced on the court or opposite party by the one claiming its protection. The case of *Crouch v. Crouch*, 30 Wis. 667, was such a case. We hold, therefore, (1) that § 2355 of the Revised Statutes is a valid enactment, and not one in conflict with § 24, art. 4, of the Constitution, and operated to absolutely dissolve the marriage relation between French and his wife upon his being sentenced to imprisonment for life; and (2) that the marriage thereafter of the defendant with the former wife of French was valid, and was not avoided by the subsequent reversal of the sentence against French.

The defendant's exceptions are therefore sustained, and his conviction is set aside, and the cause is remanded to the circuit court for a new trial.

Judgment is ordered accordingly.

ILLINOIS SUPREME COURT.

City of CARROLLTON, *Appt.*,

v.
E. BAZZETTE.

(159 Ill. 284.)

1. An ordinance providing that per-

NOTE.—For peddlers and drummers as related to interstate commerce, see note to *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97.

For discrimination by municipality between its

31 L. R. A.

sons who "temporarily reside in" a municipality must obtain a license before they can sell goods in a certain manner is invalid by reason of its discrimination against nonresidents.

2. An ordinance prohibiting the busi-

ness of peddlers and drummers as related to interstate commerce, see note to *Re Spain* (C. C. E. D. N. C.) 14 L. R. A. 97.

As to amount of license fee, see note to *State, Toi, v. French* (Mont.) 30 L. R. A. 415.

ness of itinerant merchants to be carried on without a license is not invalid as a regulation of interstate commerce as applied to one who purchases bankrupt stocks wherever he can, obtaining them to the best advantage, and sometimes buys them in other states, when it makes no discrimination between merchants whose goods are imported into the state and those whose goods are manufactured or purchased in the state, and does not impose any burden on sales in original packages brought into the state.

3. An ordinance requiring itinerant merchants to pay a license fee is not limited to peddlers but applies to a merchant who takes his stock of goods from city to city doing business for a few weeks only in each place.

4. A license fee of \$10 for each day's business carried on by an itinerant merchant, without any discrimination on account of the extent of business or the length of time it may be carried on, is invalid because unnecessarily burdensome and in general restraint of trade and prohibitory of the business.

5. A city is not liable for costs in a suit to enforce an ordinance.

(January 17, 1896.)

APPEAL, by plaintiff from a judgment of the Circuit Court for Green County which reversed a judgment of a justice of the peace imposing a fine on defendant for violation of a city ordinance. *Reversed.*

The facts are stated in the opinion.

Messrs. W. C. Scanland and Thomas Henshaw, for appellant:

It was not only within the power, but the duty, of the mayor, upon ascertaining the facts, to revoke appellee's license.

Wiggins v. Chicago, 68 Ill. 372; *Schwuchow v. Chicago*, 68 Ill. 444.

Payment of a less sum for license than that provided by law makes the license a nullity.

Munsell v. Temple, 8 Ill. 93; *Lombard v. Cheever*, Id. 469; *Spake v. People*, 89 Ill. 617.

The amount of the license fee is within the discretion of the power imposing it.

United States Distilling Co. v. Chicago, 112 Ill. 22; *Dennehy v. Chicago*, 120 Ill. 627.

The terms "itinerant merchant" and "transient vendor of merchandise," as used in the statute, are defined by the appellate court of this state to mean, and were intended to apply to, those persons who for a short space of time locate in a city and make sale and delivery of their goods as other merchants do.

Trining v. Elgin, 38 Ill. App. 361.

A license fee imposed upon persons engaged in a given business, as that of a broker or itinerant merchant, is not in violation of any constitutional provision when such fees are uniform as to all persons of the same class within the limits of a city.

Braun v. Chicago, 110 Ill. 186; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; 1 Beach, Pub. Corp. § 580.

A part of an ordinance may be void and a part valid, and if so the valid part will stand.

Baker v. Normal, 81 Ill. 108; Dill. Mun. Corp. § 420 (353) note 3; 1 Beach, Pub. Corp. § 512.

Where property from one state is brought into another state and has become a part of the general mass of the property of such state, its 31 L. R. A.

sale is subject to the restrictive or prohibitive laws of such state.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Ficklen v. Shelby County Taring Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994.

The statute of this state and the ordinance in question place no restrictions or barriers on the commerce of citizens of other states. They make no discrimination between the citizens of this state and other states or the products or property of this state and other states.

The itinerant merchant voluntarily places his property under the protection of the laws of this state. Can it be unjust to require of him the same or equal tribute that is required of his resident competitor in business?

State v. Emert, 103 Mo. 241, 11 L. R. A. 219, 3 Inters. Com. Rep. 527; *Woodruff v. Parham*, 75 U. S. 8 Wall. 123, 19 L. ed. 382; *Hinson v. Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 387; *Singer Mfg. Co. v. Wright*, 83 Fed. Rep. 121.

Protection of the goods from all state control while in transit, and from discrimination at all times, is all that Congress can or need undertake to secure in the matter.

11 Am. & Eng. Enc. Law, p. 550, note 1; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102.

The exaction is not an unreasonable or unusual one.

Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754; *Hynes v. Briggs*, 41 Fed. Rep. 468; *Ex parte Butin*, 28 Tex. App. 304; *State v. Richards*, 32 W. Va. 948, 8 L. R. A. 705; *Woodruff v. Parham*, 75 U. S. 8 Wall. 130, 19 L. ed. 382; *Hinson v. Lott*, 75 U. S. 8 Wall. 150, 19 L. ed. 388; *Paul v. Virginia*, 75 U. S. 8 Wall. 188, 19 L. ed. 357; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666.

Mr. Henry T. Rainey, for appellee:

Any acts the city council may assume to perform, not fairly within the powers conferred, are *ultra vires*.

Alton v. Aetna F. Ins. Co. 82 Ill. 47; *Chicago v. Rumpff*, 45 Ill. 96, 92 Am. Dec. 196; Dill. Mun. Corp. §§ 87 (55); *Schott v. People*, 89 Ill. 197.

No presumptions are to be indulged in favor of the validity of ordinances passed by municipal corporations.

Schott v. People, 89 Ill. 195; Dill. Mun. Corp. § 423 (355).

Ordinances must be impartial, fair, and general.

Dill. Mun. Corp. § 322 (256).

An ordinance passed under general power must be: (1) reasonable, consonant with the general powers and purposes of a corporation,

and not inconsistent with the laws or policy of the state; (2) it must not be oppressive; (3) it must be impartial, fair, and general in its application; (4) it may regulate, but must not restrain, trade.

Ex parte Frank, 52 Cal. 606, 28 Am. Rep. 642; *Braceville v. Doherty*, 30 Ill. App. 657.

A peddler is an itinerant merchant. The term "itinerant merchant" cannot be applied to a merchant who rents a storeroom in a city, places therein a stock of goods of large value, and conducts his business within the building so rented by him, whether he comes to the city to carry on business for a week, or for three weeks, or for a year.

Twining v. Elgin, 38 Ill. App. 360; *Cerro Gordo v. Rawlings*, 135 Ill. 36; *Cairo v. Bross*, 101 Ill. 478.

The legislature has not attempted to confer authority to license transient or itinerant auctioneers, or transient or itinerant liquor dealers, but they have conferred the power generally to license and tax auctioneers, and to license and tax liquor dealers.

Any attempt under the general law to discriminate as between peddlers, auctioneers, or other persons temporarily residing in a city, and those permanently residing there, or any attempt to discriminate in the matter of licensing and taxing liquor dealers, has been invariably held to be *ultra vires* and void.

Zavone v. Mound City, 103 Ill. 552; *Braceville v. Doherty*, 30 Ill. App. 657; *Cairo v. Bross*, 101 Ill. 479; *Cooley*, Const. Lim. § 390; *East St. Louis v. Wehrung*, 46 Ill. 393.

Any attempt by color of regulations to restrain trade is an abuse of power.

Caldwell v. Alton, 33 Ill. 417, 75 Am. Dec. 282; *Chicago v. Rumpff*, 45 Ill. 97, 92 Am. Dec. 196; *Bloomington v. Wahl*, 46 Ill. 490; *American Live Stock Commission Co. v. Chicago Live Stock Exchange*, 143 Ill. 235, 18 L. R. A. 190.

The license sought to be imposed upon a nonresident auctioneer or upon an itinerant merchant is \$10 a day. Such an ordinance is unreasonable.

Hyde Park v. Carlton, 132 Ill. 100; *Wiggins v. Chicago*, 68 Ill. 372; Dill. Mun. Corp. § 327 (261); *Tugman v. Chicago*, 78 Ill. 405; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 26; *Sipe v. Murphy*, 49 Ohio St. 536, 17 L. R. A. 184; *Brooks v. Mangun*, 86 Mich. 576; *Duluth v. Krupp*, 46 Minn. 435; *Chaddock v. Day*, 75 Mich. 527, 4 L. R. A. 809; *People v. Russell*, 49 Mich. 617, 43 Am. Rep. 478; *Darling v. St. Paul*, 19 Minn. 389; *Re Fruzee*, 63 Mich. 396.

A city cannot prohibit a person from selling books from house to house, or taking orders for future delivery.

Emmons v. Lewistown, 132 Ill. 380, 8 L. R. A. 328; *Cerro Gordo v. Rawlings*, 135 Ill. 36; *Twining v. Elgin*, 38 Ill. App. 359; *Bloomington v. Bourland*, 137 Ill. 534, 3 Inters. Com. Rep. 667.

The ordinance in question, and the statute which purports to authorize it, are an attempted interference on the part of the state with interstate commerce. Appellee is a resident of the state of Michigan.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Weldon v. Missouri*, 91 U. S. 275, 28 L. ed. 347; *Woodruff v. Parham*, 75 U. S. 81 L. R. A.

S. 8 Wall. 123, 19 L. ed. 332; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257.

Inaction by Congress amounts to a declaration that all commerce within its exclusive control shall remain free and untrammelled.

Gloucester Ferry Co. v. Pennsylvania, *supra*; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 679, 27 L. ed. 442; *Henderson v. Wickham*, 92 U. S. 259, 28 L. ed. 543.

The exaction of a license tax as the condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing business is surely a tax on the business.

Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143.

An article upon which a tax is levied before it can be sold to a citizen of the state of Illinois is not permitted to mingle freely with the common mass of property within the state.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Sindrich v. Dolan*, 141 Ill. 480; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 346; *Bartelott v. International Bank*, 119 Ill. 272.

This court has never held it to be error to award a judgment against a city for costs, but has held an award of an execution against a city to be reversible error. This judgment is entirely free from error of that character.

Bloomington v. Brokaw, 77 Ill. 194; *Chicago v. Hasley*, 25 Ill. 595; *Paris v. Cracraft*, 85 Ill. 294; *Kinmundy v. Mahan*, 72 Ill. 462; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Floru v. Naney*, 136 Ill. 45; *Odell v. Schroeder*, 58 Ill. 353; *Kansas v. Juntgen*, 84 Ill. 360.

Carter, J., delivered the opinion of the court:

This appeal is taken from a judgment of the circuit court of Green county rendered against appellant for costs, and in bar of its action on a cause brought to that court by appeal from the judgment of a justice of the peace imposing a fine of \$3 and costs on appellee for the violation of an ordinance of the city of Carrollton. The ordinance provided that any person or corporation making sales of goods, wares, merchandise, or other things, except farm or dairy produce, etc., upon the streets or sidewalks of the city, or who should engage in the business of hawker or peddler, or who should temporarily reside therein, and vend at auction any goods, wares, merchandise, or other thing anywhere in the city, or engage in the business of itinerant merchant, without having first obtained a license therefor in accordance with the provisions of the ordinance, should be fined not less than \$100. The ordinance authorized the mayor to revoke any license, in his discretion, on tendering back the unearned license money. Section 3 established the following schedules of license fees: "Itinerant merchants at retail or auction, \$10 per day. Foot peddlers and solic-

iting agents \$2 per day. . . . All other cases not specifically provided for, \$2 per day." Appellee applied for and obtained a license to sell books, notions, watches, etc., for the period of three weeks, for which he paid a license fee of \$30. The license provided that it was subject to revocation by the mayor. Soon after commencing business, appellee began to sell many different kinds of goods and wares not embraced within the classes mentioned in the license, both at auction and in due course of trade, at retail. His license was revoked by the mayor, and the license fee tendered back to him, but he refused to accept it. He was notified by the mayor that, for the business he was then engaged in, he would be required to take out a license as itinerant merchant, and pay therefor \$10 per day. Appellee refused to procure such license or pay the amount demanded, but continued to sell as before. Complaint was made under the ordinance, charging him with temporarily residing in said city, and vending at auction goods, wares, and merchandise, and for engaging in the business of itinerant merchant in said city, without a license. A fine of \$3 and costs was assessed by the justice of the peace. When the ordinance was offered in evidence on the trial in the circuit court, it was objected to by appellee on the ground that, both the ordinance and the statute authorizing it, approved June 10, 1887, providing that cities, etc., "shall have power to license, tax, regulate, suppress, or prohibit itinerant merchants and transient vendors of merchandise" (Rev. Stat. Meyer's ed. 1895, p. 232) were "unconstitutional and void; that they are unreasonable, in restraint of trade, tend to create monopolies, objectionable as class legislation, and discriminate between residents and nonresident auctioneers and merchants, and, as applied to the facts in this case are an attempted interference, by state regulation, with interstate commerce." The objection was sustained by the court, as to the first charge in the complaint, and later in the trial, at the close of the evidence, the court sustained the motion of the defendant to exclude the ordinance altogether from the jury, and to instruct them to find for the defendant. The jury returned their verdict as instructed, and, after overruling appellant's motion for a new trial, judgment was rendered against the city for costs.

It was insisted by the defendant that the evidence showed that he was not a resident of this state, and that he was engaged in the purchase of bankrupt stocks of goods in other states, and shipping them into this state for sale, and that, as applied to the facts of this case, the ordinance was an attempted regulation of interstate commerce, and void for that reason also. The evidence showed that the defendant purchased such stocks of goods wherever he could obtain them to the best advantage, and sold them out at retail,—sometimes at auction and sometimes in due course of trade; that for this purpose he opened stores or places of business in different cities and villages, shipping from one to another, usually continuing in business only a few weeks at a time in any one place. Both the ordinance and the license itself provided for the revocation of the license by the mayor, and we are of the opinion that,

31 L. R. A.

under the evidence, there was no abuse of this power by the mayor.

But assuming that the license granted to sell books, notions, and watches was properly revoked because the sales of appellee embraced a large class of merchandise not designated in the license, the question arises whether that part of the ordinance which provides that no person shall temporarily reside in said city, and vend at auction any goods, wares, or merchandise, or engage in the business of itinerant merchant in said city, without first having obtained a license therefor, and fixed the license fee at \$10 per day, was within the power of the city council to pass. Waiving the question that the ordinance, as set out, seems to confine the license fee of \$10 to those coming within the second class mentioned above,—that is, to itinerant merchants,—we are of the opinion that the city council had no power to make any discrimination between residents and nonresidents of the city, or between those temporarily residing in the city and those permanently residing there, in requiring licenses, or in the fees to be paid for such licenses. This part of the ordinance confines its operation to those who temporarily reside in the city, and would seem to have no reference to the temporary character or to the permanency of the business. Under the provision in question any one permanently residing in the city could engage in the business mentioned, either temporarily or permanently, without a license, while a temporary resident would, in either case, be subject to a fine. The city council had no power to make such a discrimination, and that part of the ordinance was properly held to be invalid. *Beach, Pub. Corp.* 1235; *Braceville v. Doherty*, 30 Ill. App. 645. But, as the provision relating to itinerant merchants had no necessary connection with or dependence upon the first-mentioned provision, it may be separately enforced, unless found to be also invalid upon other grounds held sufficient in the court below to invalidate it. The power of the legislature to authorize cities and villages in this state to license and regulate various kinds of business and occupations carried on within their limits, and to require the payment of license fees, has so often been the subject of review, and so often sustained, by this court, that no extended discussion of the general subject will here be attempted. It has been held that such power is inherent in all governments; that, except so far as limited or restrained by the Constitution of the state or of the United States, the legislature has such power, as being the repository of all the power of the people not taken from it. And by repeated decisions of this court it has been held that a mere license fee imposed by the municipal authorities under authority of an act of the legislature is not a tax. *Chicago Pkg. & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560, and cases there cited. And since the adoption of the Constitution of 1870, containing the provision in § 1 of art. 9, that "the general assembly shall have power to tax peddlers, auctioneers, brokers, bankers, merchants, commission merchants," . . . in such manner as it shall from time to time direct, by general law uniform as to the class upon which it operates,"

and §§ 9 and 10 of the same article, requiring uniformity in taxation as to persons and property, the same view has been maintained, and that these provisions of the Constitution have not changed the power of the legislature to authorize municipalities to require and collect such license fees. *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560. In the case cited it was said by Mr. Justice Walker, in delivering the opinion of the court (p. 567) that: "The latter words in the first section, requiring the tax to be by general law, and uniform as to the class upon which it operates, have no operation upon this case, because this, as shown by the cases cited, is not a tax, but a license. The Constitution has not prohibited the general assembly from imposing, or authorizing the imposition of, the duty to procure a license to pursue any calling, nor has it limited the power or limited its exercise. In this respect the power of the legislature is the same as it has ever been since the organization of the state government, and no one, we presume, will question the legislative power to require persons engaged in various avocations to procure a license for the purpose, and thus regulate the exercise of an avocation." While, in numerous other cases in which it was urged that the license fees exacted were taxes, and within the provisions of the Constitution above referred to, the question whether the ordinances conformed to those provisions was discussed, yet the doctrine announced by this court in previous cases has not been departed from. *Bowland v. Chicago*, 108 Ill. 496; *Timm v. Harrison*, 109 Ill. 598; *Braun v. Chicago*, 110 Ill. 186; *United States Distilling Co. v. Chicago*, 112 Ill. 19; *Kinsley v. Chicago*, 124 Ill. 359.

The ordinance appears to have been framed upon the same theory as other license ordinances, and not upon the theory of levying taxes in the ordinary acceptation of that term. And if, under the statute in question authorizing cities to "license, tax, regulate, suppress, or prohibit itinerant merchants and transient vendors of merchandise," it should be conceded the city of Carrollton had power to tax itinerant merchants, as distinguished from the power to require them to pay a license fee, we are of the opinion that the ordinance was framed under the former, and not under the latter, power. We shall therefore consider the objections urged against the validity of the ordinance, and of the statute under which it was passed, without reference to the provisions of the Constitution above mentioned, relating to taxation. It is urged with much force that the statute itself is unconstitutional,—that the legislature has no power to suppress itinerant merchants or transient vendors of merchandise, or to prohibit them from following their avocation; and, as applied to the facts of this case, it is insisted that, even regarding the exercise of the power as one to license and regulate, it is in violation of the Federal Constitution, and the legislation of Congress thereunder, as an attempted regulation of interstate commerce, and to the latter phase of the question the arguments of counsel have been chiefly addressed.

We do not think that the latter contention can be sustained. The ordinance makes no discrimination between such merchants whose

goods are imported into this state from other states, and those whose goods are manufactured or purchased in this state, and shipped from place to place for the purpose of sale. Nor does it impose any tax upon, or require the payment of any license fee for, the sale in the original package of any articles imported from another state. But the effect of the ordinance is to impose the burden, not on those engaged in importing goods into the state for sale, nor on the goods, as such imports, but upon those who are engaged in the business of selling goods as itinerant merchants, after such goods, if imported, have been so acted upon by the importer as that they have become mixed up with the mass of other property in the state. The evidence in this case showed that the goods were purchased at assignees' and other bankrupt sales; some in this and some in other states; and that the stock in question was composed of such goods, a part of which had been left unsold, and brought from some other city or village in the state, where appellee had last carried on his itinerant merchandising. We think it too clear for extended argument that there was no interference with, or attempted regulation of, commerce between the states in the enforcement of the ordinance in question. This question was discussed and the previous decisions of the Supreme Court of the United States reviewed by *Mr. Justice Gray* in *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, to which reference may be had for the doctrine of that court on this question.

But was the ordinance void for any of the further reasons urged against it? We do not think it necessary to consider here whether or not the legislature had the power to prohibit, or to authorize municipalities to prohibit, merchants, whether permanent or itinerant, from carrying on the business of merchandising. It must, however, be presumed that it was not intended, by the act of 1887, to authorize cities and villages to suppress itinerant merchants, or prohibit them from carrying on their business, unless there should be, in the character of the goods sold, or in the manner of conducting the business, something detrimental to the public good health, morality, comfort, or convenience. No such grounds for the suppression or prohibition, as a police regulation, of the business of appellee, appeared or was shown. Nor can it be said, we think, as a general proposition, that there was anything in the business in which appellee was engaged that authorized its suppression by law. The Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law;" and we have recently held that the right to contract with reference to one's own labor is a property right, and cannot be taken away by mere legislative enactment. *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79. The right to buy, sell, barter, and exchange property is a necessary incident to its ownership, and, subject to reasonable regulations, is as much protected by this provision of the Constitution as is the ownership itself. The grounds upon which the sale of intoxicating liquors may be prohibited have no application to the business of the ordinary merchant. In *Scheuchow v. Chicago*, 68 Ill. 444, it was said that the restraints which the

law applies to the liquor traffic "are not like such as restrict the ordinary avocations of life, which advance human happiness, or trade and commerce—that neither produce immorality, suffering, nor want. This business is, on principle, within the police power of the state, and restrictions which may rightfully be imposed upon it might be obnoxious as an illegal restraint of trade when applied to other pursuits." Similar views were expressed in *Dennedy v. Chicago*, 120 Ill. 627. In *Laundry v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625, an ordinance requiring licensed pawnbrokers to make out, and deliver to the superintendent of police, every day, a copy from a book to be kept by them of all personal property and other valuable things received on deposit or purchased during the preceding day, with a description of the persons from whom received, was held a reasonable exercise of the police power for the prevention and detection of crime; and it was there said the business might be prohibited altogether, under the power conferred on the city. It was not, however, put upon the ground that the city might absolutely suppress a lawful and harmless business, but that the power might be exercised for the prevention of crime. We must therefore conclude that it was not the intention of the legislature to authorize municipalities to arbitrarily suppress merchants, or prohibit them from carrying on their business, within the corporate limits, on the ground that they are itinerant or transient, instead of permanent, as applied to their business in the municipality.

As applied, then, to the case under consideration, we must consider the ordinance as one to license and regulate itinerant merchants, without authorizing the suppression or prohibition of their business. Appellee contends that he was not an itinerant merchant, within the meaning of the statute and the ordinance. He insists that an itinerant merchant and a peddler mean the same thing. We do not think so. Neither the statute nor the ordinance has furnished any definition. But it cannot be supposed that the legislature would have passed the act in question, authorizing the licensing of itinerant merchants and transient vendors of merchandise, if the power had already been conferred in the provision in the general incorporation law relating to peddlers and hawkers. We think the words used very clearly express the meaning of the law-making power, and that they would generally be well understood. The word "merchant" has a well-known meaning; but whether a particular trader is a merchant, or not, might, under the facts of the particular case, be somewhat difficult to determine. But it cannot be doubted that appellee was a merchant. He opened a store, stocked it with various articles of merchandise, and sold as other merchants do. And the only difference, aside from selling sometimes at auction, was that his business was not permanent in the particular city or village in which, for the time, it was carried on. It was not intended to be permanent,—it was intended to be, and was, transitory. He took his stock of goods from city to city, sold his goods, and transacted business as a merchant, for a few weeks only in each place; and we cannot conceive of a more appropriate designation, as applied to his

case, than that of itinerant merchant. Without finding it at all necessary here to undertake to give any precise definition of the term, applicable to other cases that may arise, we hold that appellee was an itinerant merchant. A different conclusion seems to have been reached by the supreme court of Georgia in *Gould v. Atlanta*, 55 Ga. 678, where it was held that a trader who opened a store, and proceeded there to sell out a large stock of goods, and did not convey any of the goods from place to place in the city, and sell in that way or by sample, but waited for customers to come to his place of business, was not an itinerant trader, within the meaning of the charter of the city and the laws of that state. But in that case the court defined the terms "itinerant trader" and "peddler" to mean substantially the same thing, as they had theretofore been used in the same sense in the statutes and decisions of that state. But the reasoning there employed cannot control here, and, without stopping here to point out further distinctions between the two cases, we must hold that appellee was, within the meaning of our statute, an itinerant merchant. A conclusion similar to the one here arrived at was reached by the appellate court of the second district in the case of *Twining v. Elgin*, 38 Ill. App. 361.

Holding, then, that the city of Carrollton had the power to license and regulate the business of appellee, but not to suppress or prohibit it, the question is presented whether or not the requirement of the payment of a license fee of \$10 per day was unreasonable, oppressive, and prohibitory in its character; for it must be conceded that, if the city had no power to suppress or prohibit directly, it had no power to do so indirectly, by the imposition of unreasonable and oppressive burdens. In *Braun v. Chicago*, 110 Ill. 196, it was said: "Nor is the objection well taken that no business can be regulated, or burthens imposed on its pursuit, unless there be power to suppress the business. In the case of *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560, it was held the legislature had power to authorize the city to regulate the ferry, and impose a license fee for each boat used by the company, notwithstanding the franchises the companies were exercising were granted by charter from the legislature. Yet no one will claim that the legislature could repeal the charter or impair its franchise, or authorize the city to do so. This case was affirmed in the Federal Supreme Court. 107 U. S. 365, 27 L. ed. 419. Until of comparatively recent date our legislature required all merchants of every kind to pay for and procure a license to vend their goods, wares, and merchandise, under a penalty. Nor are we aware that the power was ever questioned. And similar laws have been in force in the various states of the Union, from their organization until a recent date, if not until the present time. In the case of *Horland v. Chicago*, 108 Ill. 496, it was held that the legislature had power to authorize the city to require a keeper of a livery stable to procure a license for the purpose, under a penalty for failing to do so. Such an occupation is a natural right, as legitimate as is that of either of these appellants." And in *Kinsley v. Chicago*, 124 Ill. 363, after stating the rule laid down by other

authorities, that the license fee should be such fee only as will legitimately assist in the regulation, it was said that this court has always applied a more liberal rule of construction in reference to license fees, and that such fees, in quite large amounts, and manifestly, in part at least, for revenue, have been sustained. But it has not been held, as supposed by counsel for appellant, that in such cases, where the business may not be prohibited altogether, the amount of the burden to be imposed rests entirely in the discretion of the municipal authorities imposing it. Counsel for appellant cite *United States Distilling Co. v. Chicago*, 112 Ill. 19, as supporting their contention in this regard. The license fee required by the city of Chicago for carrying on the business of distiller or brewer was \$500 per annum, and this court, following other cases, held that while such a license fee was not a tax, in the constitutional sense of that term, still it might be imposed for substantial revenue; and it was said that, "observing constitutional restrictions, the amount would seem to be within the discretion of the body imposing it." The limitation to the discretion of the body imposing the license fee, as expressed in that case, is substantial and important. It is a constitutional limitation. If the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law forbids the suppression or prohibition of appellant's business on the sole ground that it is transitory, instead of permanent in the municipality, then it also forbids its destruction by the imposition of unequal and excessive license fees, prohibitory in their character. A liberal rule in construing grants of power to municipalities in respect to the imposition of license fees has been adopted by this court, but it has never been held that, where there is no power to suppress or prohibit, they have unlimited discretion in fixing the amount of such fees. In *Wiggins v. Chicago*, 68 Ill. 373, it was said: "The power conferred by the charter to tax, license, and regulate auctioneers, authorized the city to adopt any reasonable ordinance for the purpose. The charter points out no particular mode. The city may tax, may license, and may regulate the business of auctioneers. The city may not directly prohibit the business, nor can it adopt such unreasonable regulations as would produce such results, or even be oppressive, and highly injurious to the business." And a license fee of \$200 per annum imposed by ordinance on auctioneers was held not an unreasonable exercise of the power conferred by the charter. See also *Gartide v. East St. Louis*, 43 Ill. 47. In the case of *Sipe v. Murphy*, 49 Ohio St. 536, 17 L. R. A. 184,—somewhat analogous to the case at bar,—it was held that the imposition of a license fee of \$25 a day by the city of Columbus, for selling any goods, wares, etc., at auction, imported into such city for the purpose of being so sold, was an unreasonable 31 L. R. A.

exercise of the power conferred by the statute, although the statute purported to give cities the power "to regulate, license, or prohibit" the business, and that the effect of the ordinance was largely to prohibit, under the name of a license, the sale at auction of goods brought into the corporation for that purpose, which entered into the daily use and consumption, and which would not be excluded by any police regulation as being detrimental to the public health, comfort, and convenience, and that the ordinance was in restraint of trade, and opposed to the public policy of the state. See also *Brooks v. Mangan*, 86 Mich. 576. Under the liberal rule adopted by this court, such license fees, while imposed under the general police power, may, as we have seen, be imposed, not only as a mere means of regulation, but also for revenue. Under such a rule, it becomes a question not always easy of solution to determine whether or not the imposition of a certain amount to be paid as a license fee is an oppressive exercise of a statutory power; having the effect, whether so designed or not, to suppress and prohibit the business upon which it is imposed, rather than merely to license and regulate it, and require it to bear its due share of the public burdens. And it must be admitted that the question, so far as it comes within the discretion of the municipal authorities, is one for them, and not for the courts, to determine. It is only when the ordinance is plainly unreasonable and prohibitive in its character, where there is no power to prohibit, that the courts may interfere and pronounce it invalid. 2 Beach, Pub. Corp. § 1234; *Cooley*, Const. Lim. 200. We are, however, of the opinion that the ordinance in question is of that character. A license fee of \$10 for each day making no discrimination on account of the extent of the business, or the length of time during which it is carried on, would appear to be unnecessarily burdensome, in such a case, in general restraint of trade, and prohibitory of the business. The business of itinerant merchant would have to be much more remunerative than ordinary merchandising in small cities, to survive under a burden of this character, amounting to more than \$3,000 per annum. We are therefore of the opinion that the ordinance is void, and that the learned judge of the circuit court did not err in so holding, and in instructing the jury to find the defendant not guilty.

But there was error in rendering judgment against appellant for costs. The city was not liable for costs in such a case. *Anderson v. Schubert*, 158 Ill. 75. We think this question was correctly decided by the appellate court in the following cases: *Nokomis v. Horkey*, 31 Ill. App. 107; *Petersburg v. Whitnack*, 48 Ill. App. 668; *Fosselman v. Springfield*, 38 Ill. App. 296.

For the error indicated the judgment is reversed.

MINNESOTA LUMBER COMPANY, *Appt.*,

v.

WHITEBREAST COAL COMPANY.

(180 Ill. 85.)

1. A contract for its "requirements" of coal for a certain season, made by a lumber company, is not void for uncertainty and for want of mutuality, when it is evidently meant to call for the amount of coal which the corporation should need in its business for such season, and not merely what it might choose to require of the other party.
2. A contract for the privilege of ordering any quantity of coal not exceeding 12,000 tons is not an option contract in violation of Crim. Code, § 130, where it is made as a modification of a prior disputed contract, with the intention of limiting the quantity to be ordered, without relieving the purchaser from an obligation under the prior agreement to purchase the amount required in a certain business.

(October 11, 1895.)

APPEAL by defendant from a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for De Kalb County in favor of plaintiff in an action brought to recover the contract price of coal alleged to have been sold and delivered by plaintiff to defendant. *Reversed.*

Statement by **Magruder, J.:**

This is an action of assumpsit brought by appellee against appellant. The declaration consists of the common counts only. The bill of particulars is an account for coal aggregating \$19,739.97, at the price per ton named in the contract hereinafter set forth, upon which amount are credited payments and freight credits aggregating \$10,485.61, leaving balance, claimed to be due, of \$9,254.36. The pleas were the general issue, and the two special pleas of set-off hereinafter set out. Demurrers were filed to the two special pleas and sustained by the circuit court. The defendant elected to stand by its special pleas. A jury was then waived by agreement, and the cause was submitted to the court for trial without a jury. The findings were in favor of the plaintiff, and judgment was rendered in its behalf for said balance of \$9,254.36. The appellate court has affirmed the judgment, and the present appeal is prosecuted from such judgment of affirmance.

The second plea, or first special plea, alleges that plaintiff is indebted to defendant for damage because of its neglect and refusal to deliver to defendant coal, according to the contract of plaintiff with defendant, dated August 4, 1886, in words and figures as follows, to wit:

Polo, Ill. Aug. 4, 1886.

Memorandum of contract between the Whitebreast Coal Company, by S. G. Russell, agent, and Minnesota Lumber Company: The said Minnesota Lumber Company agrees to buy its requirements of anthracite coal for season of

1886-1887 (upon condition named hereafter) of said Whitebreast Coal Company which is to furnish the same as ordered (best quality of Scranton coal), at following prices f. o. b. cars at Milwaukee or Chicago, at option of said M. L. Co., to wit: \$4.35 per ton for egg and grate, and \$4.60 for stove and nut up to November 1, after which time said prices shall be advanced five cents per ton for the remaining term of this contract. Other sizes at proportionate prices. Payments on shipments to be settled on the 15th of each month following shipment, in a sixty day acceptance of said M. L. Co., without interest. In the event of lower prices than the above on standard anthracite coal being offered said M. L. Co., the said Whitebreast Coal Company agrees either to accept such lower prices on balance of coal not shipped or release said M. L. Co. from further liability on this contract. It is further agreed that the prices last herein made shall apply to orders up to January 1, 1887. It is agreed that this contract shall be binding on both parties, provided the said M. L. Co. shall confirm the same by telegraph any time during this or the following day.

Whitebreast Coal Co.,

By S. G. Russell, Sales Agent.

Minnesota Lumber Co.,

By Geo. W. Perkins, Sec'y.

That defendant's requirements of anthracite coal for the season between the dates of August 5, 1886, and January 1, 1887, were 25,000 tons, and that it did confirm said contract by telegraph during the day following the making of said contract; that, in pursuance of said contract, it did order a large quantity of said coal to be shipped in cars from Milwaukee and from Chicago; that plaintiff failed and neglected to fill any of said orders, although defendant avers that it was ready, willing, and able, and offered, at all times, to fulfil its part of the contract, whereby damage accrued to defendant, to wit, said sum of \$25,000; that at and before the making of said contract defendant was extensively engaged in the purchase, use, and sale of anthracite coal in the ordinary course of its business, and that its requirements for such coal, in the ordinary course of its business, for the season of 1886 and 1887, were a very large amount, to wit, the amount of 50,000 tons, all of which was well known by plaintiff.

The third plea, or second special plea, alleges that plaintiff is indebted to defendant for damage because of the neglect and refusal of plaintiff to deliver to defendant a large quantity, to wit, 10,000 tons of coal, according to the contract of plaintiff with defendant, which contract, dated August 4, 1886, and the modification thereof dated August 21, 1886, are in words and figures as follows, to wit: (Here follows, *verbatim et literatim*, the contract of August 4, 1886, as the same is above set out in the second plea). After so setting out the contract of August 4, 1886, the third plea proceeds to give the modification thereof as made on August 21, 1886, in the words and figures following, to wit:

Whereas, a dispute has arisen between the parties to the within instrument, it being claimed by the Whitebreast Coal Company that

NOTE.—As to validity of contract for purchase of indefinite quantity, see note to Wells v. Alexandre (N. Y.) 15 L. R. A. 218.

the said instrument does not constitute a valid engagement upon their part to furnish coal, which claim is denied by the said Minnesota Lumber Company:

Now, therefore, in order to arrive at an amicable settlement of the dispute pending, it is mutually agreed by the said Whitebreast Coal Company and the Minnesota Lumber Company that the said alleged contract shall be performed upon the following conditions and exceptions: Coal shall be billed and paid for at the rate of \$4.45 per ton for egg and grate and \$4.70 for stove and nut and No. 4. As soon as convenient hereafter, each of the parties hereto shall choose an arbitrator, they to choose a third, which three arbitrators, upon a hearing of the respective claims of each of the parties, shall decide whether the Minnesota Lumber Company is entitled to its coal at the prices named in the within alleged contract of August 4. In case of an affirmative decision of this question, the Whitebreast Coal Company shall rebate to said Minnesota Lumber Company the difference between said contract prices and the amended prices mentioned herein; in case of a negative decision, the said amended prices shall be in final settlement of the coal. It is agreed that the coal shall be settled for in sixty days' paper, as before mentioned, and it shall also be decided by said arbitrators whether the paper shall be with or without interest. It is agreed that this arbitration shall be made under the statute of the state of Illinois. It is agreed that the Whitebreast Coal Company shall pay the Minnesota Lumber Company the difference between the prices fixed by arbitration and the cost price upon all coal ordered by the Minnesota Lumber Company between August 4, 1886, and the date hereof. It is also agreed that the Minnesota Lumber Company shall have the privilege, under this contract, of ordering any quantity of coal not in excess of 12,000 tons, which agreement is in lieu of stipulation for requirements,—this amount of coal ordered between August 4 and date not to exceed 200 tons. It is distinctly understood and agreed that neither party hereto waives any of the respective rights heretofore claimed.

Polo, Ill., August 21, 1886.

Minnesota Lumber Company,

By Geo. W. Perkins, Sec.

Whitebreast Coal Company,

By C. K. Pittman, Gen. Agt.

The plea further averred that the sole and only cause of action in plaintiff's declaration is for the price of coal delivered in part performance of said contract; that the modification dated August 21, 1886, was made and assented to by defendant at the request of plaintiff, and for the purpose of limiting and restricting defendant to the amount of 12,000 tons of coal which it should have, and had, the right to purchase under said contract, as amended, for the season of 1886 and 1887; that plaintiff, after having delivered a small portion of the coal contracted to be delivered by said contract, to wit, 2,000 tons, neglected and refused to ship and deliver to defendant the balance of said 12,000 tons upon the order and request of defendant, although defendant was at all times ready, willing, and able to, and

did, keep and perform the terms of said contract on its part; that it did at divers times request plaintiff to deliver the balance of said 12,000 tons according to said contract, which plaintiff neglected and refused to do, whereby damage accrued to defendant, to wit, said sum of \$25,000; that at and before the making of said contracts defendant was extensively engaged in the purchase, use, and sale of anthracite coal in the ordinary course of its business, and that its requirements for such coal in the ordinary course of its business for the season of 1886 and 1887 were a very large amount, to wit, the amount of 50,000 tons, all of which was well known by plaintiff at the time of making said contracts.

Both pleas tender set-off of the alleged damages, and pray judgment.

Messrs. John P. Wilson and Carnes & Dunton, for appellant:

The word "requirements" is not uncertain and ambiguous in the light of the knowledge that the parties had at the time of the making of the contract.

National Furniture Co. v. Keystone Mfg. Co. 110 Ill. 427; *Smith v. Morse*, 20 La. Ann. 220.

When the meaning used in a contract is doubtful or susceptible of two senses, that is to be adopted which would give effect to the intent, as a legal contract, rather than that which would render it inoperative.

Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682; *Chitty, Contr.* 79, 80; *Evans v. Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297; *Crittenden v. French*, 21 Ill. 598.

If this contract should be construed to give appellant an option as to whether it should order any coal or not, even then it was not a gambling contract, and was not within the prohibition of the statute.

Castner v. Walrod, 83 Ill. 178, 25 Am. Rep. 369; *Hamilton v. State*, 103 Ill. 367; *People v. Hoffman*, 97 Ill. 234; *Cruse v. Aden*, 127 Ill. 239, 3 L. R. A. 327; *Perry County v. Jefferson County*, 94 Ill. 214.

If the court should be of the opinion that the modification brought the contract within the prohibition of our criminal law, then this modification should be rejected entirely, and the rights of the parties should be determined under the Russell contract as plead in the first plea of set-off.

8 Am. & Eng. Enc. Law, p. 860; *Memphis v. Brown*, 87 U. S. 20 Wall. 289, 22 L. ed. 264; *Bishop, Contr.* § 770.

The disability of the plaintiff to recover grows out of the fact that its cause of action arises out of an illegal transaction. The ground upon which courts refuse to enforce rights arising out of an illegal transaction is one of public policy and as affecting the public interest, which policy or principles is not affected by the order of the proof.

Greenhood, Pub. Pol. Rule 143, p. 126; *Blythe v. Loringgood*, 2 Ired. L. 20. 37 Am. Dec. 402; *Kirkpatrick v. Clark*, 132 Ill. 342, 8 L. R. A. 511; *Harrison v. Hatcher*, 44 Ga. 638; *Broom, Legal Maxims*, 702; *Miller v. Marckle*, 21 Ill. 152; *Smith v. Hubbs*, 10 Me. 71; *Winston v. McFarland*, 22 Ill. 38; *Dunaway v. Robertson*, 95 Ill. 419; *Tyler v. Tyler*, 126 Ill. 525; *Samuels v. Oliver*, 180 Ill. 73; *Foss v.*

Cummings, 149 Ill. 354; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Shaffner v. Pinchback*, 133 Ill. 410; *Goodrich v. Tenney*, 144 Ill. 422, 19 L. R. A. 371; *McBlair v. Gibbs*, 58 U. S. 17 How. 232, 15 L. ed. 132; *Corcoran v. Lehigh & F. Coal Co.* 138 Ill. 390.

If the contract of August 21 was a gambling contract prohibited by the statute, appellee was not entitled to recover for coal delivered to appellant in execution of the performance of said contract.

St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Tenney v. Foote*, 95 Ill. 99, 4 Ill. App. 594; *Fisher v. Bridges*, 3 El. & Bl. 642; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 584; *Metcalf*, Contr. pp. 263-267; *Webster v. Sturges*, 7 Ill. App. 560; *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Samuels v. Oliver*, *supra*; *Nash v. Monheimer*, 20 Ill. 215; *Jerome v. Bigelow*, 66 Ill. 452, 16 Am. Rep. 597; *Skeels v. Phillips*, 54 Ill. 309; *Lewis v. Headley*, *supra*; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361; *Gillet v. Logan County Supers.* 67 Ill. 256; *Arter v. Byington*, 44 Ill. 468; *Lineas v. Heating*, 44 Ill. 113, 92 Am. Dec. 153; *Northrup v. Phillips*, 99 Ill. 449; *Shaffner v. Pinchback*, 133 Ill. 410; *Penn v. Bornman*, 102 Ill. 523; *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 462, 42 Am. Rep. 26; *Compton v. Bunker Hill Bank*, 96 Ill. 307, 36 Am. Rep. 147; *Neustadt v. Hall*, 53 Ill. 172; *Tyler v. Tyler*, 126 Ill. 525; *Corcoran v. Lehigh & F. Coal Co.* 138 Ill. 390.

The contention that appellee was not *in pari delicto*, and was therefore entitled to recover, is not well taken.

Pearce v. Foote, 113 Ill. 229, 55 Am. Rep. 414; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453; *Baehr v. Wolf*, 59 Ill. 470; *White v. Franklin Bank*, 22 Pick. 181.

The contention that appellee is entitled to recover on the ground that the contract is only *malum prohibitum* is not well taken.

Penn v. Bornman, *supra*; *Workingmen's Bkg. Co. v. Rautenberg*, 103 Ill. 460, 42 Am. Rep. 26; *Corcoran v. Lehigh & F. Coal Co.* *supra*; *Broten v. Tarkington*, 70 U. S. 3 Wall. 377, 18 L. ed. 255; *Davidson v. Lanier*, 71 U. S. 4 Wall. 447, 18 L. ed. 377.

Mr. William McNett, for appellee:

The use of the word "requirements," taken in connection with the context, amounts to what the law denominates a patent ambiguity in the contract, and so cannot be helped, either by averment or extrinsic evidence.

Palmer v. Albee, 50 Iowa, 429; 1 Greenl. Ev. §§ 287, 288, 297, 300; *Bishop*, Contr. §§ 316, 374, 376, 377, 390, and cases cited in notes; *Colcord v. Alexander*, 67 Ill. 581; *Dent v. North American S. S. Co.* 49 N. Y. 390; 2 Taylor, Ev. Blackstone's ed. §§ 1194, 1213; *Parker v. Pettit*, 43 N. J. L. 512; *Schreiber v. Butler*, 84 Ind. 576; *American Emigrant Co. v. Clark*, 62 Iowa, 182; *Grier v. Puterbaugh*, 108 Ill. 602; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427; *Smith v. Morse*, 20 La. Ann. 220.

There is no mutuality in this contract.

Bailey v. Austrian, 19 Minn. 535; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; 31 L. R. A.

Corbitt v. Salem Gaslight Co. 6 Or. 405, 25 Am. Rep. 541; *Cooke v. Ozley*, 3 T. R. 658; *Houston & T. C. R. Co. v. Mitchell*, 38 Tex. 85.

The contract is directly within the grasp of section 130 of the Criminal Code, which defines what contracts will be considered "option" contracts in this state, and proceeds to condemn them.

Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164; *Osgood v. Bauder*, 75 Iowa, 550, 1 L. R. A. 655; *Corcoran v. Lehigh & F. Coal Co.* 138 Ill. 390; *White v. Barber*, 123 U. S. 393, 31 L. ed. 243; *Pixley v. Boynton*, 79 Ill. 351; *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414; *Tenney v. Foote*, 4 Ill. App. 594; *Miller v. Bensley*, 20 Ill. App. 528; *Webster v. Sturges*, 7 Ill. App. 560; *Wolcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 88 Ill. 38, 25 Am. Rep. 349; *Gilbert v. Gaugar*, 8 Biss. 214.

As the appellee made out its case without any reliance upon the illegal agreement, it is not affected thereby, and may recover.

Bradley v. King, 44 Ill. 339; *Armstrong v. American Exch. Nat. Bank*, 133 U. S. 493, 33 L. ed. 747; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 732; *Planters' Bank v. Union Bank*, 83 U. S. 16 Wall. 483, 21 L. ed. 473; *Manchester & L. R. Co. v. Concord R. Co.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *McBlair v. Gibbs*, 58 U. S. 17 How. 232, 15 L. ed. 132; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 700; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Welch v. Wesson*, 6 Gray, 505; *Wright v. Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701; *Suan v. Scott*, 11 Serg. & R. 155; *Thomas v. Brady*, 10 Pa. 164; *Scott v. Duffy*, 14 Pa. 18; 2 Benjamin, Sales, 3d Eng. ed. 4th Am. ed. p. 681, § 788, note 2.

As the appellee was not *in pari delicto* with the appellant in respect to the illegal contract, it may for this reason recover.

Baehr v. Wolf, 59 Ill. 470; *Herrick v. Lynch*, 150 Ill. 283; *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Dwight v. Palmer*, 74 Ill. 295; *Mosher v. Guffin*, 51 Ill. 184, 99 Am. Dec. 541; *Manchester & L. R. Co. v. Concord R. Co.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; *White v. Franklin Bank*, 22 Pick. 181; *Atlas Bank v. Nahant Bank*, 3 Met. 581; *Welch v. Wesson*, 6 Gray, 505; *Utica Ins. Co. v. Scott*, 19 Johns. 1; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; 1 Pom. Eq. Jur. § 403, and notes; 2 Pom. Eq. Jur. § 462, note 2.

The courts make a distinction between contracts *malum prohibitum* and *malum in se*, granting relief where money or property has been parted with under the former, and denying relief where money or property has been parted with under the latter class.

Schneider v. Turner, 130 Ill. 28, 6 L. R. A. 164; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *White v. Franklin Bank*, and *Utica Ins. Co. v. Kip*, *supra*; 2 Pom. Eq. Jur. § 942, note 2, p. 462; *Manchester & L. R. Co. v. Concord R. Co.* *supra*; 2 Morawetz, Priv. Corp. § 721, note 1; *Herrick v. Lynch*, *supra*.

Mr. William Barge, also for appellee:

The contract in the second plea is uncertain, and is not aided, in this respect, by any averment in that plea. It is therefore void for uncertainty.

Broun v. Berry, 47 Ill. 175; *Bouvier*, Law Dict.; *Doyle v. Teas*, 5 Ill. 202; *Griffith v. Purry*, 30 Ill. 251, 88 Am. Dec. 186; 2 Whart. Ev. § 957.

Extrinsic evidence is not admissible to remove a patent ambiguity, and the instrument is inoperative and void.

1 Am. & Eng. Enc. Law, p. 529.

The agreement in the second plea does not bind appellant to require any coal, and is therefore void for want of mutuality.

Bailey v. Austrian, 19 Minn. 535; *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427; *Campbell v. Lambert*, 36 La. Ann. 35, 51 Am. Rep. 1; 1 Parsons, Contr. 3d ed. 374; *McKinley v. Watkins*, 18 Ill. 140; 1 Addison, Contr. Morgan's ed. p. 439, § 300; *Hopkins v. Prescott*, 4 C. B. 578.

The contract set up in the third plea is in violation of § 130, chap. 38, Ill. Rev. Stat., and the demurrer was correctly sustained to it for that reason.

Schneider v. Turner, 180 Ill. 28, 6 L. R. A. 164; *White v. Barber*, 123 U. S. 392, 31 L. ed. 243; *Osgood v. Bauder*, 75 Iowa 550, 1 L. R. A. 655; *Webster v. Sturges*, 7 Ill. App. 560; *Wolcott v. Heath*, 78 Ill. 433; *Pickering v. Cease*, 79 Ill. 328; *Pirley v. Boynton*, Id. 351; *Miller v. Bensley*, 20 Ill. App. 523; *Tenney v. Foote*, 4 Ill. App. 594; *Pearce v. Foote*, 118 Ill. 228; *Lyon v. Culbertson*, 83 Ill. 33, 25 Am. Rep. 349; *Gilbert v. Gaugar*, 8 Biss. 214.

Appellee was entitled to the reasonable value of the coal delivered to appellant.

Suan v. Scott, 11 Serg. & R. 155; *Thomas v. Brady*, 10 Pa. 164; *Scott v. Duffy*, 14 Pa. 18; 2 Benjamin, Sales, 3d Eng. ed. 4th Am. ed. p. 681, § 788, note, 2; *Armstrong v. American Erch. Nat. Bank*, 133 U. S. 484, 33 L. ed. 747; *Welch v. Wesson*, 6 Gray, 505; *Manchester & L. R. Co. v. Concord R. Co.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319.

Courts will not give effect to illegal agreements.

Montefiori v. Montefiori, 1 W. Bl. 368.

The test is whether the case or defense is made out through the aid of the illegal contract. If so, it must fail.

Taylor v. Chester, L. R. 4 Q. B. 309; 2 Benjamin, Sales, 3d Eng. ed. 4th Am. ed. § 788, p. 681; *Gilliam v. Brown*, 43 Miss. 641; *Roby v. West*, 4 N. H. 290, 17 Am. Dec. 423; *Welch v. Wesson*, 6 Gray, 505; *Phalen v. Clark*, 19 Conn. 421; *Manchester & L. R. Co. v. Concord R. Co. supra*; *Woodworth v. Bennett*, 43 N. Y. 275, 3 Am. Rep. 706; *Armstrong v. American Erch. Nat. Bank*, 133 U. S. 433, 33 L. ed. 747; *Den, Roberts, v. Roberts*, 2 Barn. & Ald. 367; *Suan v. Scott*, 11 Serg. & R. 155; *Thomas v. Brady*, 10 Pa. 164; *Scott v. Duffy*, 14 Pa. 18; *Columbia Bank & B. Co. v. Haldeman*, 7 Watts & S. 233, 42 Am. Dec. 229; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Wright v. Pipe Line Co.* 101 Pa. 204, 47 Am. Rep. 701; *Northampton County's Appeal*, 30 Pa. 305; *Cooley, Torts*, p. 156, note.

There is "a good consideration for the con-

L. R. A.

tract in suit before reaching back to the alleged illegal transaction."

Armstrong v. American Erch. Nat. Bank, 133 U. S. 484, 33 L. ed. 747; *Hewitt v. Dement*, 57 Ill. 500; *Bachr v. Wolf*, 59 Ill. 470; 1 Story, Eq. Jur. § 300; *Manchester & L. R. Co. v. Concord R. Co.* 66 N. H. 100, 9 L. R. A. 689, 3 Inters. Com. Rep. 319; 1 Pom. Eq. Jur. § 403; *Smith v. Bromley*, 2 Dougl. 696, note; *Osborne v. Williams*, 18 Ves. Jr. 379; *Bowanquett v. Dashwood*, Cas. t. Talb. 37; *Earl Chesterfield v. Janssen*, 2 Ves. Sr. 156.

Since the parties in the case at bar are not *in pari delicto*, a recovery is permissible to the plaintiff for the value of the coal delivered.

Keith v. Buck, 16 Ill. App. 121; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 182; 2 Pom. Eq. Jur. p. 462, note; 2 Chitty, Contr. 11th Am. ed. 498, 499, 944, 976; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *White v. Franklin Bank*, 22 Pick. 181; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Manchester & L. R. Co. v. Concord R. Co. supra*; 2 Benjamin, Sales, 3d Eng. ed. 4th Am. ed. § 787; *Taylor v. Bowers*, L. R. 1 Q. B. Div. 291; *Congress & E. Spring Co. v. Knowlton*, 130 U. S. 49, 26 L. ed. 347; 2 Greenl. Ev. § 111; 2 Addison, Contr. § 141; 2 Story, Contr. § 617; *Lovely v. Bourdieu*, 2 Dougl. 468; 2 Morawetz, Priv. Corp. §§ 670, 673, 674, 721, note 1, 722; *Osborne v. Williams*, 18 Ves. Jr. 379; *Reynell v. Sprye*, 8 Hare, 222, 1 De G. M. & G. 660; *Lacausade v. White*, 7 T. R. 585; *Lea v. Cassen*, 61 Ala. 312; *Block v. Darling*, 140 U. S. 234, 35 L. ed. 476.

Magruder, J., delivered the opinion of the court:

The first point discussed by counsel on both sides is whether the trial court erred in sustaining the demurrer to the second plea, which sets up the contract of August 4, 1886. It is insisted by appellee that the demurrer to that plea was properly sustained upon the alleged ground that the contract of August 4 was void for uncertainty and for want of mutuality.

After a careful consideration of the terms of the contract, we do not think that it can be regarded as void for the reasons stated.

It is said by counsel for appellee that the amount or quantity of appellant's "requirements" of anthracite coal for the season of 1886-1887 is not fixed by the contract, and that, for this reason, it is wanting in certainty; and that the contract does not bind appellant to "require" any coal, and for this reason is wanting in mutuality.

Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances, which both parties had in view at the time of making the contract may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words which they may have used to express it. *Doyle v. Teas*, 5 Ill.

202; *Torrence v. Shedd*, 156 Ill. 194. The parties representing the companies who entered into the contract of August 4, 1886, were practical business men. The word "requirements," as used by them, evidently meant the amount or quantity of coal which appellant would need in its business for the specified season. Appellant agreed to buy such anthracite coal as it should need in its business for the season of 1886-1887, of appellee at a certain price per ton, and appellee agreed to furnish said amount of coal, free on board the cars at Chicago or Milwaukee, at said price per ton, as it should be ordered by appellant during said season.

The plea avers that defendant was engaged in the purchase, use, and sale of coal in its business, and that its requirements therein for that season were very large, and that such fact was well known to the plaintiff. The parties will be presumed to have contracted with reference to the knowledge which they then had upon that subject, and upon the supposition that appellant would need the same quantity of coal which it had theretofore been in the habit of using. The word, "requirements," evidently has the same meaning as the word, "needs." The amount of coal which was "required" for the business of that season was the amount of coal which was "needed" in the business of that season.

If the word, "requirements," as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said that appellant was not bound to require any coal unless it chose, and that therefore there was a want of mutuality in the contract. But the rule is that where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative. *Thrall v. Newell*, 19 Vt. 202, 47 Am. Dec. 682; *Evans v. Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297. A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negated by the language used. *Torrence v. Shedd*, *supra*. It cannot be said that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability.

A contract somewhat similar to the one now under consideration came before this court for construction in *National Furnace Co. v. Keystone Mfg. Co.* 110 Ill. 427. The following language there used is, with appropriate changes, applicable to the present case: "We do not regard the contract void on the ground stated. It is true that appellee was only bound by the contract to accept of appellant the amount of iron it needed for use in its business; but a reasonable construction must be placed upon this part of the contract, in view of the situation of the parties. Appellee was engaged in a large manufacturing business, necessarily using a large quantity of iron in the transaction of its business. It is not to be presumed that appellee would close its business and need no iron, but, on the contrary, the

reasonable presumption would be that the business would be continued, and appellee would necessarily need the quantity of iron which it had been in the habit of using during previous years. It cannot be said that appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for a breach of the contract. It was bound by the contract to take of appellant, at the price named, its entire supply of iron for the year,—that is, such a quantity of iron, in view of the situation and business of appellee, as was reasonably required and necessary in its manufacturing business. Such contracts are not unusual. A foundry may purchase its supply of coal for the season, of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter, at a specified price. Such contracts are not uncommon, and we have never understood that they were void. *Smith v. Morse*, 20 La. Ann. 220, is a case in point. In this case Smith agreed to furnish Morse all the ice he might require for the use of his hotel for five years, at a certain price. Smith undertook to avoid the contract on the ground that Morse was not bound, but the court held the contract valid and binding on both parties."

For the reasons stated, we are inclined to think that the demurrer to the second plea should have been overruled.

The second point discussed by counsel is, whether or not the contract of August 4, 1886, as changed by the modification of August 21, 1886, is in violation of § 130 of the Criminal Code of this state. That section provides, that "whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, . . . shall be fined, . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." (1 Starr & C. Stat. p. 791.) It is claimed by appellee, that the demurrer to the third plea was properly sustained upon the alleged ground that the modified contract of August 21, 1886, as therein set out, is void as being a contract for an "option" within the meaning of § 130.

The modification of August 21, 1886, contains the following provision, to wit: It is also agreed that the Minnesota Lumber Company shall have the privilege under this contract of ordering any quantity of coal not in excess of 12,000 tons, which agreement is in lieu of stipulation for requirements."

If this provision stood alone, it might be said, with some plausibility, that it was a mere contract for the option to buy coal at a future time, and that, so, it came within the meaning of § 130. But the provision must be construed in connection with the rest of the agreement of August 4, as modified by the amendment of August 21. Language used in a contract should be so construed as to give effect to the instrument as a legal agreement. *Thrall v. Newell*, *supra*. The intention of the parties, which courts will seek to discover in giving construction to a contract, is to be gathered, not from particular words and

phrases, but from the whole context of the agreement. The supplemental contract of August 21 was entered into for the purpose of settling a dispute which had arisen as to the validity of the contract of August 4. It was not designed to supersede the latter contract, but to modify it. It recites upon its face "that the said alleged contract shall be performed upon the following conditions and exceptions." It made two changes. In the first place, it increased the price of the coal 10 cents per ton over the price named in the old agreement. It provided, that the coal should be billed and paid for at this increased price, leaving it to be determined by arbitration whether appellee should retain the benefit of such advanced price, or should refund the same to appellant. In the second place, it limited the amount of coal which appellant was entitled to order to 12,000 tons. By the original agreement, appellant was entitled to order all the coal which was required or needed in its business for the season named; by the modified contract, appellant was restricted to the privilege of ordering 12,000 tons. It was not the intention here to contract for the mere option or privilege of buying coal at a future time, but simply to limit the quantity to be bought. As, by the original contract, appellant had agreed to buy and appellee had agreed to sell and deliver, as ordered, all the coal which would be needed in the business for the season, so, by the modification, appellant agreed to buy and appellee agreed to sell and deliver, as ordered, an amount of coal not to exceed 12,000 tons. The supplemental contract was not intended to relieve appellant from its obligations under the original contract, but simply to limit its rights thereunder; it was not intended to be an option contract, as it was not optional with defendant whether it should or should not perform the contract of August 4.

In *Pearce v. Foote*, 113 Ill. 228, we said (p. 284): "The true idea of an option is what are called, in the peculiar language of the dealers, 'puts' and 'calls.' A 'put' is defined to be the 'privilege of delivering or not delivering' the thing sold, and a 'call' is defined to be the 'privilege of calling for or not calling for' the things bought. 'Optional contracts,' in this sense, are usually settled by adjusting market values, as the party having the 'option' may elect. It is simply a mode adopted for speculating in differences in market values of grain or other commodities. It must have been in this sense the term 'option' is used in the statute. Such a contract is obviously fictitious, having none of the elements of good faith, as in a contract where both parties are bound, and is defined by statute as a 'gambling contract.'" It was said in *Tenney v. Foote*, 4 Ill. App. 594, and approved on appeal in *Tenney v. Foote*, 95 Ill. 99: "In practice on the stock exchange, it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences. This became common, and the English statute was aimed at its repression because it was, in effect, gambling. Our statute is directed against the same evil, and extends to transactions in grain and other commodities as well as stocks. So that the word 'option' as used in the statute here, taken with the context, means a mere choice, right, or

privilege of selling or buying; and it is the contracting for such choice, right, or privilege of selling or buying, at a future time, any commodity the statute was intended to prohibit, as contradistinguished from an actual sale or purchase, with the intention of delivering and accepting the commodity specified." This extract from *Tenney v. Foote*, 95 Ill. 99, was quoted with approval in *Schneider v. Turner*, 180 Ill. 28, 6 L. R. A. 164. In the recent case of *Preston v. Smith*, 156 Ill. 359, we said (p. 363): "In all the cases where a contract has been held void under the statute, it will be found either the option to deliver the subject of the contract remained in the vendor, or the option to accept the article remained with the purchaser."

If these definitions of an optional contract be applied to the contract of August 4 as amended by the modification of August 21, it will appear that the latter contract does not come within the meaning of § 130 of the Criminal Code. It is the duty of courts to give a reasonable construction to the contracts of parties, and to effectuate their intention if possible. By no reasonable construction can it be said that the modified agreement of August 21 was the contracting for a mere choice, right, or privilege of selling or buying coal at a future time. The parties agree to make actual sales and purchases with the intention of delivering and accepting the coal. As an evidence of this, there occur such expressions as the following: "The said Minnesota Lumber Company agrees to buy . . . of said Whitebreast Coal Company, which is to furnish the same as ordered . . . at following prices." "Payments on shipments to be settled on 15th of each month following shipment in a sixty-day acceptance." "It is agreed that this contract shall be binding upon both parties." "It is mutually agreed . . . that the said alleged contract shall be performed." "Coal shall be billed and paid for at the rate," etc. "It is agreed that the coal shall be settled for in sixty days' paper as before mentioned," etc.

Upon the trial before the court of the issue formed by the filing of the general issue, it appeared from the testimony that appellee shipped to appellant about 400 tons of the coal in September, 1,600 tons in October, 1,100 tons in November and 1,000 tons in December, or about 4,000 tons in all, leaving about 8,000 tons, stipulated for in the contract and ordered by appellant, unshipped.

It follows from the foregoing considerations that the demurrer to the third plea should have been overruled.

A third question is elaborately discussed in the arguments of counsel, and that relates to the right of appellee to recover for the value of the coal delivered, irrespective of the character of the contract upon which it was delivered, as to alleged uncertainty or want of mutuality therein. That is to say, assuming that the modified contract of August 21 was illegal and criminal under said § 130, appellee insists that, under the common counts put in issue by the plea of the general issue, it was only bound to show the orders of appellant for the coal, the shipments of the coal, and the value of the coal so shipped; that it was not necessary for it to prove the contract in order to recover

the value of the coal; that as the declaration is not upon the illegal contract, nor to enforce it, but to recover the value of coal sold and delivered, it was sufficient to establish a prima facie case without introducing the contract; and that, having established such prima facie case, its right to recovery was not affected by the introduction of the illegal contract by the appellant, accompanied by proof that the coal was sold and delivered thereunder. Appellee contends, in other words, that the test as to whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. On the other hand, appellant claims that, if the contract is illegal and criminal, the maxim *in pari delicto* applies, no matter which party is the first to urge it upon the court; and that, whenever it appears that the property, whose value or price is sued for, was delivered under an illegal contract, whether it is so made to appear by the testimony of the plaintiff or the defendant, the plaintiff cannot recover, upon the ground that in such case the court will aid neither party.

If the contract was illegal and criminal, then, under the contention of appellee upon

this branch of the case, appellant would be obliged to pay for such of the coal as was actually delivered to it, without being allowed to show, as an offset, any damages suffered by it for the nondelivery of the balance of the coal. Upon the assumption of the illegality of the contract, appellant's contention would leave appellee without payment for the coal which it parted with. The apparent injustice of either contention is obviated by the view already taken of the modified contract. As the contract is herein held to be valid, the plaintiff will be entitled, upon another trial, to recover for the coal delivered, except so far as the defendant may be able to show damages as aforesaid as an offset, either partial or entire, to the amount of coal received by it. Appellant will have the right to offset the damages, if it can prove any; but if it fail in such proof, appellee will recover the value of the coal delivered. In view of the disposition thus made of the special pleas, it is unnecessary to discuss the third question raised by counsel, and we pass no opinion upon it.

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

ARKANSAS SUPREME COURT.

CITY ELECTRIC STREET RAILWAY
COMPANY, *Appl.*,

v.

FIRST NATIONAL EXCHANGE BANK.

(.....Ark.....)

1. **The president and secretary of a corporation** have no inherent power to execute negotiable notes in its name.
2. **A usage to be good** and of which the courts will take judicial notice must be general and of such long standing as to have become a part of the law itself.
3. **The exercise of the power to make negotiable notes** by officers of a corporation does not raise a presumption of their authority to do so, in the absence of a usage or custom from which such authority can be implied.
4. **Corporations are not bound** by false and simulated entries upon their records unless they have estopped themselves to deny their truth.

(February 8, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to enforce payment of a negotiable note which had been executed by defendant's president and secretary. *Reversed.*

The facts are stated in the opinion.

Mr. John McClure for appellant.

Messrs. Ratcliffe & Fletcher, for appellees:

When the corporation has power to do an

NOTE.—For powers of president of a corporation, see note to *Walt v. Nashua Armory Asso.* (N. H.) 14 L. R. A. 366.

31 L. R. A.

act, as to execute negotiable instruments, and such instruments are signed by the proper officers of the company, although the right of the officers to execute the instrument may depend upon a previous order of the board of directors, the party taking the same in the usual course of business for value, before maturity and without notice of the want of authority, has a right to assume that all the prerequisite conditions have been complied with.

2 Morawetz, Priv. Corp. §§ 610, 611; *Royal British Bank v. Turquand*, 6 El. & Bl. 327; *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008; *National Bank of the Republic v. Young*, 41 N. J. Eq. 581; *American Exch. Nat. Bank v. Oregon Pottery Co.* 55 Fed. Rep. 265.

All persons dealing with them have the right to assume that there is no restriction of that authority, they also have the right to assume, unless they have actual notice to the contrary, that a note so signed is made in the regular course of the business of the corporation.

1 Morawetz, Priv. Corp. § 558, and note 1; 2 Morawetz, Priv. Corp. § 602; 1 Dan. Neg. Inst. §§ 381, 386, 389-392; Taylor, Priv. Corp. § 204; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *People's Bank v. Manufacturers' Nat. Bank*, 101 U. S. 181, 25 L. ed. 907; *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Lexington v. Butler*, 81 U. S. 14 Wall. 296, 20 L. ed. 812; *Tod v. Kentucky Union Land Co.* 57 Fed. Rep. 47; *Thomson-Houston Electric Co. v. Capitol Electric Co.* 65 Fed. Rep. 341; *Thomas v. City Nat. Bank*, 40 Neb. 501, 24 L. R. A. 263; *Ellsworth v. St. Louis, A. & T. H. R. Co.* 98 N. Y. 553; *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454.

If it was the duty of the holders of these

notes to make inquiry as to the authority of the president and secretary to sign the same, certainly nothing could have been required of them beyond an examination of the records of the street-car company, and had they examined those records the authority would have there appeared to be complete.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145; *Murray v. Lardner*, 69 U. S. 2 Wall. 122, 123, 17 L. ed. 860, 861; *Hotchkiss v. National Shoe & L. Bank*, 88 U. S. 21 Wall. 360, 22 L. ed. 649; *Hopkins v. Withrow*, 42 Ill. App. 584; *Wilson v. Denton*, 82 Tex. 531; *First Nat. Bank v. Stanley*, 46 Mo. App. 440; *Richards v. Monroe*, 85 Iowa, 359; *Clarke v. Evans*, 66 Fed. Rep. 263; *Goodman v. Simonds*, 61 U. S. 20 How. 543, 15 L. ed. 934; *Snift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *King v. Doane*, 139 U. S. 166, 35 L. ed. 84; *Comstock v. Hannah*, 76 Ill. 530; *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691; *Belmont Branch of State Bank v. Hoge*, 35 N. Y. 65; *Seybel v. National Currency Bank*, 54 N. Y. 288, 18 Am. Rep. 583; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Lake v. Reed*, 29 Iowa, 258, 4 Am. Rep. 209; *Woolfolk v. Bank of America*, 10 Bush, 504; *Hamilton v. Marks*, 63 Mo. 167; *Trieber v. Commercial Bank*, 31 Ark. 129; *Kitchen v. Loudenback*, 48 Ohio St. 177; *Breman Sav. Bank v. Branch-Crookes Sav. Co.* 104 Mo. 425; *Davis v. Seeley*, 71 Mich. 209; *Teschler v. Merea*, 118 Ind. 586; *Tourtelotte v. Brown*, 1 Colo. App. 408; *Martin v. Johnston*, 34 Neb. 797; *Steinhart v. Boker*, 34 Barb. 436.

The corporation will not be permitted to plead ignorance of the resolution entered of record authorizing the president and secretary to issue the notes.

It was the duty of the directors to examine the books and records of the corporation, and they are conclusively presumed to know all that they would disclose.

Martin v. Webb, 110 U. S. 7-15, 28 L. ed. 49-52; *First Nat. Bank v. Fourth Nat. Bank*, 56 Fed. Rep. 967; *Jones v. Arkansas Mechanical & Agri. Co.* 38 Ark. 17.

Wood, J., delivered the opinion of the court:

The bank sued the railway company on a negotiable promissory note purporting to have been executed by the company payable to H. G. Allis and George R. Brown and indorsed by them before maturity for value, and delivered to the First National Bank, and by it indorsed and delivered to the plaintiff. The answer, in substance, sets up that the defendant was a corporation, organized under the laws of Arkansas (Sand. & H. Dig. chap. 47); that the note was executed by the president and secretary of the defendant corporation, without any authority from or knowledge of its board of directors; that the charter and by-laws of the corporation gave no such authority; that the president and secretary had the records to show that they were duly authorized to issue the note, but that such record entry was false, and the directors had no knowledge of such entry until long after the maturity of the note; that the directors had never ratified the unauthorized acts of the said officers; that the said secretary and president had never in-

dulged in a course of dealing, between the corporation and third parties, so as to lead strangers to believe that they (the president and secretary) had power to issue negotiable paper in the name of the company, nor had the corporation ever received any consideration for said notes. A demurrer to this answer was sustained, and the defendant refusing to plead further, judgment was rendered against it for the amount of the note, which this appeal seeks to reverse.

The answer presented a good defense unless it can be said (1) that the authority of the president and secretary to issue the note in suit must be presumed from the fact that they have exercised it, or (2) that the corporation is bound by the false record showing that the directors had conferred such authority upon the president and secretary.

1. Unless the authority is expressly conferred by the charter or given by the board of directors, it may be stated, as a general proposition, that the president and secretary of a corporation are not empowered to bind it by their signatures to commercial paper. They have no inherent power to execute negotiable notes in the name of the corporation. *Tiedeman, Com. Paper*, § 121; *Cook, Stock, Stockholders & Corp. Law*, § 716; *McCullough v. Moss*, 5 Denio, 567; 4 *Thomp. Corp.* § 4619; *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* 7 Wend. 31; *Hyde v. Larkin*, 35 Mo. App. 365; *Pierce, Railroads*, 32-34; *Walworth County Bank v. Farmers' Loan & T. Co.* 14 Wis. 325; 1 *Morawetz, Priv. Corp.* § 587; *Titus v. Cairo & F. R. Co.* 37 N. J. L. 98-102; *Wait v. Nashua Armory Asso.* 66 N. H. 581, 14 L. R. A. 356, and authorities there cited; *National Bank of Commerce v. Atkinson*, 55 Fed. Rep. 465. Where the authority of the president and secretary to bind the corporation is challenged, as it has been by the answer in this case, that authority should be shown by the proof, and not be presumed as a matter of law. *Mount Sterling & J. Turnp. Road Co. v. Looney*, 1 Met. (Ky.) 550; *Bacon v. Mississippi Ins. Co.* 31 Miss. 116; 4 *Thomp. Corp.* 4619; *Craft v. South Boston R. Co.* 150 Mass. 208, 5 L. R. A. 641; *First Nat. Bank v. Hogan*, 47 Mo. 472; *Dabney v. Sterens*, 40 How. Pr. 341; 1 *Waterman, Corp.* 445; *Hallowell & A. Bank v. Hamlin*, 14 Mass. 180; *Chicago & N. W. R. Co. v. James*, 22 Wis. 197; *Bliss v. Kaweah Canal & Irrig. Co.* 65 Cal. 504. We are aware that there are authorities, *contra*, and counsel for appellee have cited us to *American Ech. Nat. Bank v. Oregon Pottery Co.* 55 Fed. Rep. 265, where it is held that, "if the president and secretary sign" a negotiable promissory note, "their authority is inferred from their official relation." This case is analogous, the question being presented (as in the case at bar) on demurrer to an answer which negated the authority of the president and secretary to issue such paper. But the court, to sustain its position in that case, cited only two cases, *viz.*: *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 644, 19 L. ed. 1018; and *Crowley v. Genesee Min. Co.* 55 Cal. 273. In the case in 10 Wall., *supra*, the court uses this language: "It should have been left to the jury to determine whether, from the

evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith [the cashier] had authority to bind the defendant." True, it is also said that, "if the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." But we submit that the broad dicta of the latter quotation, in view of the fact that there was a usage of other banks, and a usual course of dealing, with the knowledge and acquiescence of the directors, shown, were unnecessary for the determination of the question before the court. It was the very language doubtless which caused the learned circuit judge in *American Exch. Nat. Bank v. Oregon Pottery Co. supra*, to hold, as a matter of law, that the authority of the president and secretary would be presumed from the fact that they had exercised it. So, also, in the California case cited to support the ruling in 55 Fed. Rep. *supra*, it was admitted that the president, whose authority was being questioned, "was the superintendent and general managing agent, having full control of the business of the corporation." The difference, therefore, between those cases and the one at bar, and the one in which they were cited, is too obvious for further notice. The facts of the case of *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520 (where the language above quoted from Judge Swayne in 10 Wall. was first used by him), and in *Marshall County Supers. v. Schenck*, 72 U. S. 5 Wall. 772, 18 L. ed. 556; *Lexington v. Butler*, 81 U. S. 14 Wall. 296, 20 L. ed. 813; *Tod v. Kentucky Union Land Co.* 57 Fed. Rep. 47-53; and *National Bank of the Republic v. Young*, 41 N. J. Eq. 531,—also cited by counsel for appellee, where this dictum has been repeated, did not justify such a sweeping declaration of law. For an examination of these will show that, in some of the cases, municipal or county bonds were in controversy, which showed upon their face authority for their issue; and in other cases, that the contracts or transactions made or performed by the agent of the corporation were such as had been frequently or usually made or performed by him before in the course of the business of the corporation; or, that the corporation had received some benefit from the unauthorized act. But the doctrine announced in *American Exch. Nat. Bank v. Oregon Pottery Co.* 55 Fed. Rep. 265, is unsound, and not supported by the weight of authority. Besides, the principle it seeks to establish is in conflict with the doctrine announced by the Supreme Court of the United States in *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, where it was held "that the vice president of a bank, however general his powers, could not exercise such a power unless specially authorized so to do, and . . . that persons dealing with the bank are presumed to know the extent of the general powers of the officers." Mr. Morawetz, in speaking of these dicta in those cases where they have been incautiously

used, said: "They must be considered in view to the facts of the particular cases in which they were made. Taken alone, as statements of a principle or rule of law, they are certainly not in accordance with the decisions, and cannot be supported upon any sound principle." 2 Morawetz, Priv. Corp. § 608. The rule that, "if the president and secretary sign, their authority is inferred from their official relation," provided they might have had power under any circumstances to issue such paper for the corporation, is begging the question where the authority itself is challenged. This rule, too, ignores a fundamental principle of the law of agency, whether applied to natural persons or corporations: for corporations can only act through agents. It is said by Mr. Mechem, in his work on Agency (§ 289), that "every person dealing with an agent is bound to ascertain the nature and extent of his authority. He must not trust to the mere presumption of authority, nor to any mere assumption of authority by the agent." Judge Miller, of the Supreme Court of the United States, in *The Floyd Acceptances*, 74 U. S. 7 Wall. 666, 19 L. ed. 169, said: "The person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for," said he, "it is to be kept in mind that the protection which commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued." This language is exceedingly apposite to the case at bar.

It must be presumed that the answer in this case denies in toto the authority of the president and secretary to issue negotiable paper. Hence, this case bears no analogy to that line of cases where the authority exists for some purposes, but is exercised for different purposes than that for which it was conferred. Where the authority to issue negotiable paper exists at all in the president and secretary, then the innocent holder would have the right to assume that it was properly and lawfully issued. Our statute for the incorporation of business corporations expressly confers the management of their business affairs upon "not less than three directors." Sand. & H. Dig. §§ 1330-1335. Another section makes it a felony for the president or secretary of a corporation to "wilfully and designedly sign with intent to issue a promissory note without authority from the charter or by-laws of such corporation." Sand. & H. Dig. § 1604. Surely the legislature would not have made it a felony for these officers to issue negotiable notes if they had such power *virtute officii*. From the above provisions it appears that the president and secretary of corporations are not general agents. Whatever power they may have to act for the corporation at all in business matters must be delegated and special. We note, *en passant*, that the statute defines the duty of the secretary to be that of "keeping the books of the corporation." Sand. & H. Dig. § 1332. See Taylor, Corp. § 236; 1

Beach, Priv. Corp. § 202, and authorities cited in note; *Life & F. Ins. Co. v. Mechanic F. Ins. Co.* 7 Wend. 31. Those cases which hold that the president and secretary, or any other officer, of a corporation will be presumed to have authority where they have exercised it, provided, under any circumstances, it might have been conferred upon them, proceed upon the theory of a usage or custom from which authority will be implied.

But such a theory cannot be maintained as to electric street railways in this state, for the reason that no such usage as to them exists. A usage, to be good, and of which the courts will take judicial notice, must be general, and of such long standing as to have become a part of the law itself. *Mussey v. Eagle Bank*, 9 Met. 313; *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008 (dissenting opinion). The incorporation of electric street railways in the state of Arkansas is of comparatively recent date, and such corporations do not yet exist to any general extent throughout the state. Moreover, it can scarcely be conceived how a usage of the kind mentioned could have sprung up in view of our statutory provisions, and especially that one making it a felony for the president or secretary of a corporation to wilfully and designedly issue promissory notes, without authority from the charter or by-laws. *Sand. & H. Dig.* § 1604. Manifestly, if the broad dictum of Mr. Justice Swayne in 10 Wall., *supra*, is the law, then that numerous class of individuals who have invested their means in corporate property would have no protection whatever from the dishonest acts of their agents, whom they have intrusted with office. But the rule as we have declared it, while protecting the shareholders, is just to the

innocent holder; for in each case it may be shown by any competent evidence that the corporation is liable, (1) where the board of directors or the by-laws have conferred upon the president and secretary the authority to issue negotiable paper; (2) where the corporation, through its directors, has permitted these officers to habitually do such an act in the course of its business,—in other words, has clothed them with the apparent authority to so act; (3) where the directors have ratified the unauthorized acts of its officers; (4) where the corporation has received the proceeds or any benefit from the transaction. But all of these things were negatived in the answer. Hence, it was sufficient to call for the proofs.

The entries upon the books of the corporation are prima facie evidence against it, as admissions. The records and books of a corporation become conclusive evidence against it when they are the books and records of the corporation, and the entries upon them have been duly made by the recording officer. But corporations are not bound by false and simulated entries upon their records in any case, unless, knowing that they are such, they have neglected to correct them, and some innocent third party, having had proper access to them or knowledge of them, has been misled thereby to his prejudice. But a corporation is not bound to a third party by a false entry upon its records, unless such party, not knowing the entry was false, has acted upon the faith that the entry was the true record of the proceedings. This is the holding of the supreme court of Massachusetts in *Holden v. Hoyt*, 134 Mass. 181, and authorities there cited.

Reversed, with directions to overrule the demurrer.

KANSAS SUPREME COURT.

G. F. CAWOOD *et al.*, *Plffs. in Err.*,
v.

Theodore WOLFLEY, Admr. etc., of N. Morris, Deceased.

(.....Kan.....)

***All wages due a clerk for services rendered**, before as well as during the last illness of a deceased employer, fall within the second class of claims against his estate, and are included in the term "wages of servants," as used in § 80 of the "Act Respecting Executors and Administrators and the Settlement of the Estates of Deceased Persons."

(January 11, 1896.)

ERROR to the District Court for Nemaha County classifying claims against the estate of N. Morris, deceased, which refused to

*Headnote by ALLEN, J.

NOTE.—As to the question, Who are servants, etc., whose wages are preferred in payment?—see note to *Tod v. Kentucky Union R. Co.* (C. C. App. 6th C.) 18 L. R. A. 305.

31 L. R. A.

recognize plaintiffs' claims as preferred. *Modified.*

The facts are stated in the opinion.

Measrs. Wells & Wells, for plaintiffs in error:

The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect; science and skill are not required in their interpretation except where scientific or technical terms are used.

United States v. Three Railroad Cars, 1 Abb. (U. S.) 196.

Relative and qualifying words and phrases grammatically and legally, where no contrary intention appears, refer solely to the last antecedent.

Sutherland, Stat. Constr. § 267; *Fowler v. Tuttle*, 24 N. H. 9; *Quinn v. Lowell Electric Light Corp.* 140 Mass. 106.

A construction of a statute long acted upon by the people at large will be adopted by the courts, if not in direct contradiction to its terms.

Maher v. State, 1 Port. (Ala.) 265, 26 Am.

Dec. 379; *Com. v. Posey*, 4 Call (Va.) 109, 2 Am. Dec. 560.

Laws in *patri materia* should be construed together.

1 Cooley's Bl. Com. p. 60.

The courts are bound to decide what the legislature meant by what it said.

Gardner v. Collins, 27 U. S. 2 Pet. 93, 7 L. ed. 359; *Lery v. McCartee*, 31 U. S. 6 Pet. 110, 8 L. ed. 337; *Murray v. State*, 21 Tex. App. 620, 57 Am. Rep. 628; *Maillard v. Lawrence*, 57 U. S. 16 How. 261, 14 L. ed. 930.

General words in a statute are to receive a general construction unless there be something in it to restrain them.

Jones v. Jones, 18 Me. 308, 36 Am. Dec. 725; *Crane v. Giles*, 3 Kan. 54; *Re Pinkney*, 47 Kan. 89; *Wood v. Davis*, 12 Kan. 577; *State v. Ingram*, 16 Kan. 19; *Rasure v. Hart*, 18 Kan. 344, 26 Am. Rep. 772; *Barry v. Barry*, 15 Kan. 590; *State v. Buckles*, 26 Kan. 241.

Mr. Samuel K. Woodworth, for defendant in error:

At common law the priority of claims were, (1) expenses of the funeral and administration; (2) debts due the Crown by record of specialty; (3) debts of record, including judgments in courts of record or recognizances and statutes; (4) debts by specialty; and (5) simple-contract debts.

5 Am. & Eng. Enc. Law, p. 233.

The word "servants" covers only domestic, menial, and household servants.

IV. Imperial Dict. 39; Standard Dict.; Encyclopedic Dict.; Century Dict.; 14 Am. & Eng. Enc. Law, p. 745; Black, Law Dict.

To determine the sense in which the word "servants" was used by the legislature the court will consider the object the legislature desired to accomplish by preferring the wages of servants to other debts of a decedent, and the considerations which led them to prefer the claims of such persons. The inferior, humble sphere in which domestic servants move, and their dependence on their masters, entitle them to legal protection and preference.

"Interpretation" is the art of finding out the true sense of any form of words.

Lieber, Legal & Political Hermeneutics, p. 11; 23 Am. & Eng. Enc. Law, pp. 298, 326.

The statute itself should first be considered, its meaning, scope, and object.

23 Am. & Eng. Enc. Law, p. 299; Comp. L. K. 1889, subd. 12, § 1, chap. 104; *Ryegate v. Wardboro*, 30 Vt. 746.

Among the simple contracts (fifth class at common law) servants' wages are by some (1 Rolle, Abr. 927) with reason preferred to any other; and so stood the ancient law according to Bracton (lib. 2, chap. 26) and Fleta (lib. 2, chap. 56, § 10), who reckon among the first debts to be paid *servitia servientium et stipendia famulorum*. 2 Bl. Com. 511. A liberal rendering of this law is: The services of laborers, and the wages of household servants.

The wages, also, of domestic servants and of laborers are considered by some authorities to be entitled to a preference.

2 Wms. Exrs. 5th Am. ed. 923, note y, citing 2 Bl. Com. 511.

It is difficult to point out any legal ground on which such preferences can be claimed.

31 L. R. A.

Blackstone refers to 1 Rolle, Abr. 927, where it is said debts for servants' wages within the statute of laborers shall be paid before simple contracts "*come moi semble*."

Toller, Exrs. & Admsrs. 224; Spaulding, Exrs. & Admsrs. Guide, pt. 2, p. 225; Godolphin, Legacy, 221.

The word "servants" in bequests ordinarily means only those that are employed in and immediately around the homestead of the deviser.

14 Am. & Eng. Enc. Law, p. 751; *Nicoll v. Greaves*, 17 C. B. N. S. 27; *Rex v. Buckingham*, 2 Nev. & M. 72; *Nowlan v. Abiett*, 2 Cromp. M. & R. 54; *Todd v. Kerrich*, 8 Exch. 151; *Turner v. Mason*, 14 Mees. & W. 112; *Townshend v. Windham*, 2 Vern. 546; *Chilcot v. Bromley*, 12 Ves. Jr. 114; *Howard v. Wilson*, 4 Hagg. Eccl. Rep. 107; *Ogle v. Morgan*, 19 L. J. Ch. N. S. 531, 1 De G. M. & G. 359, 16 Jur. 277; *Blackwell v. Pennant*, 9 Hare, 551, 16 Jur. 420; *Booth v. Dean*, 1 Myl. & K. 560; *Herbert v. Reid*, 16 Ves. Jr. 481; *Vaughan v. Booth*, 16 Jur. 808; 15 Enc. Britannica, 620; *Ex parte Meason*, 5 Binn. 167; *Hart v. Aldridge*, Cowp. 54; *Williamson v. Wadsworth*, 49 Barb. 298.

The legislature intended the preference of wages of only domestics, menial or household servants, earned "during the last sickness of the deceased."

In order to arrive at the true legislative intent in construing a doubtful statute, that construction should be adopted which is most conformable to reason and justice; the legislature will not be presumed to have intended that which is against reason.

23 Am. & Eng. Enc. Law, pp. 306, 358; 1 Bouvier, Inst. 661, note 170; *Singer Mfg. Co. v. McCollock*, 24 Fed. Rep. 667; 2 Bell's Com. 162-165; 2 Woerner, American Law of Administration, p. 779, § 373.

Clerks are not menial servants.

Beeston v. Collyer, 4 Bing. 309; *Waterhouse v. State*, 21 Tex. App. 663; *Wakefield v. State*, 41 Tex. 558.

Allen, J., delivered the opinion of the court:

The sole question presented by the record in this case is whether, in the classification of demands against the estate of a deceased person, the wages of a clerk employed by the decedent in his store for a period prior to his last illness are to be included, under the provisions of § 80, chap. 37, of the General Statutes of 1889, in the second class. The first part of the section reads as follows: "All demands against the estate of any deceased person shall be divided into the following classes: (1) Funeral expenses. (2) Expenses of the last sickness, wages of servants, and demands for medicines and medical attendance during the last sickness of the deceased and the expenses of administration." Is a clerk a servant, within the meaning of this language, and, if so, are the wages confined to those accruing during the last illness of the deceased? No direct authority is cited or known to us on the question. The legislature, in more than one enactment has manifested a purpose to secure to all wage earners their hire, and to prefer their claims to those of most other creditors. It is conceded that the term "servant," in

its usual acceptation, especially in the law, is broad enough to include a clerk; but it is argued that the word is here used in a restricted sense, and means only menial or household servants. We are loath to recognize any such classification in Kansas as menial servants. The word is broad enough to include a clerk, and we think the legislature intended it should do so. Nor do we think the wages referred to are limited to those earned during the last illness of the deceased. In this particular case the amount of wages conceded to be due is unusually large, but that fact cannot affect the general

rule. Though the language used might perhaps be held to restrict the time to the period of the last sickness we think it as capable of the other construction, and that the legislature intended to classify all wages of servants ahead of debts due the state, judgments and demands of the fifth class.

The judgment of the District Court will be modified by classifying the demand allowed the plaintiff in the second class, instead of the fifth.

Judgment will be entered in this court in favor of the plaintiffs in error for costs.

All the Justices concur.

MARYLAND COURT OF APPEALS.

Barbara YOUNG, *Appt.*,
v.

COLLEGE OF PHYSICIANS AND SUR-
GEONS OF BALTIMORE CITY *et al.*

(81 Md. 358.)

1. A coroner may lawfully order a post-mortem examination without the consent of the family of the deceased, where death has followed an injury which seems to him insufficient alone to produce death.

2. A post-mortem examination made

by a medical examiner in the exercise of his duty, when required by a coroner, does not render him liable for mutilating the body without consent of the family of the deceased, if the work was done with ordinary decency, without wantonly disfiguring the body.

3. Testimony of a funeral director that he never received a body after post-mortem examination that was in condition for the family to see without being prepared is admissible in an action for unlawfully cutting and mutilating a body by post-mortem examination.

(June 8, 1895.)

NOTE.—The power of a coroner to order a post-mortem examination.

- I. *Coroners in general.*
- II. *Justices of the peace, etc.*

The decision in the principal case of *YOUNG v. COLLEGE OF PHYSICIANS AND SURGEONS* is in keeping with the prior cases.

As to the rights and duties in regard to the burial of the dead, and to control the disposition of a body, see *note to Larson v. Chase* (Minn.) 14 L. R. A. 85, and also the later case of *Hackett v. Hackett* (R. I.) 19 L. R. A. 358.

As to the propriety and necessity of a coroner's inquest, see *note to Lancaster County v. Holyoke* (Neb.) 21 L. R. A. 304.

I. *Coroners in general.*

A coroner is a public officer charged with the duty of holding inquests, and is clothed with general powers for that purpose, among which is the power to summon physicians to make scientific examinations of the body when the jury shall deem such examination requisite. *Pueblo County Comrs. v. Marshall*, 11 Colo. 84, 87.

It is not the duty of a coroner to inquire of sudden deaths, unless there is reasonable ground to believe that they are the result of violence or unnatural means, and his authority is to be exercised within the limits of a sound discretion, and when exercised the presumption is that the coroner has acted in good faith on sufficient cause. *Clark County v. Calloway*, 52 Ark. 361.

And where a death has been caused by violence, it is the coroner's duty to order a post-mortem examination by a competent medical authority. *Com. v. Harman*, 4 Pa. 209.

In the above case it was stated that there ought to be a post-mortem examination in all cases of death by violence.

By the imposition of the duty cast upon the coroner, 31 L. R. A.

ner, he is authorized to do all things whatsoever reasonably necessary to discharge that duty. *St. Francis County v. Cummings*, 55 Ark. 419.

The presumption is that the coroner acts in good faith and on sufficient cause, in the exercise of his discretion in the holding of an inquest, and in such discretion he may order a post-mortem examination. *Lancaster County v. Mishler*, 100 Pa. 624, 627.

He has power to order a post-mortem examination. *Pickett v. Erie County*, 19 W. N. C. 60; *Allegheny County v. Watt*, 3 Pa. 462; *Com. v. Harman*, *supra*; *Northampton County v. Innes*, 26 Pa. 156; *Allegheny County v. Shaw*, 34 Pa. 301.

In *Marvin Shaft Inquest*, 3 Pa. Co. Ct. 10, the court admitted the power of a coroner to order a post-mortem examination of a body, and held the county liable for the expenses thus incurred.

So, in *Gaston v. Marion County Comrs.* 3 Ind. 497, it was held that the coroner had power to order such an examination when necessary.

And in *Van Hoevenbergh v. Hasbrouck*, 45 Barb. 197, it was held that a coroner had a right to employ a physician to attend to inquests.

So, it has been stated that a thorough examination, aided by professional skill, is in general absolutely necessary to the proper administration of justice. *Northampton County v. Innes*, 26 Pa. 156.

Such an examination is frequently necessary for the detection and punishment of crime. *Fears v. Nacogdoches County*, 71 Tex. 337; *Frio County v. Earnest* (Tex.) 16 S. W. 1036.

In taking an inquisition of death, the coroner as the agent of the public has authority to order a post-mortem examination. *Allegheny County v. Watt*, 3 Pa. 462.

And the power is incident to the coroner's duty. *Dearborn County Comrs. v. Bond*, 88 Ind. 102; *Jay County Comrs. v. Gillum*, 92 Ind. 511; *Dubois County Comrs. v. Wertz*, 112 Ind. 208; *Lang v. Perry County Comrs.* 121 Ind. 133.

So, in the exercise of his discretion and power in

APPEAL by plaintiff from a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover damages for the alleged wrongful mutilation of the dead body of plaintiff's deceased husband. *Affirmed.*

The facts are stated in the opinion.

Messrs. Andrew H. Mettee and R. B. Tippet & Bro., for appellant:

In a very recent case, on all fours with this, on the question of recovery for mental anguish, where such right has been violated, the court of appeals unanimously decided that an action would lie.

Larson v. Chase, 47 Minn. 307, 14 L. R. A. 85; *Re Beekman Street*, 4 Bradf. 503; 3 Chicago Leg. News, 378; 4 Alb. L. J. 56.

Let it once be ascertained that a party is entitled to a right, then any one who hinders or disturbs him in the exercise and enjoyment of it is liable to an action.

Ashby v. White, 2 Ld. Raym. 953.

The invasion of the appellant's right by the fraudulent act of the appellees entitles the appellant to damages.

Store v. Heywood, 7 Allen, 123; *Meagher v. Driscoll*, 99 Mass. 285, 96 Am. Dec. 759; *Elbin v. Wilson*, 33 Md. 140.

The coroner and his jury do not constitute a court, and are not clothed with judicial powers, as was the case at common law.

State, Grice, v. Cecil County Comrs. 54 Md. 426; *Blaney v. State*, 74 Md. 153; *United States L. Ins. Co. v. Vocke*, 129 Ill. 569; *Flour-*

noy v. Jeffersonville, 17 Ind. 173, 79 Am. Dec. 468; *Tillotson v. Cheetham*, 2 Johns. 71; *Grider v. Tally*, 77 Ala. 423, 54 Am. Rep. 65.

The jurisdiction of the coroner in Baltimore city is limited.

City Code, p. 78, § 151; Pub. Gen. Laws, art. 22, §§ 3, 4; *Lancaster County v. Holyoke*, 37 Neb. 328, 21 L. R. A. 394.

The coroner has nothing to do with investigating the death of any person, unless such person is supposed to have come to his death by unlawful means.

To entitle even a judicial officer of inferior rank to immunity from liability he must have jurisdiction.

Grove v. Van Dugn, 44 N. J. L. 660; *Rodrigas v. East River Sav. Inst.* 63 N. Y. 464, 20 Am. Rep. 555; *Perkin v. Proctor*, 2 Wils. 384; *Piggott v. Ramey*, 2 Ill. 147.

Even though the coroner in this case had acted in the best of faith, he having no jurisdiction, and being a ministerial officer, much less than a judicial officer, he is liable.

Mechem, Pub. Off. §§ 524, 630, p. 412; *Wright v. Rouss*, 18 Neb. 234; *Rouss v. Wright*, 14 Neb. 457; *Estopinal v. Peyroux*, 37 La. Ann. 477; *Patzack v. Von Gerichten*, 10 Mo. App. 424; *Holtzman v. Robinson*, 2 MacArth. 522; *Piper v. Pearson*, 2 Gray, 122, 61 Am. Dec. 438; *Barkeloo v. Randall*, 4 Blackf. 478, 32 Am. Dec. 46; *Burnham v. Sterens*, 33 N. H. 253.

Motive has nothing to do with it.

Rerill v. Pettit, 3 Met. (Ky.) 819; *Clarke v.*

the employment of such skill, it would seem that the coroner is not limited by the boundaries of his own county. *Jameson v. Bartholomew County Comrs.* 64 Ind. 524, 530.

In that case a chemical analysis of the contents of the stomach of the deceased was allowed to be made outside of the county, the deceased's death being attributed to poison.

And for that purpose he has authority to employ a chemist, who is neither a surgeon nor a physician, to make an analysis for the purpose of discovering poison, even though such chemist lives in neither county. *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154.

The court in *Jameson v. Bartholomew County Comrs.* 64 Ind. 524, 530, held that the provisions of the Indiana statute should be liberally construed with a view to the accomplishment of the end desired, and in such a manner as to enable the coroner, where the death of a human being has apparently been caused by criminal agency, to employ such scientific means and persons skilled therein as may be necessary to ascertain the cause of such death, using his judgment according to the particular case in hand.

And in the same case the court further stated that the welfare of society and the interest of public justice, alike, demanded that such an inquiry or inquest should be thorough and complete, so that if death had been caused by a criminal agency the guilty party might be discovered and receive a just punishment.

So, a coroner has power to compel the attendance of all witnesses, by attachment. *Re Application of Coroner*, 1 W. N. C. 372.

And parol evidence is admissible to prove that the coroner did employ a physician or surgeon to make a post-mortem examination. *Jay County Comrs. v. Gillum*, 92 Ind. 511.

A coroner may summon a physician to testify, and compel him to swear to his opinion on a superficial view of the body, but he cannot compel him 31 L. R. A.

to touch it or do the more nauseous and dangerous work of opening it; yet, as he is authorized to ascertain the truth concerning the death, he must in such cases employ a physician to make the autopsy and ascertain the cause of death, as in that case such a course is the only proper means by which the truth can be ascertained. *St. Francis County v. Cummings*, 55 Ark. 419.

And the right of a coroner in this respect cannot be precluded by the county commissioners. *Allegheny County v. Shaw*, 34 Pa. 301.

So, the county board has no control over such right. *Dearborn County Comrs. v. Bond*, 88 Ind. 102; *Jay County Comrs. v. Gillum*, 92 Ind. 511; *DuBois County Comrs. v. Wertz*, 112 Ind. 288; *Lang v. Perry County Comrs.* 121 Ind. 133.

As the coroner possesses the power to bind the county by the employment of a physician or surgeon for the purpose of making a post-mortem examination, it follows that the board of commissioners upon whom no such duty rests cannot discharge the duty for him, nor exempt the county from liability by reason of such employment. *Dearborn County Comrs. v. Bond*, *supra*.

The point as to whether or not a post-mortem examination should take place before the coroner impaneled a jury, was said to be a debatable one, yet it was settled that the post-mortem examination should not be made in the presence of the jury. *People v. Fitzgerald*, 105 N. Y. 146, 50 Am. Rep. 483.

In the case of *Re Coroner's Inquest*, 1 Pa. Co. Ct. 14, 3 Kulp, 451, the court recognized the power of a coroner to order a post-mortem examination of the body of the deceased by one physician, but disallowed the expenses of two.

A physician summoned by a coroner to make a scientific examination of a body has a right to rely upon the official act of the coroner, as it is a general principle to presume that public officers act correctly until the contrary is shown. *Pueblo County Comrs. v. Marshall*, 11 Colo. 84, 87.

May, 2 Gray, 412; *Vosburgh v. Welch*, 11 Johns. 177.

The coroner has no absolute right to hold an inquest in every case in which he chooses to do so.

Witthaus & Becker, Medical Jurisp. p. 337; Jervis, Coroner, pp. 7, 8; 1 Taylor, Medical Jurisp. 2d ed. p. 18.

When a person puts another in his place to do certain acts in his absence, he necessarily leaves him to determine for himself, according to his judgment and discretion and to the circumstances and exigencies that may arise, when and how the act is to be done, and trusts for its proper execution, and is liable for the act, both in the manner and occasion of doing it.

Tome v. Parkersburg Branch R. Co. 39 Md. 64, 17 Am. Rep. 540; *Northern C. R. Co. v. Bastian*, 15 Md. 494; *Lamm v. Port Deposit Homestead Asso.* 49 Md. 233, 33 Am. Rep. 246; *Pennsylvania, D. & M. Steam Nav. Co. v. Hungerford*, 6 Gill & J. 291.

If a corporation intrusts a general duty to an agent, it is to be held liable for damages flowing from the agent's act done in the course of his general authority.

Pennsylvania Co. v. Weddle, 100 Ind. 141;

And it is the duty of such a physician to obey such summons, without an investigation as to whether the jury deemed it requisite to make such an examination. *Ibid.*

The Indiana statute provides that when a surgeon or physician is required to attend an inquest held by a coroner and make a post-mortem examination, the coroner shall certify such service to the board of county commissioners, who shall order the same to be paid out of the county treasury. 2 Gavin & H. Stat. 17, § 8.

In *Cook v. Walley*, 1 Colo. App. 163, an action was brought by the daughters of the deceased, whose husband was yet alive, against the undertakers who had charge of the body and the physician who performed the post-mortem examination, to recover damages occasioned by reason of such post mortem, but the court held they were not liable inasmuch as the city ordinance required a doctor's certificate of the cause of death before the burial could be allowed, the circumstances of the case showing that such certificate could not be granted by the physician without such examination being made in order to ascertain the cause of death, the examination being made in a decent and scientific manner without an undue exposure of the body.

One of the reasons assigned for the denial of the remedy in the above case was that the plaintiffs were not the sole heirs of the deceased, inasmuch as she left a husband surviving whose duty it was to attend to the burial of the wife.

The New York Penal Code, § 311, provides that a person who removes the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried, or from a place where the same has been deposited while awaiting burial, without authority of law, with intent to steal the same, or for the purpose of dissection, or for the purpose of procuring a reward for a return of the same, or from malice or wantonness, is punishable by imprisonment for not more than twenty years, or by a fine not exceeding \$500, or both.

In *People v. Fitzgerald*, 105 N. Y. 146, 50 Am. Rep. 483, decided under the above statute, the prisoner was indicted and convicted of the crime of body stealing, and the facts showed that, after the deceased had been interred, upon application sup-

Eransville & T. H. R. Co. v. McKee, 99 Ind. 523, 50 Am. Rep. 102; *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 46.

It would seem poor law that would allow a corporation to act thus, holding out these two individuals in their respective capacities as coroner and post-mortem physician, recognizing the benefit derived from their actions and doings by being an advantage to students, thus increasing the number of said students, and thereby swelling their resources, without incurring at the same time a liability for the wrongful acts of their servants.

Hewett v. Swift, 3 Allen, 424; 1 Addison, Torts, 6th Am. ed. 118; *Brokaw v. New Jersey R. & Transp. Co.* 32 N. J. L. 332, 90 Am. Dec. 659; *Fishkill Soc. Inst. v. National Bank*, 80 N. Y. 168, 36 Am. Rep. 595; *Barrick v. English Joint Stock Bank*, L. R. 2 Exch. 266; *MacKay v. Commercial Bank*, L. R. 5 P. C. 394; *Johnston v. South Western Railroad Bank*, 8 Strobb. Eq. 317; Bigelow, Torts, 305; *Kennedy v. Green*, 3 Myl. & K. 719; *Althorff v. Wolfe*, 22 N. Y. 865; *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 812, 10 Am. Rep. 111; *Patten v. Rea*, 2 C. B. N. S. 813.

If corporations are not to be held responsible for injuries to persons done in the trans-

ported by affidavit setting forth a sufficient ground to give the coroner jurisdiction, he directed the body to be exhumed for the purpose of a post-mortem examination in order to discover the cause of death, whether by murder or otherwise, and that the body was exhumed and an examination taken without a jury being impaneled. The court held that even though the proceedings by the coroner might have been irregular, yet an indictment would not lie under the above section of the Penal Code, the statute not being intended to apply, the exhumation being made by legally constituted public authorities for the purpose of ascertaining whether a crime had been committed which produced the death of the person whose body was exhumed.

In the above case it was further stated that when the examination was made, not secretly, but publicly, on an open application to the officer of justice charged with the duty of inquiring into the cause of the death of any person whose body was brought within his jurisdiction, it was a total misapplication of the statute against body stealing to use it for the purpose of imposing its punishment on all persons concerned in the exhumation, in case any proceedings of the officer, under whose direction it was made, should be found to be irregular.

In that case the irregularity charged was neglect of the coroner to impanel a jury before ordering the post mortem.

Under § 4109 of the Revised Code of Georgia of 1873, the coroner has power to order a post-mortem examination only in cases of death from poison, the act of 1863 superseding that of 1850. *Farrell v. Floyd County Comrs.* 57 Ga. 347.

In *Kelly v. Brooks*, 50 Ga. 582, it was held that, under the laws of Georgia, a coroner had no vested right to hold an inquest upon dead bodies, unless the laws of the state required himso to do, or unless the alleged facts were sufficient to make it his duty under such law.

Under the Revised Statutes of Indiana (2 Rev. Stat. 1876, p. 21, § 8) when a surgeon or physician is required to attend such inquest and make a post-mortem examination, the coroner must certify such service to the board of county commissioners.

In *Jameson v. Bartholomew County Comrs.* 64 Ind. 524, 626, the court held that it was the intent and purpose of the provision of the Indiana stat-

action of a series of wrongful acts, such an immunity would have wide scope.

New York, L. E. & W. R. Co. v. Haring, 47 N. J. L. 138; 2 Beach, Priv. Corp. § 444; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 34; *Higgins v. Waterloo Turnp. & R. Co.* 46 N. Y. 27, 7 Am. Rep. 298; *Salt Lake City v. Hollister*, 118 U. S. 260, 20 L. ed. 177; *Mersey Docks & Harbour Board v. Gibbs*, L. R. 1 H. L. 93.

When the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

Scott v. London & St. K. Docks Co. 3 Hurlst. & C. 596; *Houser v. Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154; *Stevens v. European & N. A. R. Co.* 66 Me. 76.

Messrs. Richard M. Venable, Rich & Bryan, and Edwin G. Baetjer, for appellees: There are no rights arising out of a dead body which are known to the law of torts.

ute to clothe the coroner of the county, whenever he should be notified that the dead body of any person, supposed to have come to his death by violence or casualty, was within his county, with the necessary power to properly inquire, and if possible ascertain when and in what manner and by whom such person came to his death, and whether any one was guilty of such death, and the degree of guilt.

And under §§ 5878 and 5879 of the Revised Statutes of Indiana of 1881, it is the duty of a coroner to make all inquests, and for the purpose of ascertaining in what manner death was caused he is authorized to require a physician or surgeon to attend and make a post-mortem examination; and for the services rendered under the certificate of a coroner it is the duty of the board of commissioners to pay the same out of the county treasury.

In construing the above sections of the Revised Statutes, the court, in the case of *Dearborn County Comrs. v. Bond*, 88 Ind. 102, stated that such duty was imposed upon the coroner, and for the purpose of enabling him to discharge it he was empowered to employ such means and to select such physician or surgeon as in his judgment would enable him to ascertain the cause of death, the duty thus imposed necessarily conferring the authority to make his own selection in the faithful discharge of his duties, and in that respect he could not be superseded by the board of commissioners upon whom no such duty rested.

Under § 368 of the Iowa Code a coroner, when he or the jury deem it necessary, has power to cause a post-mortem examination, and a justice of the peace acting for him has like power. *Cushman v. Washington County*, 45 Iowa, 255; *Sanford v. Lee County*, 49 Iowa, 148.

Under the New York Statute of 1873, it is discretionary with the coroner to cause a dissection to be made, and to select the surgeons. *Crisfield v. Perine*, 15 Hun, 200, 203, 81 N. Y. 622.

In *Crisfield v. Perine*, *supra*, the real question was whether a post-mortem examination conducted by surgeons employed by a coroner holding an inquest was a part of the inquest in such a sense as that every person had a right freely to attend it, and the court held that it was not, the statute (Laws 1873, chap. 833, § 2, Laws 1874, chap. 535, § 2) authorizing a coroner to cause the examination to 31 L. R. A.

The clause "rights of persons" means rights of persons to the enjoyment of their own lives, limbs, bodies, health, and reputation.

3 Bl. Com. 119; *Baltimore & O. R. Co. v. State*, 24 Md. 107; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290.

Mental anguish alone is not a ground of action.

Sloan v. Edwards, 61 Md. 89; *Lynch v. Knight*, 9 H. L. Cas. 577; *Chapman v. Western U. Teleg. Co.* 88 Ga. 763, 17 L. R. A. 430; dissenting opinion in *Wadsworth v. Western U. Teleg. Co.* 86 Tenn. 695; *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L. R. A. 810.

This is the rule in nearly every state in the Union.

Western U. Teleg. Co. v. Rogers, 68 Miss. 748, 13 L. R. A. 859; *Burnett v. Western U. Teleg. Co.* 89 Mo. App. 599; *Connell v. Western U. Teleg. Co.* 116 Mo. 34, 20 L. R. A. 172; *Newman v. Western U. Teleg. Co.* 54 Mo. App. 434; *Russell v. Western U. Teleg. Co.* 3 Dak. 315; *West v. Western U. Teleg. Co.* 39 Kan. 93; *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Johnson v. Wells F. & Co.* 6 Nev. 224;

be made providing that "a coroner shall have power, when necessary, to employ not more than two competent surgeons to make post-mortem examinations and dissections, and to testify to the same."

And since the passing of the New York act of 1874, the coroner has the right to employ physicians for the purpose of making post-mortem examinations. *People, Cosford, v. Niagara County Supers.* 38 N. Y. S. R. 964.

II. Justices of the peace, etc.

Under the Pennsylvania act an alderman was held to have power to hold an inquest and order a post-mortem examination in the absence of the coroner, he being *ex officio* a justice of the peace within the meaning of the Pennsylvania statute. *Pickett v. Erie County*, 19 W. N. C. 60.

So, a justice of the peace has power to hold an inquest under the Indiana statutes where the coroner is absent from the county, or in cases in which he is unable to attend, and such justice has full power to perform all the duties pertaining to the office of coroner, including the procurement of a physician or surgeon to make a post-mortem examination. *Stevens v. Harrison County Comrs.* 46 Ind. 541.

And in *Dubois County Comrs. v. Wertz*, 112 Ind. 268, the court construed § 5888 of the Indiana Revised Statutes of 1881, concerning the duties of coroners, as applying to a justice of the peace of the county. Such justice has power to perform all the duties of a coroner in connection with it.

The New York Laws of 1864, chap. 379, provide that a justice of the peace may hold an inquest in case the attendance of a coroner cannot be procured within twelve hours after the discovery of a dead body, and further that "in all cases in which the cause of death is not apparent, it shall be the duty of the justice to associate with himself a regular licensed physician to make a suitable examination for the discovery of said cause;" and in the case of *Crisfield v. Perine*, 15 Hun, 200, 203, 81 N. Y. 622, it was held that such act had no application to an inquest held by a coroner.

See also *Cushman v. Washington County*, 45 Iowa, 255; *Sanford v. Lee County* 49 Iowa, 148, *supra*, I. E. W.

Chase v. Western U. Teleg. Co. 44 Fed. Rep. 554, 10 L. R. A. 464; *Wilcox v. Richmond & D. R. Co.* 52 Fed. Rep. 264, 8 U. S. App. 118, 17 L. R. A. 804; *Kester v. Western U. Teleg. Co.* 55 Fed. Rep. 605; *Western U. Teleg. Co. v. Wood*, 57 Fed. Rep. 477, 21 L. R. A. 706, 13 U. S. App. 317.

An injury to the family relations means an interference with some right which arises out of the family relations, and which the law of torts recognizes as a legal right.

The law does not recognize all the rights which the family relations create.

Pollock, Torts, 196; *Lynch v. Knight*, *supra*.

The only rights which the law thus recognizes are:

(a) The right of the husband to the consortium of the wife.

Pollock, Torts, 196.

(b) Possibly the right of the wife to the consortium of the husband.

Cooley, Torts, 267; Pollock, Torts, 197.

If the right of consortium or the service has ceased, then the husband, wife, or parent has no rights which the law protects.

It is clear that the dead body is not property in any sense.

2 Bl. Com. 429; *Chapman v. Western U. Teleg. Co.* 88 Ga. 771, 17 L. R. A. 480; *Re Brick Presby. Church*, 3 Edw. Ch. 155; *Griffith v. Charlotte, C. & A. R. Co.* 23 S. C. 40, 55 Am. Rep. 1; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Reg. v. Sharpe*, 40 Eng. L. & Eq. 582; Cooley, Torts, 281; 28 Alb. L. J. 107.

To steal the body is no crime.

4 Bl. Com. 236; *Foster v. Dodd*, 8 Best & S. 854; Bishop, Crim. L. § 780; Roscoe, Crim. Ev. 10th ed. 445; Stephen's Dig. Crim. L. art. 292.

Trover will not lie for it.

2 East, P. C. p. 652.

Replevin will not lie.

Guthrie v. Weaver, 1 Mo. App. 141.

It cannot be the subject of contract.

Jones v. Ashburnham, 4 East, 460.

After death of a human being, the disposition of his body becomes a matter for the public, and was in charge of public officials, *i. e.*, the executor, who at the time was a public officer or coroner.

Queen v. Scott, 2 Q. B. 246, note; *Williams v. Williams*, L. R. 20 Ch. Div. 659; Wms. Exrs. 6th ed. 906.

No rights of a dead body were ever recognized at law; they were sometimes recognized in ecclesiastical or chancery courts, but never in courts of law.

Griffith v. Charlotte, C. & A. R. Co. *supra*; *Weld v. Walker*, 130 Mass. 422; *Snyder v. Snyder*, 60 How. Pr. 368; *Boyce v. Halbaugh*, 47 Md. 336, 28 Am. Rep. 464; *Peters v. Peters*, 43 N. J. Eq. 140; *Johnston v. Marinus*, 18 Abb. N. C. 74; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 242, 14 Am. Rep. 667; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Guthrie v. Weaver*, 1 Mo. App. 141.

There is not in the entire domain of the law a single example of a right of possession recognized by the law of torts in a thing in which there can be no right of ownership.

Greenwood v. Greenwood, 28 Md. 370.

It has no value save a sentimental one.

31 L. R. A.

Lynch v. Knight, 9 H. L. Cas. 577; *Chapman v. Western U. Teleg. Co.* 88 Ga. 772, 17 L. R. A. 480.

If it exists at all it is a purely equitable right, liable to regulation according to circumstances by a court of equity.

Guthrie v. Weaver, 1 Mo. App. 141; *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Page v. Symonds*, 63 N. H. 20; *Snyder v. Snyder*, *supra*; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 242, 14 Am. Rep. 667.

The coroner is a public officer whose duties include the holding of inquests, and the ordering of autopsies.

A public official whose duties involve the exercise of discretion is only liable for an official act if he fails to honestly exercise that discretion.

Bishop, Non-Cont. L. § 787; *State v. Carrick*, 70 Md. 586; *State v. Bizler*, 62 Md. 357; *Mincher v. State*, 66 Md. 227; *Kendall v. Stokes*, 44 U. S. 3 How. 99, 11 L. ed. 512; *Wilkes v. Dinsman*, 48 U. S. 7 How. 181, 12 L. ed. 637; *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489; *Easton v. Calendar*, 11 Wend. 91; *Stewart v. Southard*, 17 Ohio, 402, 49 Am. Dec. 463; *Green v. Swift*, 47 Cal. 541; *Boner v. Adams*, 65 N. C. 643.

Judicial or quasi judicial officers or officials in judicial or quasi judicial proceedings are protected from civil liability provided they act in good faith.

Throop, Pub. Off. § 533; *Downer v. Lent*, and *Kendall v. Stokes*, *supra*.

The question of liability depends, not on the character of the proceeding or of the officer, but upon the character of the act performed.

State v. Carrick, *State v. Bizler*, and *Mincher v. State*, *supra*; *Wilson v. New York*, 1 Denio, 599, 43 Am. Dec. 719.

Officers who are judicial officers in the highest sense are liable for nonperformance or improper performance of acts with reference to which they have no discretion, even though the acts are performed in a strictly judicial proceeding.

Throop, Pub. Off. §§ 539, 540, 729; *People, McDonald, v. Bush*, 40 Cal. 344; *Nash v. People*, 36 N. Y. 607; *Thompson v. Holt*, 52 Ala. 491; *Matthews v. Houghton*, 11 Me. 377; *State v. Carrick*, and *Mincher v. State*, *supra*; 1 Poe, Pl. § 515; *Dillingham v. Snow*, 5 Mass. 547; *Easton v. Calendar*, *State v. Bizler*, *Stewart v. Southard*, *Green v. Swift*, *Kendall v. Stokes*, *Wilkes v. Dinsman*, *Boner v. Adams*, and *Downer v. Lent*, *supra*; *Seaman v. Patten*, 2 Cal. 312.

The liability depends, therefore, not on the character of the office or proceeding, but on the character of the act.

The official duties of the coroner include the holding of an inquest and the performance of autopsies.

1 Bl. Com. 348, 349; Alexander, British Stat. 71, 72; Baltimore City Code, p. 78; *St. Francis County v. Cummings*, 55 Ark. 419; *Allegheny County v. Watt*, 3 Pa. 462; *Lancaster County v. Mishler*, 100 Pa. 624.

He can even order examinations not strictly autopsies.

Jameson v. Bartholomew County Comrs. 64

Ind. 524; *Bartholomew County Comrs. v. Jameson*, 86 Ind. 154; *Cook v. Walley*, 1 Colo. App. 163.

The statutes conferring upon coroners the right to hold autopsies should, in view of the importance and necessity of the autopsies, receive a liberal construction. The coroner has the right to determine when an autopsy should be held.

Jameson v. Bartholomew County Comrs., *Bartholomew County Comrs. v. Jameson*, and *St. Francis County v. Cummings*, *supra*; *Beard v. Hoffman*, 18 Md. 479, 81 Am. Dec. 618; *Allegheny County v. Shaw*, 34 Pa. 301; *Allegheny County v. Watt*, 3 Pa. 462.

There was no evidence that the college of Physicians and Surgeons in any way participated in the commission of the wrong charged in the declaration.

The body was in the possession of the coroner; the college had the right to assume that the coroner was in rightful possession of the body and acting lawfully; he had the undoubted right to prevent the removal or interference until he had decided whether or not an inquest was necessary.

Jameson v. Bartholomew County Comrs. supra.

Even if the person performing the autopsy did have authority to act on behalf of the college, there is no evidence that they exercised it and performed the autopsy on behalf of the college.

When a question arises as to the capacity in which a person has acted in doing a particular act, he is presumed to have acted in that capacity in which it was his legal duty or in which he was authorized to act.

Phelps, Principles of Eq. § 212; *Jameson v. Bartholomew County Comrs. supra*.

Roberts, J., delivered the opinion of the court:

The plaintiff below (who is now appellant) brought suit against the College of Physicians and Surgeons of Baltimore City, Dr. Nathaniel G. Keirle, and Dr. Edwin Geer. In her declaration she averred that the body of her deceased husband was wrongfully and unlawfully taken in charge by the defendants, and cut and mutilated, and used as a subject for the students of the defendant college, without warrant in law; and that the defendants wrongfully and unlawfully detained the dead body from burial, when demanded for that purpose by the plaintiff; and that the cutting and mutilation of the body were done secretly and clandestinely, in order to afford instruction to the students of the college, and without the consent of plaintiff, or any one acting for her.

The damage alleged to have been caused by these acts was great mental excitement and distress and bodily suffering on the part of the plaintiff. Demurrers by each of the defendants presented to the court below the question whether the facts alleged entitled the plaintiff to a cause of action. The court overruled the demurrers, and the case was tried before a jury. The verdict and judgment were in favor of the defendants and the plaintiff appealed.

Of course, even if errors were committed by the court in the course of the trial, we could

not reverse the judgment, if it were manifest to us that the declaration showed no right of recovery on the part of the plaintiff. We shall not, however, further advert to this matter at present. But inasmuch as the acts laid to the charge of the defendants impute grave moral delinquency, it seems to us just that we should, in the first instance, carefully examine the grounds on which these accusations are made. The deceased, George W. Young, while engaged in coupling cars on the Northern Central Railroad, sustained a very severe injury; his right leg was mashed below the knee, and the injured portion almost severed from his body, retaining its connection with it, only by a few threads of tissue. The wounded man was a strong stout man, of good nerve and able to work.

His widow testified that he never lost any time from his work; and one of his fellow laborers testified that he had worked with him five years, and that he lost no time. He was sent to the city hospital in Baltimore where he died the next day. The College of Physicians and Surgeons supplies the medical and surgical service to the city hospital; and the patient was under the care of a resident physician who was appointed by the college. After his death a post-mortem examination was ordered by Dr. Geer, one of the defendants, and was conducted by Dr. Keirle, another of the defendants. The post mortem was made in a room belonging to the College of Physicians and Surgeons, where such examinations are usually made; and the two physicians just named are connected with the college, Dr. Keirle being a member of the faculty. The post mortem was without the consent of the plaintiff, the widow of the deceased, or of any member of his family. Evidence was offered on the part of the plaintiff for the purpose of showing that the body was wantonly cut, mutilated, and disfigured, and the feelings of the relatives of the deceased inhumanly outraged. On the part of the defendants it was shown that Dr. Geer was one of the coroners of the city of Baltimore, and that Dr. Keirle was the medical examiner appointed by the board of health; also that the post mortem was ordered by Dr. Geer, as coroner, and performed in obedience to his orders, by Dr. Keirle.

Dr. Geer testified that he ordered the autopsy because he wished to know the cause of death; that it had been reported to him that the man's leg had been cut off by the train and that he had died within thirty-six hours after he was brought to the hospital, and that he did not think that the loss of the leg in this way sufficiently accounted for the death, and that he could not give the death certificate without having a post mortem. Dr. Keirle testified that he did not think that in the majority of cases persons in ordinary health when the leg was crushed below the knee would die from shock. Dr. Welsh testified that if a healthy man should have his leg crushed off he would not think it a sufficient cause to explain the death, and in such case if his official duty required him to give a death certificate he would make every effort to obtain a post mortem, and that it was so unusual for a death to occur from accident under the conditions surrounding the deceased that other explanations were

more probable. Dr. Michael testified that when a man's leg is cut off below the knee, and he dies within thirty-six hours after the injury, the accident would not be an entirely satisfactory explanation of the death, if the man was ordinarily healthy and muscular; and if he was required to determine definitely the cause of death in such a case he would not consider that he had done his duty without having an autopsy.

Dr. Keirle described his proceeding in making the autopsy, the taking out the brain, the opening the body, the removing and cutting into the different organs, the liver, spleen, kidneys, lungs, and heart. He testified that you have to examine all the vital organs to see the cause of death, and that the cause of death was persistent heart shock; that the deceased had fatty kidneys, and fatty degeneration of the heart; that the injury itself was not of such a nature as should have caused persistent heart shock, unless there was something else besides the injury which helped to produce it; that the crushing of a man's leg below the knee was not such a thing, in his opinion, as would produce persistent heart shocks. Dr. Welsh and Dr. Michael testify that to make a complete examination it is necessary to remove and open the brain. Without going into minute details we may say that the professional testimony in this case tends to show that the autopsy was conducted in the usual manner.

By the act of 1878, chapter 347, the governor is authorized to appoint four coroners for the city of Baltimore. This act is codified among the public local laws as article 4, §§ 149, etc. Inquests are required to be held whenever a person is found dead and the manner and cause of death shall not be already known as accidental or in the course of nature. There are other duties which coroners in the city of Baltimore are required to perform. The municipality has the power to pass ordinances to preserve the health of the city and to prevent introduction of contagious diseases therein. In pursuance of this power a board of health has been established, and many ordinances have been passed for the purpose of detecting and preventing the causes of diseases and removing them when they are found to exist. The board of health is authorized and required to appoint a medical examiner, and it is made his duty to make post-mortem examinations in any part of the city when called upon by either of the coroners of the board of health. Baltimore City Code of 1892, art. 23, §§ 1-7. Furthermore, it is enacted that "when any person shall die in the said city it shall be the duty of the physician who attended during his or her last illness, or the coroner, when the case comes under his notice, to furnish within forty-eight hours after the death . . . a certificate setting forth, as far as the same can be ascertained, . . . the cause, date, and place of death." City Code of 1892, art. 42, § 2. The object of this last provision is obvious. The spread of infectious and contagious diseases is very apt to occur in thickly settled communities.

It is therefore the part of wisdom to watch with vigilance every indication of their approach, and to investigate the causes which might, in any probability, produce them.

91 L. R. A.

The causes of death must be ascertained, so that means may be adopted for the prevention of other deaths from the same sources. The evidence before us exhibits the case of a public officer whose duty it is to find out and certify the cause of a death which is brought to his notice. The accident preceding his death, and disabling him, is not, in his opinion, sufficient to cause the death of a healthy person. There must therefore, as he thinks, be some diseased condition of the injured man, which contributed to bring about this result. His opinion is shared by other reputable physicians who have testified in the case. He could not honestly and conscientiously give the certificate which the law required him to give, unless he made proper inquiry into the case. In his judgment, and in the judgment of the professional witnesses, proper and sufficient inquiry could not be made without an autopsy. So far as the evidence in the case shows, or any rational inference from it, the coroner did simply his plain and positive duty in ordering the autopsy. And the medical examiner, Dr. Keirle, was equally obliged by his duty to obey the order of the coroner. On the prayer of the defendants the court gave to the jury the three following instructions:

"1. There is no evidence in this case to show that the College of Physicians and Surgeons did any of the alleged wrongful acts mentioned in the declaration or ratified the same, and therefore their verdict must be for the said defendant, the College of Physicians and Surgeons of Baltimore City.

"2. That there is no evidence legally sufficient to show that the defendant Geer participated in any way in the commission of the alleged wrongful acts mentioned in the declaration, further than as coroner of the state of Maryland to order the post mortem examination to be performed, and that there is no evidence legally sufficient to show that in ordering the post-mortem examination to be performed he acted wantonly, maliciously, or corruptly, and therefore the verdict must be for this said defendant, Edwin Geer.

"3. If the jury believe that the defendant Keirle performed the post mortem upon the body of George W. Young, deceased, at the order of Coroner Geer, as the city examining physician, and that in performing said post-mortem he treated the body with ordinary decency and did not wantonly disfigure the same, he acted within the scope of his official duty, and the verdict must be for the defendant, Keirle."

The College of Physicians and Surgeons permitted its room to be used for the post-mortem examination, but appears to have had no further connection with the matter. The post mortem was a lawful proceeding. If anything irregular or improper occurred in the prosecution of it, the college took no part in it. The same thing may be said in reference to the coroner. The question regarding the charges which alleged the wanton mutilation of the body was fairly left to the jury in the last instruction. The prayers offered on the part of the plaintiff were inconsistent with those granted by the court, and were properly rejected. As the jury have acquitted the defendants of the charges made against them, it

would seem to be rather an abstract question to consider what would have been their responsibility in a civil action if they had been found guilty. It is to be hoped that few persons in a civilized country would wantonly mutilate a dead body, or would without warrant of law attempt to prevent surviving friends and relatives from performing the rites of Christian sepulture. Such acts would manifest a great depth of depravity.

Two exceptions were taken to the admission of testimony given by Mitchell, a funeral director. He was asked, "Did you ever have in your professional capacity anything to do with the preparing for burial persons upon whom post-mortem examinations had been made? To which he replied that he had. He was then asked, "When the body is turned over to the

funeral director for burial is it or is it not, after a post-mortem has been performed on it, fit to be seen by the family without shocking their sensibility? To which he replied: "I never received a body from the hands of the coroner or where a post-mortem examination had been made, that was in a condition for the family to see, without being prepared." The testimony showed the effect produced on a dead body by a post mortem examination. We cannot see any objection to proving this fact; it might almost be inferred from common knowledge that the use of the surgeon's knife would disfigure the human body and give it an appearance which would shock the sensibilities of the family of the deceased.

The judgment must be affirmed.

MINNESOTA SUPREME COURT.

John B. GILFILLAN, *Respt.*,

v.

Anton SCHMIDT *et al.*, *Appts.*

(.....Minn.....)

* 1. **The lands of the defendants were situated immediately north of those of the plaintiff, those of both parties sloping to the south at a grade of 9 feet to the mile. The north part of defendants' lands formed a watershed, the surface waters from which naturally drained into a large pond or marsh, which was fed entirely by surface water. This pond or marsh had a natural outlet at its south end, whence, in the wet seasons of the year, its waters flowed, through a fairly well-defined channel or waterway, southerly to and across plaintiff's land, into a small lake, and thence into Lake Minnetonka. This was the natural and only feasible drainage of defendants' lands. In wet seasons the pond or marsh on defendants' lands filled with surface waters from the surrounding watershed, covering 30 or 40 acres, but at other seasons ran off, evaporated, or was absorbed by the soil, until the water only covered a few acres, to the depth of from 2 or 3 feet down to only a few inches. Much of the adjacent land, although wet and marshy, was susceptible of valuable improvement by drainage, but the waters stood on them so late in the season as to render them valueless. About fifteen years ago, the defendants, for the purpose of draining these lands, deepened the outlet of this pond or marsh and the natural waterway thence south towards plaintiff's land about 2 feet, thus draining and reclaiming much land which would otherwise be valueless. They did not divert any of the water from its natural course, but merely aided the natural system of drainage. Neither have they done anything more than was necessary in the interests of good husbandry. In July, 1892, there was a very unusually heavy rainfall, which filled up the pond or marsh on defendants' lands, from which the waters flowed in great volumes through the outlet and channel**

deepened by the defendants; and when it reached the north side of plaintiff's land, large quantities of this water left its natural course, and overflowed, in another direction, upon plaintiff's meadows, greatly damaging his crop of hay. There is no evidence that the water has thus overflowed either before or since, or that it is likely ever to occur, except under exceptional circumstances, in case of unusual rainfalls. Assuming that this overflow was caused by defendants' deepening the natural line of drainage, it does not appear that plaintiff cannot protect himself against its recurrence at small expense compared with the benefits resulting to the defendants by reason of the improved drainage of their lands. *Held*, that the evidence does not justify the conclusion that the overflow and consequent damage to plaintiff were caused by the acts of the defendants in deepening the natural outlet and way for these waters.

2. **But even if such acts will, in case of unusually heavy rains, render the water more liable to overflow, or cause greater quantities of it to overflow upon plaintiff's meadows, yet, under the modified common-law rule as to the disposition of surface waters adopted in this state, and within the rules laid down in *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632, the defendants had a right to do what they did in the reasonable improvement of their own lands.**

(*Start, Ch. J., and Buck, J., dissent.*)

(January 29, 1896.)

A PPEAL by defendants from an order of the District Court for Hennepin County denying a new trial after verdict in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by water which flowed upon plaintiff's land because of defendants' act in deepening the channel for the drainage of their lands. *Reversed.* The facts are stated in the opinion.

Messrs. Welch & Hayne, for appellants:

Defendants are entitled to judgment on the facts as found.

Sheehan v. Flynn (Minn.) 26 L. R. A. 632.

The doctrine established by this court in that case is one which commends itself to every student of the subject who analyzes the ques-

* Headnotes by MITCHELL, J.

NOTE.—For rights as to flow of surface water, see *note* to *Gray v. McWilliams* (Cal.) 21 L. R. A. 593; also *Edwards v. Charlotte, C. & A. R. Co.* (S. C.) 22 L. R. A. 246; *St. Paul & D. R. Co. v. Duluth* (Minn.) 23 L. R. A. 88; *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632; *Albany v. Sikes* (Ga.) 26 L. R. A. 653.
31 L. R. A.

tion, and is founded upon common sense and sound principles of law.

Peck v. Herrington, 109 Ill. 611, 50 Am. Rep. 627; *Baker v. Leika*, 48 Ill. App. 358; Gould. Waters, § 266, p. 466; *West Cumberland Iron & S. Co. v. Kenyon*, L. R. 1 Ch. Div. 787; *Peck v. Goodberlett*, 109 N. Y. 180; Washb. Easem. 3d ed. p. 452 (355); *Schaefer v. Marthaler*, 34 Minn. 487, 57 Am. Rep. 73.

Messrs. Gilfillan, Willard, & Willard, for respondent:

Until the case of *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632, an owner of land had no right to drain surface water standing thereon upon the lands of his neighbors merely to render his land tillable.

Hogenson v. St. Paul, M. & M. R. Co. 31 Minn. 224.

The order in this case will have to be affirmed unless *Sheehan v. Flynn* prevents such a result. That case can be distinguished from this one in several ways:

1. The water there was surface water.

Schaefer v. Marthaler, 34 Minn. 487, 57 Am. Rep. 73; *Pinney v. Luce*, 44 Minn. 367; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355.

2. There is nothing to show in the findings or the evidence but that the injury to the respondent's lands is greater than the benefit to the appellants' lands.

3. The doctrine, new to this court, announced in *Sheehan v. Flynn*, *supra*, was that an owner might, by an artificial ditch, drain a body of surface water from his land on to his neighbor for the purpose of making his land fit for cultivation. But even that case does not go, unless by implication, to the extent of holding that such owner may collect, by artificial ditches, into a basin, surface water from the surrounding country, and then drain that basin on to his neighbor by an artificial ditch.

St. Paul & D. R. Co. v. Duluth, 56 Minn. 494, 23 L. R. A. 88.

4. The decision in *Sheehan v. Flynn* is not the law elsewhere.

Cairo & V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 138; *Yerer v. Eineder*, 86 Mich. 24; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *Vernum v. Wheeler*, 35 Hun, 53; *Kauffman v. Griesemer*, 26 Pa. 407; *Gregory v. Bush*, 64 Mich. 44; *Barkley v. Wilcox*, 86 N. Y. 148, 40 Am. Rep. 519; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Adams v. Walker*, 34 Conn. 466, 91 Am. Dec. 742; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Field v. West Orange*, 36 N. J. Eq. 120; *Boynton v. Longley*, 19 Nev. 69; *Hicks v. Silliman*, 93 Ill. 260.

The owner of a natural pond or reservoir where the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor to his injury.

Davis v. Londgreen, 8 Neb. 43; *White v. Chapin*, 12 Allen, 516; *Chapel v. Smith*, 80 Mich. 100; *Barrow v. Landry*, 15 La. Ann. 681, 77 Am. Dec. 199; *Gregory v. Bush*, 64 Mich. 43.

31 L. R. A.

Mitchell, J., delivered the opinion of the court:

The findings of the trial court are very long, mainly descriptive of the situation, and largely consisting of statements of what may be called "evidentiary facts." For this reason it is somewhat difficult to state wherein they are, and wherein they are not, sustained by the evidence. An examination of the record, however, shows that there is no real conflict in the evidence. It discloses substantially the following state of facts:

The lands of the two defendants Schmidt constituted a watershed, which naturally drained from the east, north, and west into a large marsh, slough, or pond, indicated on defendants' plat, situated mainly on the lands of the Schmidts, but extending a short distance into the north side of the lands of defendant Classen. The lands of the defendants in the immediate vicinity of this slough or pond were naturally wet and marshy, by reason of the spongy nature of the soil, their proximity to the pond, and the fact that they were only slightly elevated above the ordinary level of the water in the slough or pond; but they were capable, by drainage, of being rendered dry and valuable grass lands. This slough or pond was not fed by any springs or natural streams, but entirely from surface waters from the adjacent watershed. In the wet seasons of the year, this large marsh or slough filled with surface water from the surrounding watershed, covering from 30 to 40 acres, presenting the appearance of a large pond or small lake, from 6 to 8 feet deep in its deepest part, but, in the dry seasons, frequently covering only a few acres, to the depth of from 2 or 3 feet in its deepest part down to only a few inches in its shallowest places. The natural outlet for the waters which thus collected in this slough or pond was at its south end, whence, in wet seasons, they flowed in a large stream southerly, through a fairly well-defined course, on substantially the line of the ditch indicated on defendants' plat, into a pond or bog in the north part of plaintiff's land; thence through a depression or outlet on the west side of this pond or bog, first, westerly, and thence southerly, as indicated on the same plat, into Gleason's lake, which, in turn, flowed into Lake Minnetonka. In brief, the natural drainage of the large marsh or pond on defendants' lands, and of the watershed tributary to it, was substantially as indicated on defendants' map; and throughout its entire course the flow of this water was through a fairly well-defined natural depression in the soil. The slope or fall of the lands was to the south, and about 9 feet to the mile.

As already stated, at certain seasons of the year the flow of water was quite large, while at others it would diminish, and, finally, in the dry portions of the year, entirely cease; leaving, however, a considerable quantity of water in the big marsh or pond on defendants' land, the effect of which was to leave the lands adjacent to this pond either covered or saturated with water so late in the season as to render them practically valueless. The lowest point on the east or southeasterly side of the pond or bog on plaintiff's land was some 3 feet higher

than the the outlet on the west side, already described. Hence the water in this pond or bog would have to rise about 8 feet above the level of this outlet on the west before any of it would overflow to the east or southeast. Such was the condition of things before the defendants committed any of the acts complained of.

About fifteen or sixteen years ago, the defendants, or their grantors, for the purpose of draining their lands, dug a ditch from the south end of the big marsh or pond down to about the third or lowest stone culvert marked on defendants' map. This ditch commenced at the natural outlet of the marsh, and substantially followed the natural waterway. Practically, what defendants did consisted of deepening the outlet and waterway about 2 feet. While this ditch has been repaired and cleaned out at different times, it still remains of substantially the same depth as when first dug. Subsequently, and for the same general purpose, the defendants extended this ditch through Classen's land, down to the bog or pond in the north side of plaintiff's land, also following substantially the line of the natural waterway. This part of the natural waterway seems to have been more clearly defined than the part up next to the big marsh or pond, and what defendants did on it consisted mainly in straightening it, and removing local obstructions, but not greatly deepening it. The defendants Schmidt have also extended the ditch up through the big marsh or pond, and likewise dug some short lateral ditches, as indicated on their plat, to aid the natural drainage of their lands into this large or central pond or marsh; but these acts are not important in the determination of this case. Of course, the effect of deepening the outlet and natural waterway south of the big marsh or pond is to cause more of the water to flow out, and to leave less of it to stand in the marsh, thereby so far relieving defendants' lands of the burden of these waters as to render much of them valuable meadow lands, which would otherwise be valueless. There is no evidence that defendants have done anything more than is necessary in the interests of good husbandry, or than they might lawfully do in the reasonable use of their own lands, provided they are not thereby casting a burden on plaintiff's lands which they have no right to do. In July, 1892, there was an unusually heavy rainfall, from the effects of which the big marsh or pond on defendants' land rapidly filled with water, which flowed in great volumes through the ditch cut by defendants, into the slough or bog on the north of plaintiff's lands, and filled it up to so high a level that large quantities of water flowed out southeasterly, as indicated on plaintiff's map, and spread over his meadows, and either found its outlet into Parker's lake, or else remained on the meadows until absorbed or evaporated, thereby causing serious damage to plaintiff's crop of hay. To secure protection against a recurrence of this injury, plaintiff brought this action for a preventive injunction, forbidding the defendants from maintaining the ditch across their lands. There is no evidence and no claim that the digging of the ditch—that is, the deepening of the outlet and waterway of the big marsh or pond on defendants' land—imposes any additional

burden upon, or does any injury to, plaintiff's land, unless it be by causing the water to overflow to the southeast, over his meadows. Neither is there any evidence that it ever did thus overflow either before or since the ditch was dug, except on this occasion, in July, 1892, after this unusually heavy rain. So far as appears, on all other occasions the water did not flow down any faster or in any greater volume than could find its outlet through its natural course into Gleason's lake. The court finds that originally the natural flow of the water from the slough or bog on the north side of plaintiff's lands was southeasterly, down into Parker's lake. In view of the topography of the country, this was probably so; but this is wholly immaterial in view of the fact, also found by the court, and supported by the evidence, that this had ceased long before the settlement of any of the lands in the vicinity, since which time the natural flow has been to the west, as already stated. There was no evidence as to whether it was practicable for plaintiff to adopt means to guard against the danger of this overflow eastward upon his meadows, or, if so, at what expense. The situation, however, would seem to indicate that a feasible preventive would be to either widen and deepen the outlet to the westward, or raise the easterly bank of the bog or pond. The trial court granted a mandatory injunction requiring the defendants to fill up the ditch to the depth of 2 feet, from the south end of the big marsh or pond down to the third or lowest culvert, and thus restore the condition of things as it existed before any artificial excavations were made.

It will be seen from the foregoing statement of facts that the defendants have not diverted any of these waters from their natural course. All that they have done was in aid of the natural and only system of drainage. The only effect of their acts in deepening the natural outlet of this marsh or pond is to cause more of these waters to flow out, and thus leave less of them standing on their lands than would have remained there had things continued in their natural condition. In view of the topography of the country, it is also apparent that this was the only means by which defendants could have drained their lands. It is also to be noted that the object and effect of what they did was not simply to drain and reclaim the bed of a permanent and well-defined lake, but to lower the water in a marsh or pond of variable size, so as to drain the adjacent low and swampy lands, and thus render them fit for use as pastures or meadows.

The decision of the trial court seems to be mainly predicated upon the assumption that it was the deepening of the outlet and natural waterway of the big pond or swamp which caused the water to overflow to the southeast, over plaintiff's meadows. It is far from clear that this assumption is correct. Of course, the effect of thus deepening the outlet and channel would be to cause more water to flow out of the swamp or pond. But this overflow would commence sooner. It would commence whenever the water in the marsh rose to the level of the outlet, and continue until it fell to that level. After the marsh or pond was once filled, if the rains continued, the overflow

would be the same whether the outlet remained at its original level or was lowered 2 feet by artificial excavations. So far as appeared, the water had never before overflowed easterly, over plaintiff's meadows; and, for anything that appears, the overflow on this occasion might have occurred, as the result of the unusual and extraordinary rainfall, even if the outlet and waterway had been left in their natural condition. It would seem self-evident that this might occur if the rains were sufficiently heavy and continued long enough. Therefore, it does not seem to us that the evidence furnishes any sufficient basis for the assumption of fact upon which the decision of the court must be sustained, if at all; for, unless the deepening of the natural waterway was the efficient and proximate cause of the overflow easterly, upon plaintiff's meadows, the plaintiff would not, under any view of the law, have a cause of action. No innovation or change in the distribution of water from a superior to an inferior tenement is material or the subject of condemnation, unless it works injury to the inferior estate. *Peck Goodberlutt*, 109 N. Y. 180.

But we shall concede (which is the most that can be claimed for the evidence) that, so long as the natural channel for this water on plaintiff's land is left in its present condition, the acts of the defendants in deepening the channel on their lands will, at rare intervals, in case of extraordinary or unusual rainfalls, render the water more liable to overflow to the east, upon plaintiff's meadows, or to flow there in larger quantities, than they otherwise would. Still, under the modified common-law rule adopted in this state, defendants have done nothing but what they might lawfully do in the reasonable improvement of their own lands. The small inland lakes of this state are in some respects *sui generis*. Some of them are fed mainly by surface waters, and yet are permanent and well-defined lakes. We do not wish to be understood as holding that such lakes continue to be surface waters. But, on the facts of the present case, we hold that the waters which collected on the defendants' lands never lost their character as surface waters. This so-called "pond" or "lake" was merely a large marsh, in which large quantities of surface water collected at certain seasons of the year, and mostly disappeared at others, but remained long enough to render the lands upon which they rested, and the adjacent lowlands, unfit for use. What defendants have done amounted merely to aiding the natural drainage of these waters. They have done nothing more than was reasonably necessary in the interests of good husbandry. They have adopted the only feasible or possible means of draining their lands. In doing this they have inflicted no unnecessary injury upon the plaintiff. The benefit to them appears to be very great as compared with any injury likely to result to plaintiff from their acts. There is nothing to indicate that plaintiff might not readily protect himself from any injury liable to result from defendants' acts.

The case is more than covered by *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632. It is true that that case the collection of surface water was 'han in the present case; also, that there

R. A.

the water entirely dried up in the summer; while here, in the natural condition of things, some of the water stood the year around in the lowest part of the marsh. But, on the other hand, in the *Sheehan Case* none of the water overflowed upon the plaintiff's land until the ditch was dug, and it then had no outlet from plaintiff's land, but rested there; while here the waters had a natural outlet and channel to and across plaintiff's land, and thence into Gleason's lake, and finally into Lake Minnetonka. This whole question of the disposition of surface water has been so recently and so fully considered in the *Sheehan Case* that it is unnecessary to discuss the question here at any length.

Much can be said both for and against the common-law rule on the subject. An argument often used, and at first sight plausible, is that a man ought not to be permitted to cast upon his neighbor's land a burden which nature has imposed upon his own. But the maxim that a man must use his own so as not to injure another is only true in a limited and qualified sense. No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but, if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use; and the common-law rule as to surface water is but an application of the universal rule, perhaps somewhat enlarged in the interests of agriculture and the improvement of lands.

Under the facts of this case, the plaintiff ought not to be allowed to stand in the way of defendants' reasonable improvement of their lands, by aiding nature in their drainage.

Order reversed, and new trial granted.

Start, Ch. J.:

I concur in the result, on the ground that the evidence fails to establish plaintiff's claim that the deepening of the ditch was the proximate cause of the overflow easterly upon his meadows. I dissent from so much of the foregoing opinion as approves of the doctrine of *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632.

Buck, J.:

While concurring in the result arrived at in the majority opinion, upon the same grounds as stated by the Chief Justice, yet I feel that the doctrine laid down in the case of *Sheehan v. Flynn* (Minn.) 26 L. R. A. 632, ought not to be adhered to. When that case was under consideration in this court, I reluctantly assented to the rule there adopted; but upon reflection and more mature deliberation, I think that rule unsound. I do not think that the private proprietary rights of one individual should be subject to the personal interests of another individual in the manner stated in that case. It seems to me that it permits the taking of private property for private use, and that in its practical operation it will lead to endless litigation, if not great injustice. From such doctrine I therefore dissent.

Mary LUCY, *Resp't.*,

v.

CHICAGO GREAT WESTERN RAIL-
WAY, COMPANY, *App'l.*

(.....Minn.....)

"In an action by a passenger against a common carrier for damages for failing to exercise proper police powers to protect her, and by reason of which a drunken and disorderly fellow passenger used towards her vile and abusive language.—Held, the verdict is sustained by the evidence, and is not so excessive that this court ought to set it aside after the court below had held it not excessive.

(January 28, 1896.)

APPPEAL by defendant from an order of the District Court for Ramsey County overruling motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for defendant's neglect to protect plaintiff from insult while a passenger on its train. *Affirmed.*

The facts are stated in the opinion.

Mr. Dan. W. Lawler, for appellant:

The conductor was bound to consider all the circumstances and decide on his line of action in obedience to his duty to his employer as well as to the passengers. He was a conductor of large experience and he knew the seriousness involved in ejecting a drunken man from a train, near midnight, and in the depth of our winter. He also knew that in two or three minutes the train would reach South St. Paul, the destination of Curtiss and the other passengers. He believed that an affray would follow his attempt to eject Curtiss, and this belief was shared by plaintiff's witnesses. He had in his charge a passenger train loaded with over 200 passengers, and considering all the circumstances and in the exercise of the sound discretion which the law compelled him to exercise, he decided to permit Curtiss to ride to his destination, which the latter would reach in a few minutes. For this decision the defendant cannot be mulcted in damages.

Mullan v. Wisconsin Central Co. 46 Minn. 474; *Putnam v. Broadway & S. A. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190.

Mr. S. L. Pierce, for respondent:

It was the duty of the defendant to protect passengers from insult.

Mullan v. Wisconsin Central Co. 46 Minn. 474; *Putnam v. Broadway & S. A. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190; *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465.

There are no fixed rules for measuring damages which may be allowed for physical and mental suffering. Damage of this kind is matter of greatest uncertainty, and must from necessity of the case be left to the discretion of the jury; and that discretion cannot be interfered with by the courts unless the amount is so disproportioned to the suffering sustained that it is clear the jury were actuated by passion

or prejudice, and not with a desire to give a just and fair compensation.

Deile v. Chicago & N. W. R. Co. 51 Wis. 400; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290; *Purecell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504.

Canty, J., delivered the opinion of the court:

Plaintiff, with her husband, was a passenger on defendant's suburban railway train, which runs from St. Paul to South St. Paul. It was a late evening train, and, while they were waiting for it in the little station or waiting room at Jackson street, a drunken man with a jug of whiskey in his hand came into the room, and used such abusive language that the ladies all left the room and waited for the train out of doors. When the train arrived plaintiff took one car, and her husband took the smoking car just ahead of it. The drunken man, with his jug in his hand, boarded the car in which plaintiff was, went up and down the aisle, and sat in a seat in front of plaintiff, who knew him "by sight," but was not personally acquainted with him. He then commenced to abuse her, called her foul names, and used such abusive language towards her that she and most of the other ladies in the car left it. The plaintiff brought this action to recover damages for defendant's negligence in failing to protect her from insult while a passenger, and recovered a verdict for the sum of \$250. From an order denying its motion for a new trial, defendant appeals.

1. The law is well settled that it is the duty of a common carrier to use the highest degree of care reasonably practicable in exercising police power to protect its passengers from insult and injury by fellow passengers. *Mullan v. Wisconsin Central Co.* 46 Minn. 474. This is not controverted by appellant, but it is urged that the evidence does not show that appellant did not use all the care which the law requires. We are of the opinion that, under the evidence, it was a question for the jury whether or not such care was used. It is true that it does not appear that appellant had any agent or other employee stationed at this waiting room; but, on the contrary, the evidence tends to prove that it had not. Neither are we inclined to hold that it was its duty to have any employee stationed there for the protection of passengers. This service was little, if anything, more than that furnished by ordinary street railways, in connection with which similar waiting rooms, or no waiting rooms at all, are used at street crossings or intersections. Then we cannot hold that the appellant received any notice of this drunken passenger's actions at the waiting room, and it does not appear that the conductor on the train was ever informed of those actions. Neither can we hold that it is the duty of a common carrier to eject a drunken passenger who is otherwise entirely inoffensive. Then we cannot hold that it was the duty of the conductor to eject this passenger until after he had commenced his vile abuse of the plaintiff, and the conductor had learned of it, or, in the exercise of the proper degree of care, should have learned of it; and the defendant is liable only for compensatory

*Headnote by CANTY, J.

NOTE.—As to protection of passengers from assault, see note to *Davis v. Houghtell* (Neb.) 14 L. R. A. 738; also *Baltimore & O. R. Co. v. Barger* (Md.) 26 L. R. A. 220.

31 L. R. A.

damages for the subsequent abuse which might, with such care, have been prevented. The train was crowded, and the conductor was for a part of the time in some of the other cars collecting fares; but it appears that, after he came into this car and was informed of this passenger's actions, he did not interfere, but went on collecting tickets, and that this passenger called plaintiff names afterwards, and continued to abuse her. We are of the opinion that there is evidence tending to prove that the conductor could and should have prevented some of this abuse, and that a verdict for plaintiff for some amount was justified by the evidence. The fact that the drunken passenger would reach his destination and leave the train in a very few minutes, and the claim that it might cause considerable more disturbance to attempt to eject him before than to let him ride to his destination, were all matters for the jury to consider.

2. It is contended that the verdict is excessive. The plaintiff testified: "I was very delicate and nervous, and had been under the doctor's care for a good many years; and I was not fit to be excited, and it affected my nerves so I was sick for a long while afterwards. . . .

"Q. Well, how did it affect you?

"A. Affected my nerves, so I couldn't rest at night, or the next day at all, but just thinking of it, and deathly sick all the way through."

Another witness testified that after the occurrence, plaintiff "felt very poorly. She was sick,—nervous all the week. Seemed to be in distress. Sleepless." This is all the evidence as to the extent of the injury plaintiff received. Neither does it appear but what plaintiff would have received a part of this injury, even if the conductor and defendant had used, to protect her, the utmost care and diligence which the law requires. Under these circumstances we feel that the verdict is decidedly large, and that a person who should, in proportion, receive compensation for a physical injury confining him to his bed for a few months, and causing him severe pain during the time, might receive much more than any court would allow. But the majority of the court are of the opinion that the verdict is not so excessive that it should be set aside by this court after the court below has passed on the question and held the verdict not excessive. Of course, if the action was against the drunken passenger himself no nice question of this kind would arise, as the plaintiff would, as against him, be entitled, not only to full compensatory damages for all his acts, but, in the discretion of the jury, to punitive damages also.

Order affirmed.

Becker SVENDSEN, *Appt.*,

v.

STATE BANK OF DULUTH, *Respt.*

(.....Minn.....)

***When a banker has in his hands funds of a depositor for the purpose of paying the**

***Headnote by CANTY, J.**

NOTE—For note on the liability of a bank for refusal to pay check when it has funds to pay it, see *haffner v. Ehrman* (Ill.) 15 L. R. A. 134.

L. R. A.

depositor's checks, and the depositor is a trader or merchant, and his check is dishonored by the banker and returned to the payee for the alleged reason that he has not sufficient funds of the maker in his hands to pay the same, when he in fact has, it amounts to a slander of the merchant or trader in his business, and he is entitled to recover general compensatory damages in an action against the banker.

(January 29, 1896.)

A PPEAL by plaintiff from an order of the District Court for St. Louis County denying a motion for new trial after verdict awarding only nominal damages in an action brought to recover damages for refusal to pay check. *Reversed.*

The facts are stated in the opinion.

Mr. John Rustgard, for appellant:

A refusal by a banker to pay the order or draft of the customer, he having at the time in his hands sufficient funds of the customer for that purpose, is a wrongful act injurious to the credit of the customer, entitling him to substantial damages, although no actual damages can be proved at the trial.

Rolin v. Stevard, 14 C. B. 595; *Patterson v. Marine Nat. Bank*, 130 Pa. 419; *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190; *Addison, Torts*, § 17; 3 Am. & Eng. Enc. Law, pp. 225, 226; 1 *Sutherland, Damages*, p. 128; *Bishop, Non-Cont. L.* § 491; *Cooley, Torts*, 203, note.

A tort is one's disturbance of another in rights which the law has created, either in the absence of contract or in consequence of a relation which a contract had established between the parties.

Bishop, Non-Cont. L. § 4.

In an action for a breach of contract merely, the damages are confined to pecuniary loss; the law takes no notice of the motives of the party in default.

1 *Sedgw. Damages*, 7th ed. 45; 5 Am. & Eng. Enc. Law, p. 21.

Messrs. Smith, McMahon, & Mitchell, for respondent:

The action is founded in a tort.

In order to sustain the action upon this theory, malice must be shown. The wrongful refusal to pay a check must be treated as an intentional wrong in order to imply malice.

The wrongful act was the refusal to pay when the money was on hand. This act was not intended by the bank; it intended only to refuse the check when the money was not on hand.

Booth v. Lloyd, 33 Fed. Rep. 593; *Churchill v. Welsh*, 47 Wis. 39; *Warder v. Baldwin*, 51 Wis. 450.

The damage arising out of respondent's failure to pay the check upon demand, if any, was a damage arising out of contract, and nominal damages only can be given unless actual damage was sustained.

Marzetti v. Williams, 1 Barn. & Ad. 415; *Prehn v. Royal Bank*, L. R. 5 Exch. 92; *Brooke v. Tradesmen's Nat. Bank*, 69 Hun. 202; *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134; *Riggs v. Lindsay*, 11 U. S. 7 Cranch, 500, 3 L. ed. 419.

Canty, J., delivered the opinion of the court:

During the time covered by the transactions hereinafter mentioned, plaintiff was carrying on a mercantile business in Duluth, and the defendant was carrying on a banking business in that city. Plaintiff was a customer of the defendant, and kept a deposit in its bank, which he was in the habit of drawing out by means of checks, and which was held by the bank for the purpose of paying such checks. He had drawn on the bank a check for \$42.15 in favor of one firm, and another for \$54.60 in favor of another firm. These checks came through the clearing house, and were on the 20th day of October, 1893, presented for payment to the bank, and payment refused, for want of funds, though the plaintiff then had on deposit in the bank, subject to his check, the sum of \$235.22. The checks were returned through the clearing house to the holders thereof. The reason why the bank refused to honor the checks was that it had by mistake charged up to plaintiff's account a note for \$300, made by him, and held by it, which was not yet due, but which the bank by mistake supposed was due. This action was brought to recover damages for the refusal to pay the checks. Plaintiff did not allege or prove any special damages, but claimed to be entitled to recover substantial general damages. The court below on the trial ruled against him on this point, and ordered a verdict in his favor for nominal damages, to which he excepted, and from an order denying a new trial he appeals.

It is held by the authorities that in such a case the plaintiff's recovery is not limited to nominal damages, but he is entitled to recover general compensatory damages. *Rolin v. Steward*, 14 C. B. 595; *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 134; *Bank of Commerce v. Goos*, 39 Neb. 437, 23 L. R. A. 190; *Patterson v. Marine Nat. Bank*, 130 Pa. 419; 3 Am. & Eng. Enc. Law, p. 225; 1 Sutherland, Damages, 2d ed. § 77. The case of *Patterson v. Marine Nat. Bank*, *supra*, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. We are of the opinion that the recovery of more than nominal damages can, on sound principle, be sustained on the latter ground, where the drawer of the check is a merchant or trader. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such a slander. *Townshend, Slander & Libel*, 4th ed. § 191; *Odgers, Slander & Libel*, 2d ed. 80. Respondent's position that an action of tort cannot be maintained in such a case as this, and that plaintiff's only remedy is an action on contract, in which only nominal damages can be recovered, is not sustained by the authorities. The case of *Marzetti v. Williams*, 1 Barn. & Ad. 415, cited by him, was an action in tort. The 31 L. R. A.

amount of the verdict is not reported, but it is very evident that it was only for a nominal amount, and the only question before the court was whether or not the defendant was entitled to a nonsuit because the action should have been brought on contract, not in tort. The court held against the defendant on that point, and what is said beyond this is merely *obiter* and was so regarded in the subsequent case of *Rolin v. Steward*. In *Prehn v. Royal Bank*, L. R. 5 Exch. 92, the only question was whether plaintiffs were entitled to recover of the bank certain sums which they had paid to save their credit by procuring money elsewhere to pay bills drawn by them on the bank, and to prevent the bills from going to protest after the bank had notified them that it would not pay these bills, although it had funds in its hands for that purpose. It was held that they could recover the full sum so paid by them to preserve their credit, and the authority of *Rolin v. Steward* was expressly recognized. The case of *Brooke v. Tradersmen's Nat. Bank*, 69 Hun, 202, was an action by the receiver of an insolvent whose check had been wrongfully dishonored by the bank. The plaintiff was forced to concede that he could not maintain an action of tort, or recover any damages but such special damages as he alleged and could prove in an action for breach of a contract. These are all the cases cited which have any bearing on the case. These are the only questions raised worthy of consideration. It necessarily follows from the foregoing conclusions that the order appealed from must be reversed.

So ordered.

Donald J. CAMERON, *Respt.*.

v.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, *Appt.*

(..... Minn.)

The provisions of sections 2660, 2661, Gen. Stat. 1894, allowing the plaintiff reasonable attorneys' fees in actions brought under the statute to recover possession of land taken, without compensation, by a railroad for its right of way, are constitutional.

(January 8, 1896.)

APPPEAL by defendant from a judgment of the District Court for Fillmore County awarding attorneys' fees to plaintiff in a proceeding brought to recover land forming part of defendant's right of way. *Affirmed*.

The facts are stated in the opinion.

Mr. H. H. Field, with **Messrs. Wells & Hopp**, for appellant:

This provision of the statute is class legislation.

What justice is there in such a provision, or

*Headnote by **START, Ch. J.**

NOTE.—For constitutionality of statute authorizing attorneys' fees in a particular class of cases, see last division of *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 546; also *Hocking Valley Coal Co. v. Rosser* (Ohio), 29 L. R. A. 386, and *Vogel v. Pekoc* (Ill.) 30 L. R. A. 491.

upon what principle can it be sustained? If A brings an action of ejectment against a railway company to recover a strip of land constituting a portion of his farm, is there any more reason why he should be allowed attorneys' fees than if he brought a similar action against B for the possession of another strip of the same farm occupied by the latter?

Cooley, Const. Lim. 6th ed. pp. 483, 484; *Nichols v. Walter*, 37 Minn. 364; *Allen v. Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532; *State v. Sheriff of Ramsey County*, 48 Minn. 236; *Johnson v. Chicago, M. & St. P. R. Co.* 29 Minn. 425; *State v. Wood*, 49 N. J. L. 85; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249; *Johnson v. St. Paul & D. R. Co.* 43 Minn. 232, 3 L. R. A. 419; *State v. Chicago, M. & St. P. R. Co.* 36 Minn. 402; *Watson v. Chicago, M. & St. P. R. Co.* 46 Minn. 321.

The provision violates section 8 of article 1 of the Constitution of the state which provides that every person ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay,—conformably to the laws.

State v. Gorman, 40 Minn. 232, 2 L. R. A. 701; *Baker v. Kelley*, 11 Minn. 480; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Hocking Valley Coal Co. v. Rosser*, 52 Ohio St. —, 29 L. R. A. 386; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *Schut v. Chicago & W. M. R. Co.* Id. 433; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 35; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641; *Randolph v. Builders' & P. Supply Co. (Ala.)* 17 So. 721.

There are cases holding that even in actions for stock killed attorneys' fees cannot lawfully be imposed when no such burden is placed upon other litigants.

South & North Ala. R. Co. v. Morris, 65 Ala. 193; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492.

The provision of the statute in question is in violation of sections 2 and 7 of article 1 of the Constitution of this state in that it deprives the defendant of property without due process of law.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869.

Messrs. **Gray & Thompson**, for respondent:

Johnson v. Chicago, M. & St. P. R. Co. 29 Minn. 425, is similar in principle to the case at bar, and is absolutely decisive of the question involved in this case.

If the laws be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply, and they are then public in character and of their propriety and policy the legislature must judge.

Cooley, Const. Lim. 390; *Jones v. Galena & C. Union R. Co.* 16 Iowa, 6; *Tredway v. Sioux City & St. P. R. Co.* 43 Iowa, 527; *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 47 Am. Rep. 771, 32 Minn. 435, Affirmed, *Minneapolis & St. L. R. Co. v. Herrick*, 127 210, 32 L. ed. 109.

R. A.

The policy of the statute seems to be to make it the duty of the railway company to institute proceedings, for when it does so no costs are allowed to the land owner. But if the railway company omits to do so, and thus drives the landowner to institute and prosecute the condemnation proceedings, it seems to be the intention of the statute to give him full indemnity for his necessary expenditures in that behalf.

Taylor v. Chicago, M. & St. P. R. Co. 83 Wis. 645.

The law giving the trial court power to fix reasonable attorneys' fees in cases like this has been in existence for more than twenty years, and has been acquiesced in and acted upon without question.

Gen. Laws 1875, chap. 98; *Coleman v. St. Paul, M. & M. R. Co.* 38 Minn. 260; *Scott v. Minneapolis, St. P. & S. Ste. M. R. Co.* 42 Minn. 179; *Carson v. Smith*, 5 Minn. 73, 77 Am. Dec. 539.

Start, Ch. J., delivered the opinion of the court:

This is an action under the provisions of chap. 98, Laws 1875 (Gen. Stat. 1894, §§ 2657-2662), in the nature of ejectment where compensation for the taking of land for a right of way and other railway purposes has not been made. The complaint alleged ownership and right of possession in the plaintiff in and to the demanded premises; that the defendant was in the possession thereof using the same for railway purposes, and had refused to deliver possession to the plaintiff, or to compensate him for the same, although repeatedly requested so to do. The defendant by its answer, denied the plaintiff's title, and alleged that it was the owner, by grant and adverse possession of the premises, and had been in possession thereof, and using the same, for more than fifteen years before the commencement of the action, for right of way and other railway purposes. The defendant did not exercise the option, given by the statute, to have the compensation due to the plaintiff, for the taking and perpetual use of the premises for railroad purposes, assessed in case he established his right to the premises, but rested its defense upon its claim of title thereto. The trial court found that the plaintiff was the owner of the premises; that the defendant's grantor entered upon the premises under license and permission from the plaintiff, and continued to use them for its right of way and for railway purposes, without compensation to the plaintiff or acquiring his interest therein, until January 1, 1880, when they were conveyed to the defendant; that the defendant then went into possession of the premises, and so continued to use them until the year 1884, when the plaintiff revoked the license, and demanded that the defendant purchase his interest therein, or surrender the possession thereof, which it refused to do, and has ever since wrongfully excluded the plaintiff therefrom. As a conclusion of law the court directed judgment for the plaintiff for the possession of the premises and for the mesne profits. The defendant appealed from an order denying its motion for a new trial to this court, and the order was affirmed and the cause remanded to the district

court. *Cameron v. Chicago, M. & St. P. R. Co.* (Minn.) 61 N. W. 814. Thereafter the plaintiff moved the district court to determine the amount of attorneys' fees the plaintiff was entitled to recover. This motion was opposed by the defendant, but upon what ground the record does not disclose, and, by agreement of the parties, the hearing of the motion was continued, with leave for both parties to make and file affidavits. Afterwards the court made its order, upon such affidavits and the records and files of the court in this case, fixing the attorneys' fees to be paid by the defendant in the sum of \$250, and thereupon judgment was entered for the plaintiff, that he recover from the defendant the possession of the premises, the mesne profits, his attorneys' fees, and his costs and disbursements. The defendant appealed to this court from the judgment.

Neither the evidence nor the affidavits upon which the order of the court was based are a part of the record on this appeal; and it must be assumed that chapter 98, Laws 1875, applies to this case, and that it is a proper case for the allowance of attorneys' fees, and that they were properly allowed by the trial court, provided the statute is constitutional. This is conceded by the defendant, but it is contended on its behalf that section 5 of the statute (Gen. Stat. 1894, § 2661) is unconstitutional, for the reason that it is class legislation; that it violates art. 1, section 8, of the state Constitution, which provides that every person is entitled to obtain justice freely, without purchase, conformably to the laws; and that it deprives railway corporations of their property without due process of law, contrary to the provisions of art. 1, sections 2, 7, of the state Constitution, and the 14th Amendment to the Constitution of the United States. Is this statute here in question constitutional in so far as it allows the plaintiff to recover reasonable attorneys' fees in an action under the statute, when the defendant does not exercise the privilege given by the statute to practically convert the action into condemnation proceedings? This is the only question presented by the record for our decision, and we answer it in the affirmative.

The here material provisions of the statute (Laws 1875, chap. 98; Gen. Stat. 1894, §§ 2657-2662) are as follows:

"Sec. 1. One year after any railroad has been constructed across the land of any person, if he has not already obtained compensation for the taking of his land for such purpose, and in all cases where any person is entitled to such compensation for such land, whether the same was taken with his acquiescence or not, and no proceedings are pending to ascertain and assess such compensation, he may maintain an action to recover his land so taken with damages and rents against the corporation or person constructing or operating such railroad.

"Sec. 2. In such action the defendant may by answer ask to have the compensation due to the plaintiff, in case he establishes his right to recover the land in question, ascertained and assessed by the jury trying the action.

"Sec. 3. In such action when the defendant pleads as in section 2 provided, the jury shall find whether the plaintiff is entitled to recover

the land and if so the compensation to which he is entitled for the taking and perpetual use of his land for railway purposes.

"Sec. 4. Upon a verdict finding that the plaintiff is entitled to recover the land and the compensation for such taking and perpetual use, judgment shall be entered for the plaintiff that he recover the land, or in lieu thereof the compensation fixed by the jury (in case the defendant elects to take the land) with costs and disbursements, and reasonable attorneys' fees to be fixed by the court.

"Sec. 5. In case the defendant does not plead as in section 2 specified, if the plaintiff establishes his title to the land he shall have judgment for its possession, with mesne profits and reasonable attorneys' fees besides the usual costs and disbursements.

"Sec. 6. The action given by this act shall, in all other respects except as herein provided, be governed by the rules of practice and procedure applicable to other actions for the recovery of real estate."

This statute has been in force for nearly twenty years, and attorneys' fees have been repeatedly allowed to the plaintiff in actions brought under it. Two such cases have been heard on appeal in this court (see *Coleman v. St. Paul, M. & M. R. Co.* 38 Minn. 260; *Scott v. Minneapolis, St. P. & S. Ste. M. R. Co.* 42 Minn. 179); and, so far as we are advised, this is the first time any question as to the constitutionality of the provisions of this statute allowing reasonable attorneys' fees has ever been suggested. This acquiescence, without question, of bench and bar, in the validity of the statute, is significant; and it is entitled to controlling weight if the question as to the validity of the statute is doubtful. The reasons given by counsel for the defendant why the statute, in so far as it provides for the allowance of reasonable attorneys' fees to the plaintiff in cases where the railway company does not elect to convert the action into condemnation proceedings, are all substantially included in his general proposition that it is arbitrary and unequal class legislation. If such it is, there is nothing to discuss; for then the conclusion necessarily follows that the statute is unconstitutional. Class legislation, discriminating against some and favoring others, is prohibited, but legislation is not prohibited either by the state or Federal Constitution, which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated. *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925. The legislature, however, cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each of the classes adopted. The classification, to be valid, must be based upon some reason of public policy, growing out of the condition or business of the class to which the legislation is limited. But a law which is confined in its application to a particular class of persons is not void as unequal class legislation if the distinction is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances. *Nichols v. Walter*, 37 Minn. 264; *Allen v. Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532; *Lavallee v. St. Paul, M. & M.*

R. Co. 40 Minn. 249. This right to classify persons, corporations, and associations, and to impose upon them, as a class, duties, and liabilities, or to confer upon them privileges, not imposed or conferred upon the whole people of the state, is a matter committed to the sound discretion of the legislature, subject to the supreme condition that the classification must not be arbitrary, but must be based upon some natural reason of public policy. Upon the exercise of this right rests much of the necessary and beneficent legislation of the state. The exercise of this right is not limited to matters connected with the police power of the state, but it may be exercised in all cases where public interests and the due administration of justice require it. Thus, in the case of *Allen v. Pioneer Press Co.*, it was held, in view of the general nature of the business of the publisher of a newspaper, and the interests of the public therein, that chap. 191, Laws 1887, regulating actions for libel, was not arbitrary or unequal class legislation, although it made special provisions for the protection of the publishers of newspapers when sued for a libel which were not conferred upon other defendants in libel suits, for the reason that the distinction was based upon considerations of public policy, of which the legislature was the judge. It is the settled policy of this and many other states to provide by law for an increase of damages or indemnity for the expenses of litigation by allowing double costs or reasonable attorneys' fees where an injury results to a person from the wilful act or neglect of another, and such laws are held to be a legitimate exercise of legislative discretion. Thus, a law providing for double costs or for double damages in actions for the recovery of damages for live stock killed or injured by the neglect of railway companies to fence their right of way is constitutional. *Johnson v. Chicago, M. & St. P. R. Co.* 29 Minn. 425; *Schimmele v. Chicago, M. & St. P. R. Co.* 34 Minn. 216; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585.

Tested by the rule we have stated as to class legislation, the statute in question is constitutional when applied to actions within its provisions, although the defendant does not elect to avail itself of the privilege of retaining the land for railway purposes, and making compensation for such taking. Counsel erroneously assumes that an action under this statute is a simple action of ejectment, when the defendant fails to exercise its option to convert the action, by its answer, into condemnation proceedings. While it is true that the statute creates no new remedy, yet it regulates and materially qualifies an existing one, to the detriment of the landowner, for the benefit of the railway company and the public; and, as compensation to the owner for his expenses in the litigation, it allows him reasonable attorneys' fees, provided he brings his case within the terms of the statute. The failure of the defendant to accept the privileges conferred upon it by the statute can neither make nor mar the considerations of public policy upon which the statute is based, or deprive the plaintiff of the indemnity, for his expenses in prosecuting his action, given by the statute for the injury sus-

tained by the wilful act or neglect of the defendant. It is to be noted that the statute does not purport to allow attorneys' fees in ordinary actions of ejectment against railway companies. It is only when the landowner foregoes his right to repossess himself of his land taken for a railway purpose for one year, after the land has been taken, and the railroad constructed across it, and when no proceedings to acquire a right to so take and use his land are pending, and when he is entitled to compensation for taking his land, but has not received it, that he may bring an action for the recovery of the possession of his land under the statute, and obtain an allowance for his reasonable attorneys' fees. If he brings an ordinary action of ejectment when none of these conditions exist, he is not entitled to any allowance of attorneys' fees. But when they do exist, and the action is brought under the statute to redress the wrong done to him and to the public by the wilful act of the railway company in taking forcible possession of his land for railway purposes, or (where such taking was with his temporary acquiescence) by its neglect of its duty to acquire and pay for the right to take the land, his right to reasonable attorneys' fees cannot be defeated by the failure of the railway company to claim by its answer the privileges conferred upon it by the statute. Declining the benefits of the statute does not absolve the railway company from the liabilities imposed upon it for its neglect of a public and private duty. The statute applies alike to all persons or corporations constructing or operating a railroad and to all landowners who bring an action under it, including railway corporations. It includes in its classification all persons and corporations similarly situated, and as to them it is general in its application. It is true that persons and corporations other than those engaged in building or operating railroads are authorized to exercise the power of eminent domain, and possibly they may have taken land for a quasi public purpose without making compensation therefor; but the business of such persons and corporations is radically dissimilar in its character and extent, and in its effect upon public and private interests, from that of railway corporations. This difference constitutes a proper basis for limiting the operation of the statute to corporations and persons operating railroads.

The reason and public policy justifying the provisions of this statute giving reasonable attorneys' fees to the plaintiff in actions brought under it, when no such allowance is made to parties in ordinary actions for the recovery of land, are obvious. One purpose of this provision is to induce by the promise of indemnity for the expenses of the litigation, the owner whose land has been unlawfully taken, without compensation, for the right of way of a railroad, to wait a reasonable time before bringing an action to repossess himself of it, and then to bring the action under the statute, so that in case his right to recover the land is established, the railway company may retain it by making compensation therefor, and avoid a break in its right of way, whereby its business would be interrupted, to the injury of public and private interests. Another purpose of the statute, and

perhaps the principal one, is to compel railway companies to respect the constitutional rights of the citizen, and to discharge their duties to the public and individuals. Such corporations must have land for their right of way in order to discharge the public functions for which they were created, and, to enable them to acquire such land, the state has armed them with the sovereign power of eminent domain. They are therefore charged with the duty of acquiring and paying for their right of way in the manner and at the time required by the Constitution and laws of the state. When they neglect this duty, and forcibly take possession of the land of another for railway purposes, or take such possession with the temporary consent, expressed or implied, of the owner, and unreasonably neglect to make compensation therefor, their conduct menaces in a measure the public peace and the safety of the traveling public, for nothing is better calculated to arouse the evil passions of men than a wanton and unredressed invasion of their constitutional and property rights. Such wilful act or unjustifiable neglect oppresses and wrongs property owners, and it is entirely competent for the legislature, as a means for correcting such abuses and as a matter of justice, to give to persons injured by such act or neglect increased damages or indemnity for their expenses incurred in actions to right their wrongs by allowing them double costs or reasonable attorneys' fees. The validity of the statute in question is supported by the considerations of public policy and justice to which we have referred. It is not partial or unequal class legislation; it does not deprive the defendant of its property without due process of law; nor does it violate our bill of rights securing to every person the right to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws. This proposition is supported by the cases to which we have referred, sustaining the validity of statutes giving double costs or double damages in actions against railway companies to recover damages for domestic animals killed or injured by their neglect.

For reasons already suggested, it is not necessary here to decide whether any limitation ought to be placed upon the application of this statute, so as to restrict its operation to cases where the failure of the owner to secure compensation for his land taken for railway purposes is due to the wilful act or inexcusable

neglect of the railroad corporation. We can conceive of probable cases which are not within the reason or policy of the statute; for example, cases where the railway company had in good faith, as it had reason to believe, lawfully acquired and paid for its right of way, but by reason of a forged deed, or some error of its attorney in the condemnation proceedings, it failed, through no neglect of its own, to obtain a strictly legal title to its right of way. Upon the question whether or not such cases must, on constitutional grounds, be excluded from the operation of the statute, we express no opinion, and leave it an open question, to be decided when it arises.

Judgment affirmed.

Canty, J.:

I concur in the result, but am of the opinion that the statute cannot be held constitutional as applied to all the different cases which may come within its terms. The legislature has a perfect right to provide for redressing a class of wrongs by imposing extra costs in the suit brought to vindicate those wrongs, providing the class selected by the legislature is different in some essential particular from all other wrongs,—if the basis of classification is a proper one. Ejectment cases to recover land occupied as a right of way are often defended in bad faith, or without color of right, or with a negligent disregard for the truth as to the merits of the controversy. A railroad company enjoys peculiar privileges for the protection of its franchises, and to prevent the interruption of the public service in such cases, and the legislature may well provide means to prevent the abuse of those privileges. As applied to proper cases, the statute is clearly constitutional; but when the defendant has color of right, is acting in apparent good faith, is not negligent in failing to ascertain the truth or merits of its defense, and is not in any manner abusing its privileges,—as applied to such cases, I am of the opinion that the statute is unconstitutional. I am also inclined to think that, if we had before us the record brought up on the former appeal, this would be such a case. But there is nothing before us on this appeal but the complaint, findings, and judgment. Every presumption is in favor of the regularity of the proceedings of the court below, and I am therefore of the opinion that the judgment appealed from should be affirmed.

NORTH DAKOTA SUPREME COURT.

James R. GAGE, *Appt.*,

v.

Asa FISHER, *Respnt.*

(.....N. D.....)

***1. Equity will not specifically enforce a contract** to give a minority stockholder the

*Headnotes by CORLISS, J.

NOTE.—For voting trusts of corporate stock, see *note* to *Clarke v. Central R. & Bkg. Co.* (C. C. S. D. Ga.) 15 L. R. A. 683.

31 L. R. A.

right to control the stock of another and vote it at a stockholders' meeting, where the sole purpose is to secure control of the corporation by the use of such stock.

2. Therefore when such a contract has been made, and on the strength of it the promisee has suffered to pass beyond his control stock which, in connection with stock owned by him, would have given him control of the corporation, and thereafter the promisor threatens to sell his stock to the opposing faction, and thus give them control of the corporation, and the promisee, to save himself from defeat in

his project to secure control of the corporation, purchases such stock at a figure much in excess of its normal market value, such contract of purchase cannot thereafter be rescinded, but the purchaser must pay the stipulated price.

3. **A contract to allow another to control the voting of stock**, based upon a promise of the one who is to control such stock to secure for the owner of the stock an office in the corporation, is illegal; and the whole contract is void, although the illegal consideration (i. e. the promise to secure for the owner of the stock a corporate office) constitutes only a part of the consideration for the agreement to give such promisee control of the stock.

(November 11, 1895.)

A PPEAL by plaintiff from a judgment of the District Court for Burleigh County in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. Newton & Patterson and S. L. Glaspell, for appellant:

The defendant was not induced to make the contract by fraud or undue influence.

Fraud is the intentional and successful employment of any cunning, deception, or artifice used to circumvent, cheat, or deceive another.

1 Story, Eq. Jur. § 186.

There was no relation of trust and confidence between the parties.

It is held to be inexpedient, upon grounds of public policy, that a written contract should be set aside upon the ground of fraud unless the proof be clear and strong.

McCall v. Bushnell, 41 Minn. 37.

If Fisher was induced to buy the Gage stock by means of fraud or undue influence, still he ratified and reaffirmed the contract repeatedly, with full knowledge of all the facts.

A person who is induced to part with his property in a fraudulent contract may, on discovering the fraud, avoid the contract and claim a return of what had been advanced upon it.

But if the one defrauded would disaffirm the contract he must do so at the earliest practicable moment after the discovery of the cheat.

Masson v. Boret, 1 Denio, 69, 43 Am. Dec. 651; *McCulloch v. Scott*, 13 B. Mon. 172, 56 Am. Dec. 561; *Schiffer v. Dietz*, 83 N. Y. 800; *Bach v. Tuch*, 126 N. Y. 53; *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798; *Bell v. Keepers*, 39 Kan. 105; *Dennis v. Jones*, 44 N. J. Eq. 513; *Crooks v. Nippolt*, 44 Minn. 239; *Parsons v. McKinley*, 56 Minn. 464.

The alleged contract whereby Gage agreed to vote his stock with Fisher for certain directors, whereby Gage agreed not to sell his stock, nor permit it to be voted against Fisher, and wherein Fisher as an individual agreed for the First National Bank that he would make Gage a director and give him employment as cashier, was void from public policy. There can be no rescission of such a contract and a court will leave the parties where it finds them.

Martin v. Wade, 37 Cal. 168; *Moses v. Scott*, 84 Ala. 608; *Williams v. Montgomery*, 68 Hun, 416; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Woodruff v. Wentworth*, 133 Mass. 309; *Guernsey v. Cook*, 120 Mass. 501; *Forbes v.* 31 L. R. A.

McDonald, 54 Cal. 98; *Foll's Appeal*, 91 Pa. 434, 86 Am. Rep. 671; *Cone v. Russell*, 48 N. J. Eq. 208.

To establish our claim we are only required to produce and prove the promissory note. We do not touch, we are not required to refer to, the contract behind it to establish our demand.

2 Kent, Com. 588; *Buck v. Albee*, 26 Vt. 184, 62 Am. Dec. 564; *Larison v. Wilbur*, 1 N. D. 284; *Warren v. Chapman*, 105 Mass. 87; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

Mr. Alexander Hughes, for respondent:

The evidence sustains and supports the answer, and establishes that the defendant was induced to make the contract of purchase by fraud and undue influence.

The burden of proof is on the plaintiff to show affirmatively that the transaction was fair, open, and free from the least spark of imposition, and that the defendant's consent was not obtained by any oppression, undue influence, or undue advantage taken of his condition, situation, and necessities.

Hunsaker v. Sturgis, 29 Cal. 142; *Rankin v. Porter*, 7 Watts, 387; *Shaeffer v. Sleade*, 7 Blackf. 179; *Bigelow*, Fr. p. 365, note 5; *Platt v. Snipes*, 43 Ark. 21; *Poston v. Buleh*, 69 Mo. 115; *Stone v. Wood*, 85 Ill. 603; *Hall v. Perkins*, 3 Wend. 626; *Osgood v. Franklin*, 2 Johns. Ch. 1, 7 Am. Dec. 513; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 164; *Temple v. Hooker*, 6 Vt. 240; *Chickering v. Lovejoy*, 13 Mass. 51; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Wilson v. Watts*, 9 Md. 437; *Gibson v. Jeyes*, 6 Ves. Jr. 276; *McCormick v. Malin*, 5 Blackf. 509; *Emmons v. Moore*, 85 Ill. 305; *Pom. Eq. Jur.* § 963.

Upon the subject of taking advantage of one's necessities, it is held that when a person is encumbered with debts and the fact is known to the person with whom he contracts, who avails himself of it to exact an unconscionable value, equity will relieve upon account of the advantage of hardship.

Hough v. Hunt, 2 Ohio. 495, 15 Am. Dec. 569, notes, 572-575; *McDonald v. Neilson*, 2 Cow. 139, 14 Am. Dec. 431; *Kelley v. Caplier*, 28 Kan. 474, 33 Am. Rep. 179; *Cutler v. How*, 8 Mass. 257; *Cutler v. Johnson*, Id. 266; *Baxter v. Wiles*, 12 Mass. 365; *Greer v. Tweed*, 13 Abb. Pr. N. S. 427; *Judge v. Wilkins*, 19 Ala. 765; *Seymour v. Delaney*, 3 Cow. 444, 15 Am. Dec. 270; *Parmelee v. Cameron*, 41 N. Y. 396; *Russell v. Roberts*, 3 E. D. Smith, 318; *Joannin v. Ogilvie*, 49 Minn. 564, 16 L. R. A. 376; *Pom. Eq. Jur.* § 928; *Smith v. Cuff*, 6 Maule & S. 160.

The burden of proof is on plaintiff.

Kaine v. Weigley, 22 Pa. 183; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 163; *Conce v. Cornell*, 75 N. Y. 98, 31 Am. Rep. 428; *Douglas v. Mitchell*, 35 Pa. 440; *Kerr, Fraud & Mistake*, pp. 182, 183; 27 Am. & Eng. Enc. Law, pp. 453-458, notes.

Where one of the parties, from distress, undue influence, or oppression, enters into the contract, the onus of proof rests on the party who seeks to uphold it, to show that the consent of the party was not obtained by reason of any undue advantage taken of his position, or undue influence exerted over him.

Pom. Eq. Jur. §§ 955-957, cases cited, §§ 943-

944, 951; *Sparks v. Dawson*, 47 Tex. 139; *Abbey v. Deucey*, 25 Pa. 413; *Ripley v. Miller*, 1 Jones, L. 479, 62 Am. Dec. 187; *Bigelow, Fr.; Kerr, Fraud & Mistake*, p. 183; *McCormick v. Malin*, 5 Blackf. 509; *Wilson v. Watts*, 9 Md. 356; *Disnukes v. Terry*, Walk. (Miss.) 197.

Estoppel, acquiescence, waiver, and ratification are affirmative defenses, and must be pleaded to be available.

Holtry v. Foley (Neb.) 61 N. W. 121; *Mudsill Min. Co. v. Watrous*, 22 U. S. App. 12, 61 Fed. Rep. 163; *Pence v. Langdon*, 99 U. S. 581, 25 L. ed. 421.

The contract attempted to be proved by the plaintiff is not voidable and liable to be made obligatory by subsequent ratification. It was absolutely void and was incapable of ratification.

Broeze v. Bryant, 50 Mich. 136; *Lyon v. Waldo*, 36 Mich. 352; *Kerr, Fraud & Mistake*, p. 296; *Cumberland Coal & I. Co. v. Sherman*, 20 Md. 134.

If the original undue influence still remains, or if the act was simply a continuation of the former transaction, or if the party wrongly supposes that the original contract or transaction is still binding upon him and he has not knowledge of all his own rights, no act of confirmation, however formal, is effectual.

Pearson v. Chapin, 44 Pa. 9; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311; *McCormick v. Malin*, 5 Blackf. 509; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Cherry v. Newsom*, 3 Yerg. 369; *Moran v. Payne*, 43 L. J. Ch. 240; 21 Am. & Eng. Enc. Law, pp. 79, 80, note 2; *Cortland Mfg. Co. v. Platt*, 83 Mich. 419; *Tarkington v. Purris*, 128 Ind. 182, 9 L. R. A. 607; *Whitcomb v. Denio*, 52 Vt. 382; *Marston v. Simpson*, 54 Cal. 191; *Andrews v. Hensler*, 73 U. S. 6 Wall. 254, 18 L. ed. 737.

The agreement between Gage and Fisher in substance and effect was, that Fisher would purchase the two additional shares, surrender the control of the Shaw stock, take him into the combination forming the majority, and Gage was to vote his stock at the ensuing election for the directors which they had mutually agreed upon. The evidence clearly and conclusively shows that it was their intention to improve the management, build up the institution, and thereby benefit all the stockholders thereof. Such an agreement is not contrary to public policy and is valid.

Cook, Stock & Stockholders, § 618, and cases cited; *Havemeyer v. Havemeyer*, 11 Jones & S. 506, Affirmed 86 N. Y. 618; *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24; *People v. Albany & S. R. Co.* 55 Barb. 344; *Fisher v. Bush*, 35 Hun, 641; *Barnes v. Brown*, 80 N. Y. 527; *Mobley v. Morgan* (Pa.) 5 Cent. Rep. 527; *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 42 Hun, 496; *Fremont v. Stone*, 42 Barb. 169; *Moses v. Scott*, 84 Ala. 608; *State v. Smith*, 48 Vt. 268; *Woodruff v. Wentworth*, 133 Mass. 309; *Pender v. Lushington*, L. R. 6 Ch. Div. 70; *Quincey v. White*, 63 N. Y. 370.

If the plaintiff's statement of this transaction be true he cannot abandon or waive the alleged illegal part thereof. It tainted the whole transaction.

Brown v. Tarkington, 70 U. S. 3 Wall. 377, 18 L. ed. 255.

If any part of the entire consideration for a

promise, or any part of the entire promise, be illegal, whether by statute or common law, the whole contract is void.

Craig v. Missouri, 29 U. S. 4 Pet. 410, 7 L. ed. 903; *Bartle v. Nutt*, 29 U. S. 4 Pet. 184, 7 L. ed. 825; *Donallen v. Lennox*, 6 Dana, 91; *Brown v. Langford*, 3 Bibb, 500; 1 Parsons, Contr. 380; *Hinesburgh v. Sumner*, 9 Vt. 23; *Deering v. Chapman*, 22 Me. 488, 39 Am. Dec. 592; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *The Pioneer*, Deady, 72; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Widow v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664; *Carleton v. Woods*, 28 N. H. 290; *Cotten v. McKenzie*, 57 Miss. 418; *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

A party to an illegal contract may set up its illegality when it is sought to be enforced against him, though he cannot enforce it.

Hall v. Coppell, 74 U. S. 7 Wall. 542, 19 L. ed. 244; *Tylee v. Yates*, 3 Barb. 222; *Barton v. Port Jackson & U. F. Pl. Road Co.* 17 Barb. 397; *Craig v. Missouri*, 29 U. S. 4 Pet. 436, 7 L. ed. 912.

The court will not lend its aid to enforce a contract which grows out of or is connected with an illegal act, or to recover thereon.

Barton v. Port Jackson & U. F. Pl. Road Co. *supra*; *Hunt v. Knickerbacker*, 5 Johns. 327; *McBlair v. Gibbs*, 58 U. S. 17 How. 232, 15 L. ed. 132; *Pratt v. Adams*, 7 Paige, 615; *DeGroot v. VanDuzer*, 20 Wend. 390; *Pennington v. Townsend*, 7 Wend. 276; *Pepper v. Haight*, 20 Barb. 429; *Hayden v. Davis*, 3 McLean, 276; *Milne v. Huber*, Id. 212; *Brown v. Tarkington*, 70 U. S. 3 Wall. 377, 18 L. ed. 255; *Rose v. Triax*, 21 Barb. 361.

That the defendant is not *in pari delicto* with the plaintiff is shown in *Pomeroy's Equity Jurisprudence*, § 403, and authorities cited.

The parties are not *in pari delicto* when public policy is advanced by allowing either, or the one most excusable of the two, to sue for relief, and be restored to his original position.

Davies v. London & P. Marine Ins. Co. L. R. 8 Ch. Div. 469; 1 Pom. Eq. Jur. p. 422.

When one party acts under oppression, injustice, hardship, undue influence, or a great inequality of condition, although he may be *in delicto*, he is not *in pari delicto*, and may have relief in equity.

Phalen v. Clark, 19 Conn. 421, 50 Am. Dec. 253; *Pinckston v. Brown*, 3 Jones, Eq. 494; *Freelore v. Cole*, 41 Barb. 318; *Goodenough v. Spencer*, 15 Abb. Pr. N. S. 248, 46 How. Pr. 347; 1 Story, Eq. Jur. 300; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Bayley v. Williams*, 4 Giff. 638; *Thomas v. Richmond*, 79 U. S. 12 Wall. 353, 20 L. ed. 456.

The maxim *In pari delicto potior est conditio defendentis*, does not apply to a case like this raised upon the grounds of public policy.

Cone v. Russell, 48 N. J. Eq. 208; 1 Story, Eq. Jur. § 298, and cases cited; 1 Pom. Eq. Jur. § 403, cases cited; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Curtis v. Leavitt*, 15 N. Y. 9; *White v. Franklin Bank*, 22 Pick. 181; *Lowell v. Boston & L. R. Corp.* 23 Pick. 32, 34 Am. Dec. 33; *Bellamy v. Bellamy*, 6 Fla. 62; *Prescott v. Norris*, 32 N. H. 101.

The contract under which the plaintiff seeks to recover is wholly void.

Bizby v. Moor, 51 N. H. 402; *Snyder v.*

Wiley, 33 Mich. 494; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 534; *Foley v. Speir*, 100 N. Y. 552; *Bishop*, Contr. 471; *Chitty*, Contr. 11th ed. p. 973; *Pueblo & A. Valley R. Co. v. Taylor*, 6 Colo. 1, 45 Am. Rep. 512; *Hanauer v. Gray*, 25 Ark. 350, 99 Am. Dec. 228; *Cotten v. McKenzie*, 57 Miss. 418; *Widoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664.

Corliss, J., delivered the opinion of the court:

We have reached the conclusion in this case that we must decide against the defendant and respondent on his own theory. Taking the view of the facts which is most favorable to him, we are yet compelled to hold that he has neither any defense to the note sued on, nor any valid counterclaim against the plaintiff for money paid by him to plaintiff in part payment of such note. We will state our reasons for this conclusion as briefly as the complicated nature of the case will permit.

The action is on a promissory note for \$3,000 given by defendant to plaintiff. The consideration for the note was the sale by plaintiff to defendant of 10 shares of the stock of the First National Bank of Bismarck, N. D. The date of this transaction was December 19, 1893. The capital stock of the bank was \$100,000, divided into 1,000 shares of \$100 each. For some time prior to 1888, plaintiff and defendant had both been directors of this bank, and defendant had been president thereof. In 1888 plaintiff was dropped from the directory, and in 1889 the defendant also ceased to be a director. The control of the bank was then in the hands of a number of stockholders, who acted in unison, and who were more or less hostile to defendant and plaintiff. Among these stockholders were George H. Fairchild, H. R. Porter, and Daniel Eisenberg. This group of stockholders will be designated in the course of this opinion as the "Fairchild interest." The defendant, for the purpose of securing control of the bank, began purchasing its stock, and in the summer of 1892 he found himself the owner of 489 shares of such stock, and in the possession of a proxy to vote 16 shares more, owned by a Mrs. Shaw. Had this condition of affairs remained unchanged until the next annual stockholders' meeting, in January, 1893, the defendant would have been master of the situation, and would have secured full control of the bank, electing his own board of directors, and through them, such officers of the corporation as he might see fit to elect. While this condition existed, the defendant claims that he was induced to part with his control over the Shaw stock at the suggestion of plaintiff, and under his promise to allow him (the defendant) to control, or in other words to direct, the voting of this stock at the next annual stockholders' meeting, in January, 1893. Relying on this promise of the plaintiff to defendant, who, unquestionably, could have voted the Shaw stock at such meeting, had he so desired, defendant notified Mrs. Shaw that she could sell this stock to the Fairchild interest. The plaintiff, the defendant, and Mrs. Shaw were all hostile to the Fairchild interest; and the motive which prompted defendant in releasing his control over the Shaw stock, and in sug-

gesting to Mrs. Shaw that she sell it to the enemy, was apparently a desire to induce the Fairchild interest to assume the heaviest possible burden, without at the same time giving them control of the majority of the stock. Defendant, having purchased two more shares, was now the owner of 491 shares; and when plaintiff promised him control of his ten shares, defendant felt sure of a majority, and therefore permitted the control of the Shaw stock to pass from him. Plaintiff now held the balance of power. The Fairchild interest began to bid for his stock. Finding that plaintiff, despite his promise to allow defendant to control his stock at the meeting, intended to sell to the enemy unless he (the defendant) purchased it for the sum of \$5,000, he finally yielded to this demand, and the contract of sale was entered into on this basis. It is not claimed, however, that plaintiff, from the start, intended to inveigle by his promises, the defendant into a position where he could take advantage of the necessities of his situation to extort from him an exorbitant price for the stock. Fraud is not claimed, except as it is urged that plaintiff's subsequent conduct was fraudulent in contemplation of law. Two thousand dollars of the purchase price was paid at the time of sale, and the note in suit, for \$3,000, was given for the balance of the consideration. Subsequently the defendant paid \$1,000 on this note, and thereafter this suit was brought to recover the remaining \$2,000 due thereon, with interest. The defendant interposed as a counterclaim a claim to recover back the \$3,000 so paid; having, as he insists, rescinded the contract, and offered to restore to plaintiff the ten shares of stock delivered under this contract. The trial court rendered judgment in his favor, both on the plaintiff's claim against him, and on his claim against the plaintiff; directing that the note be canceled, and that defendant recover from plaintiff the consideration paid, namely, \$3,000. It is true that the plaintiff claims—so swears—that the agreement between him and the defendant was that he would give defendant the preference in purchasing the stock, in case he offered as much for it as the Fairchild interest; and, if this be the case, he was acting strictly under the contract, in demanding the sum of \$5,000 for his stock from the defendant. In that event both law and good morals would approve the course. But the trial court found that the contract was as we have stated, and we will assume, for the purpose of this decision, that this finding is correct. The defendant certainly cannot, and he does not, claim that he proved a case more favorable to himself than the findings, nor does he pretend that he can ever establish a stronger case on another trial.

Taking these findings as the basis of our decision, we are very clear that the court erred in deciding the case in favor of the defendant. The court erred in its conclusions of law that the facts found established a defense to the note, and also a valid counterclaim, for the \$3,000 paid on account of the purchase price. We regard the contract for the sale of the ten shares of stock for \$5,000 as entirely legal, and we do not consider that the defendant is in position legally to claim that, because an un-

conscionable price was extorted from him on account of the necessities of the situation, he has any right, after having with full knowledge of the facts submitted to the demand, to rescind the contract he deliberately made. If it is true (but we express no opinion on this question of fact) that the plaintiff, after having induced the defendant to part with the control of the corporation, by letting the Shaw stock slip from him on promise to substitute his (plaintiff's) stock for the Shaw stock, and to allow defendant to use the plaintiff's stock as he (the defendant) could have used the Shaw stock at the next annual meeting; his subsequent conduct in repudiating his agreement was an act of gross perfidy, and the using of his power, under such circumstances, to coerce the defendant into paying an exorbitant price for this stock, which was worth in the general market not over \$500, was base and dishonorable in the extreme. But the decision of this case turns on a larger question,—the question of public policy. There is no pretense that plaintiff was guilty of any fraud in the sale of the stock. The parties both dealt at arm's length. There was no concealment of any fact. There was no misrepresentation. Whatever relation of confidence which theretofore existed between the plaintiff and defendant must have ceased, whatever esteem which the defendant had entertained for the plaintiff must have instantly perished, when he was confronted by the plaintiff with this, to the defendant, unconscionable demand that he pay him \$5,000 for stock which, as defendant understood, the plaintiff had agreed he was to have the right to use at the meeting without compensation. Whatever defendant did at this time must have been done, not cheerfully, in a spirit of confidence, but reluctantly, with anger in his heart, and therefore with no disposition on his part to yield to any demand, except so far as coerced by the necessities of his position.

It is said that plaintiff having by his promises induced the defendant to place himself in the plaintiff's power, the plaintiff should not be allowed to take advantage of the situation to extort from him an exorbitant price for the stock. The fallacy of this reasoning lies in its untenable assumption that defendant, at the time he bought the stock for \$5,000, under the stress of necessity, could have maintained an action against plaintiff to compel the specific performance by him of his contract to allow defendant to vote his (the plaintiff's) stock. If at the time defendant agreed to pay \$5,000 for this property, he was powerless to secure redress in a court of equity,—if at that time the plaintiff could not be compelled to permit him (the defendant) to vote the stock,—then plaintiff had a perfect legal right to sell to whom he pleased, for such price as he could obtain, and therefore had an undoubted legal right to sell to defendant for \$5,000, so long as defendant, being under no other pressure than that of his necessities, agreed to pay that sum for it. Defendant has no right to insist that he was unexpectedly placed in this peculiar position, relying on the promise of plaintiff; for, if it was a promise which a court of equity would not enforce, he had no right to rely on such promise. He was bound to know that the plaintiff might refuse to carry out his agree-

ment, and that in that event he (the defendant) would be powerless to compel its performance, but must, to save himself from being baffled in his scheme, buy the stock at such a figure as it could be purchased for. Even assuming the contract to allow defendant to control the stock to be valid, so that its breach would subject plaintiff to liability for damages, still defendant cannot use the breach of that promise as a basis for rearing upon it this argument that plaintiff took advantage of his necessities, unless such a contract could be specifically enforced in equity. Plaintiff had a legal right to take advantage of his necessities, and exact such price as he could under the circumstances secure, if he could not be compelled by a court of equity to allow defendant to vote the stock. If plaintiff could break this promise without liability for damages, because it was void, he could charge what he chose for the stock, and defendant would have no legal ground for complaint. So if the breach of this promise, assuming it to be valid, subjected him to liability only for damages, he yet could break it, and compel the defendant to buy the stock and pay him what he asked for it, without rendering himself liable to the charge of having, in legal contemplation, extorted an unconscionable contract from the defendant. Suppose that the contract was valid, and that its breach would have subjected the plaintiff to liability for \$500 damages. He might have broken it, and then have taken the position that while he was liable for these damages, he yet had the undoubted legal right to break such contract and incur such liability, and thereupon sell the stock to whom he pleased, without being liable for anything more; and, if the defendant desired to purchase on the same terms as another person had offered, he had a legal right to make a new contract of sale with him (the defendant), and the contract would be as valid as a sale to a stranger. The defendant could not complain that an unfair advantage had been taken of him, for, if it is the law that a court of equity will not enforce such an agreement as the original one in this case, but will leave the party to his action for damages, then defendant was bound to know that he was all the time at the mercy of the plaintiff, who might at any moment repudiate the contract, without other liability than for damages; and the defendant was in this position because he had failed to take the precaution to secure a promise that would fully protect him. He has no legal right to appeal to equity for relief because the plaintiff took advantage of this struggle for supremacy to exact from him (defendant) an enormous price for his stock, if he (the defendant) failed to secure from plaintiff such a contract to protect him against such exaction as a court of equity would enforce for his protection. Before this promise to allow the defendant to vote the stock was made, plaintiff might have sold his stock to defendant for \$5,000 without the possibility of any rescission of the contract. If defendant saw fit to let the Shaw stock go, without securing in place of it an agreement that he could enforce in equity against the plaintiff, and without securing the plaintiff's stock itself, he voluntarily relinquished his vantage

ground without taking the precaution to protect himself legally, and trusted himself and his interests to the honor of the plaintiff; knowing full well, as he testifies himself, that the plaintiff, in the impending struggle for supremacy, would be sorely tempted to desert him, and, being only human, might fail.

If we should affirm this judgment, we would give the defendant all the benefit he could have obtained from a decree of specific performance, rendered before the stockholders' meeting, that defendant be allowed to vote the stock. Defendant would recover his money; plaintiff would have back his stock; and it is undisputed that defendant has in fact voted the stock in the manner he desired to vote, and has, through the use of this stock, secured control of the corporation. We are satisfied that, both on principle and under sound authority, the true rule is that a court of equity should never specifically enforce a contract by which one person agrees that another should control his stock without purchasing it, where the sole ground of the appeal to equity is the desire of the party making the appeal to secure control of a corporation through the use of the stock he is thus seeking to control. It is a general rule that a court of equity will not enforce a specific performance of a contract for the sale of personal property. Corporate stock comes within the scope of this rule, unless there are peculiar features calling for the interposition of a court of equity. But when such peculiar features exist equity will decree specific performance. *Eckstein v. Downing*, 64 N. H. 248; *Goodwin Gas Store & M. Co's Appeal*, 117 Pa. 514; *Cook, Stock, Stockholders & Corp. Law*, §§ 737, 738; *White v. Schuyler*, 1 Abb. Pr. N. S. 300; *Treasurer v. Commercial Coal Min. Co.* 23 Cal. 890; *Frue v. Houghton*, 6 Colo. 318; *Bumgardner v. Leavitt*, 35 W. Va. 194, 12 L. R. A. 776.

When the only peculiar feature is the desire of the plaintiff, with the aid of the stock he is seeking to obtain, to secure the control of a corporation, this, perhaps, so far from being a ground for taking the case out of the ordinary rule, may be a reason for denying the relief sought. While it is not illegal for a stockholder to buy up a controlling interest in a corporation, and so absolutely rule its affairs, and while it is also true that agreements to vote stock together are not, when carried out, illegal, in the sense that the law regards the vote as void or voidable, yet it may be contrary to public policy for a court of equity to decree specific performance of contracts touching the control of stock, where the sole object of the person who is seeking to enforce the contract is thereby to secure control of the corporation. We do not say that such a contract is necessarily void, as repugnant to public policy, but we are by no means clear that a court of equity would specifically enforce it. It may be that sound public policy demands that a court of equity should never lend its aid to the enforcement of a contract relating to stock, when the sole object of the person who wishes it enforced is to give that person control of the corporate affairs. Efforts are often put forth to secure the management of a corporation, which are inspired by laudable mo-

tives. But it is also true that many of these schemes to obtain the control of a corporation are conceived and carried on in a spirit inimical to the interests of the minority stockholders, and not infrequently for the purpose of so managing the affairs of the corporation as to force them to sell their holdings at practically such a figure as the majority stockholders should dictate. Should courts of equity adopt the practice of giving to a minority stockholder the right to enforce specific performance of a contract to buy stock, simply to enable him to control the corporation, or, what is still more indefensible, the right to vote or control the voting of stock that he does not own, to enable him to secure control of the corporation, they would find that in many cases they had suffered their functions to be perverted by designing men: that they had in fact been lending to dishonorable schemes such effectual aid as to insure their consummation. Proof that the object was legitimate, that the motive was pure, would furnish no guaranty that the real purpose was not to wreck or mismanage the corporate affairs. In no case can a court determine with certainty just what course the minority stockholder, when armed by the court with this absolute power over the corporation, will pursue when he has attained his vantage ground. It is therefore possible that the question whether specific performance should be decreed ought not to turn on the court's surmise or guess as to the ulterior purpose of the person who is seeking to secure control; but because there is always danger that such purpose may be dishonest, and because the court can never surely know the truth as to the real motive, it may be that courts of equity should inflexibly refuse to aid the minority stockholder in his effort to obtain control. In this case the defendant's motive appears to have been honorable, and we have no doubt that such is the fact. He was merely seeking to take the management of the bank from persons who, in his judgment, were mismanaging it, and resume control of its affairs, that it might be built up for the benefit, necessarily, of all stockholders. But perhaps this fact should not influence us. If the specific enforcement of such a contract is to turn on the opinion of the court touching motives, it is obvious that in many cases dishonest projects will receive effectual equitable aid. The decision of the Pennsylvania supreme court in *Foll's Appeal*, 91 Pa. 434, 36 Am. Rep. 671, strongly supports the view that equity would not specifically enforce a contract for the sale of stock where the only ground for invoking the aid of the court is the peculiar value of the stock to the person who has contracted to buy it, because of his desire to secure control of the corporation. The bill in that case was filed to compel specific performance of a contract to purchase stock in a national bank. The basis of the application to equity was the desire of the plaintiff to secure control of the bank. The court unanimously held that, on grounds of public policy, the relief should be denied. The court said: "While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of

equity will lend its aid to help him. A national bank is a quasi public institution. While it is the property of its stockholders and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place, supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected, the depositors, the noteholders, and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock, as now held, is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for the safekeeping of their moneys, or the business public who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it. . . . We are in no doubt as to our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid."

It is true that some stress was laid by the court on the fact that the plaintiff was operating with borrowed capital, in his efforts to secure control of the bank. But this fact was not treated as decisive, and it is clear from the whole trend of the opinion that the absence of this fact would not have resulted in a different ruling in the case. Moreover, this fact was adverted to as tending to show that the object was to speculate, and not to invest funds in corporate stock. But in the case at bar the defendant never intended to invest a dollar in plaintiff's stock until he was compelled to do it to enable him to accomplish his real purpose, which was to secure control of the bank. In *Moses v. Scott*, 84 Ala. 608, after stating that a vote based upon a prior agreement to vote as a unit would not necessarily be illegal, the court says, at page 611: "Whether an agreement to vote as a unit, or, as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no party to it can withdraw from it, or disregard it without the consent of his fellows, may be a different question. Possibly public policy may exert an influence in the solution of this problem. . . . And even if such contract be lawful and, upon its naked face, exert a continuing force, the grave question comes up, Will a court of chancery, in its enlightened discretion, lend its aid in the enforcement of a contract of so doubtful policy?" However, we are not called upon to settle this interesting question in this case. The case before us presents a stronger one against the exercise of the equitable powers of the courts to enforce specific performance than a contract for the purchase of stock; for here the contract was to give the minority stockholder the right to dominate and direct the judgment of the plaintiff, as stockholder, in the voting of his stock, without owning the stock himself. Every

31 L. R. A.

other stockholder in the bank had the right to demand that the plaintiff should, if he desired so to do, exercise at the very time of the annual meeting his own judgment as to the best interests of all the stockholders, untrammelled by dictation, and unfettered by the obligation of any contract. We know of no case where a court of equity has enforced such an agreement. We regard as controlling on this question the rule that an irrevocable proxy to vote stock is revocable. See *Cook, Stock, Stockholders & Corp. Law*, § 610, note 6.

There is another reason, and to our mind a still stronger reason, for holding that defendant could not have secured in a court of equity a decree specifically enforcing this contract. The plaintiff's promise to allow the defendant to control his stock was based upon an illegal consideration,—one condemned by public policy,—and the promise was therefore not binding in law. The trial court found that before defendant suffered the Shaw stock to pass beyond his control, and before plaintiff had agreed to permit defendant to control his stock, defendant had informed the plaintiff that it was his purpose to vote his own and the Shaw stock to make plaintiff one of the directors of the bank, and that it was also his purpose to cause him (plaintiff) to secure employment in the bank when the new board of directors was elected; that he desired the advice and co-operation of plaintiff in securing such control, and the selection of suitable persons to put in the directory to carry out his plans, etc. The court also found that thereafter plaintiff represented to defendant that he did not need the Shaw stock "to accomplish his said purpose," that he had better let the Fairchild interest purchase that stock, and that he (the plaintiff) would not permit his stock to be bought or controlled by the Fairchild interest, but that he would vote his stock with the defendant's stock at the next annual stockholders' meeting, for the persons agreed upon by plaintiff and defendant for directors, and would in every way aid and assist defendant in the consummation of his plans for securing the possession, control, and management of the bank and its affairs. These findings make it apparent that one of the considerations, if not the main consideration, which influenced plaintiff in agreeing to give defendant control of his stock, was the previous statement of defendant that he intended to make plaintiff a director, and see that he was employed in the bank by the new board of directors to be elected at the approaching stockholders' meeting. That both parties understood that at least a portion of the consideration for plaintiff's co-operation with defendant in the project to obtain control of the corporation was the promise of defendant to give him employment in the bank is apparent from a written contract subsequently entered into between the parties. On the 19th of December, but entirely separate from the contract of sale, the defendant signed and delivered to plaintiff, who accepted the same, the following memorandum of agreement:

Bismarck, N. D., Dec. 19, 1892.

In consideration of J. R. Gage joining me in effecting the controlling interest of the capital stock of the First National Bank of Bis-

mark, I hereby agree to furnish said J. R. Gage a position as cashier of said bank at a salary of not less than \$100 per month, payable monthly, beginning at the 11th day of January, 1898, and during his ability to perform his duties as cashier, provided such control is assumed at such time.

Asa Fisher.

In connection with this agreement the court made a finding of fact which conclusively shows that, all along, one of the inducements to plaintiff's promise to vote his stock with defendant's stock was the promise of the latter to give him a place in the bank. "That said agreement was signed by the defendant, Fisher, and was then and there, on said 19th of December, 1892, delivered to plaintiff, J. R. Gage, by the defendant, and was then and there accepted and retained by said plaintiff, and he, the said plaintiff, then and there promised to perform said agreement on his part; that said contract, interpreted and explained by the circumstances under which it was made and the subject to which it relates, was intended by each of the parties thereto as follows: That the plaintiff would vote his said ten shares of stock at the annual meeting of the stockholders of said bank, to occur in the month of January following, for the persons agreed upon by the plaintiff and defendant for the directors of said bank, and that he would aid, assist, and co-operate with the defendant in carrying out the plans which they had previously discussed and agreed upon for the management of said corporation, as hereinbefore set forth, and that the defendant would use his influence with the said persons proposed and agreed upon for directors, when chosen, to elect the plaintiff to the position of cashier of said bank, at a salary of not less than \$100 per month, during his ability to perform said duties."

It is apparent from the findings that this written agreement represents the previous oral understanding between the parties, reduced to writing. It is not claimed that the parties entered into three different contracts. There were only two agreements made. One related to the control of the stock by defendant without buying it. The other was the contract of sale. The court expressly finds that this written contract was no part of the contract for the sale of the stock. That one of the considerations which induced plaintiff to enter into an agreement to vote his stock with defendant's stock was the defendant's promise to secure his employment in the bank, is apparent from the findings to which we have referred; and as it is not pretended, and does not appear, that two different contracts relating to the control of plaintiff's stock by defendant preceded the contract of sale, we can find no escape from the conclusion that the promise on which defendant relied in parting with the Shaw stock was a promise made by plaintiff under the expectation, justified by defendant's promise, that he (plaintiff) was to have a place on the board of directors, and also a position in the bank at a salary. We are strengthened in this view by the consideration that, unless the promise to give plaintiff employment was part of the original arrange-

ment, the subsequent written promise of defendant would be without consideration. If plaintiff, for a sufficient consideration, had already promised to let defendant control his stock, an agreement on the part of defendant to give him an additional consideration for the right which was already his would be a purely gratuitous promise, not binding in law. So far from its appearing that defendant regarded that he was making such a promise, he shows by the written agreement signed by him that the sole consideration running to plaintiff for his agreement to permit defendant to control his stock was defendant's promise to secure him a position as cashier in the bank. It is impossible to conceive that so shrewd a man as the defendant would have promised in writing to give plaintiff a position in the bank, if such had not been part of the original understanding; for, unless it was part of it, the defendant had already secured, by his contract with plaintiff, all he could ever obtain by making additional promises. The case would be similar to that of a person, after having secured a contract for the sale to him of stock for a specified consideration, promising in writing that in consideration of such sale he would give the owner of the stock a place in the corporation. Such a promise would not be made by a reasonable being under such circumstances. The fact that such a contract was made in this case is convincing to our minds that the real consideration running to plaintiff for his original promise to let defendant control the stock was the promise of defendant to give him employment in the bank. This was what induced plaintiff to make the promise. At least, we are satisfied that it was one of the inducements. The contract was therefore contrary to public policy and void. At least a portion of the consideration was illegal, and hence the promise founded on it was a promise which no court would enforce. The law in such a case leaves both parties where it finds them. To neither will it give redress. That a contract relating to the purchase or control of corporate stock, founded in whole or in part upon a promise to secure for the person who owns the stock employment in the corporation, and an office therein, is illegal and void, is a doctrine supported by the unanimous voice of the decisions. *Woodruff v. Wentworth*, 133 Mass. 309; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Guernsey v. Cook*, 120 Mass. 501; *Forbes v. McDonald*, 54 Cal. 98; *Cone v. Russell*, 48 N. J. Eq. 208; *West v. Camden*, 135 U. S. 507, 34 L. ed. 254.

In the case last cited the court, referring to a contract, one element of which was a promise to give one of the parties to it permanent employment as manager of a corporation in which he was a stockholder, said: "It was a contract the purpose and effect of which were to influence the defendant as a stockholder and officer of the company, 'in the decision of a question affecting the private rights of others, by considerations foreign to those rights,' and the defendant, by the contract, was placed under direct and very powerful 'inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers.' He was to be in

a relation of trust and confidence, which would require him to look only to the best interests of the whole, uninfluenced by private contracts. We think this salutary rule is applicable in this case, notwithstanding the alleged contract was not corruptly made for private gain on the part of the defendant. There were other stockholders in the company. The defendant and the Standard Oil Company, for whose benefit it is alleged the contract was made, were not all the stockholders, and it seems to us that it was certainly the right of those other stockholders to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." It cannot be claimed that the illegal parts of this contract could have been separated from the remainder, and the agreement sustained to that extent. The case falls within no exception to the general rule that where a part of a contract is illegal the whole agreement is void. It was not a case where the contract had been executed on one side, and the person who had received the benefit of it was asked to pay only the legal consideration he had agreed to pay, the illegal consideration being waived. In such a case the agreement can be sustained to the extent of the legal consideration. *Casady v. Woodbury County*, 13 Iowa, 118; 1 Parsons, Contr. 380. So far as any consideration ran to plaintiff, there was only a single consideration to induce him to make his promise to allow defendant to vote his stock, *i. e.* the promise to give him employment in the bank. But even if he had been induced to make this promise for money, in addition to the agreement to give him a position in the bank, still the legal part of the consideration could not have been separated from the illegal, for no court could say, in the light of the actual contract, that he would have made the promise to allow the stock to be voted by another solely for the cash consideration. To separate the legal from the illegal consideration, under such circumstances, and then sustain and enforce the contract as so radically altered, would be to make a new contract for one wrongdoer, to enable him to enforce against the other wrongdoer, who would be no more culpable, an agreement which he never made. See *Greenhood*, Pub. Pol. p. 17, rule 21, and page 24, rule 25, and cases cited; 2 Addison, Contr. pt. 2, bottom paging, 762, and cases in note 1; *Tobey v. Robinson*, 99 Ill. 222-233; Comp. Laws, § 3533.

For both of the reasons set forth in this opinion, we are clear that, at the time plaintiff and defendant made the contract of sale sought to be rescinded by defendant, the latter was powerless to compel the plaintiff to carry out his promise to allow defendant to vote his stock, and that therefore, as defendant, to secure control of the bank, saw fit to buy the plaintiff's stock for the sum of \$5,000, he could not, after availing himself of all of the advantages growing out of the possession of such stock, rescind the sale, on the theory that he was coerced by his necessities into making a hard bargain.

The confidential relations existing between the plaintiff and defendant would not transmute into a contract binding in equity a contract which otherwise would not be enforced by a court of equity. Equity will not grant

or withhold relief because the promisor was or was not trusted by the promisee, but it will withhold relief, in all cases of this character, irrespective of the question of confidential relations, because public policy demands that equitable aid should not be extended to what may be in fact an illegal scheme. Nor is there any force in the contention that the case is brought within the scope of the doctrine that a court will relieve a party who has made a contract under the stress of great necessity. As we have already demonstrated, the defendant has only himself to blame for trusting to a promise the fulfilment of which equity would not compel. He was in no different position from that which he would have occupied had the promise of plaintiff never been made. And it is too clear to justify argument that had plaintiff demanded \$5,000 for his stock, without having made any prior promise to permit defendant to control it, the defendant, if he saw fit to yield to this demand, would have been entitled to no relief on the ground that it was a hard bargain, extorted from him by the necessities of his situation. It would be a novel and dangerous doctrine that a party who, in his anxiety to secure property, had paid more than its market value, could appeal to equity to relieve him because he had been impelled by his desires to pay a large price for the thing bought. The cases cited by counsel for defendant do not lay down any such doctrine. They are cases where one person has taken advantage of the financial distress of another to extort from him an unconscionable contract. See *Hough v. Hunt* [2 Ohio, 495], 15 Am. Dec. 569, and note. Neither can it be said that the defendant was compelled to pay more for the stock than the market price. The strife of the controlling factions to secure control of the majority of the stock, to be used at the approaching stockholders' meeting, had temporarily given to this stock a value above its intrinsic value. To the purchaser of it, it meant victory and supremacy in the management of corporate affairs. Why should defendant claim that an exorbitant price had been extorted from him, if he was paying only what plaintiff could have secured from the opposing faction, had defendant declined to buy at that figure? The counsel for the defendant, in his learned and exhaustive brief, and in his very able oral argument before the court, has presented everything that could possibly be urged in favor of the case he represents; and this, too, with great ingenuity and force. But while we fully agree with him that, if the facts found be true, his client has a just grievance in the forum of conscience, yet we are unable, because of the considerations of public policy to which we have alluded, to give him any legal redress.

The judgment of the District Court is in all things reversed, and that court is directed to modify its conclusions of law in accordance with this opinion, and to enter judgment for the plaintiff for the full amount due on the note, for principal and interest.

All concur.

Rehearing denied.

COLORADO SUPREME COURT.

DENVER CONSOLIDATED ELECTRIC
COMPANY, *Appl.*,

v.

John H. SIMPSON.

(.....Colo.....)

1. Evidence that notice was given to an electric company prior to an accident from a fallen wire, that the wire was down, is admissible upon an issue of negligence in omitting to exercise due care in building the line, and in failing to maintain it in good repair.
2. A new trial on the ground of newly discovered evidence is not warranted in an action for injuries caused by a defective electric wire, by the fact that the record at the police headquarters does not show that notice of the defect was sent in as stated by a patrolman, who testified that he reported the defect before the accident happened.
3. The giving to or withholding from the jury questions for special findings of fact is within the discretion of the trial court, under Code 1887, § 190, providing that in any case in which the jury render a general verdict they may be required by the court to find specially upon any particular questions of fact to be stated to them in writing.
4. That an electric wire had become disconnected or detached from its fastening, and hung down in a public alley so as to endanger public travel, is of itself prima facie evidence of negligence upon the part of the company maintaining it.
5. An instruction that a company maintaining an electric wire carrying a dangerous current, over a public street or alley, is not an insurer of the safety of passers-by, but in constructing its line and maintaining the same is bound to the utmost degree of care and diligence,—that is, to the highest degree of care, skill, and diligence so as to make the same safe against accidents so far as such safety can by the use of such care and diligence be secured,—is not erroneous, although it is better to instruct the jury that the company is bound to exercise that reasonable care and caution which would be exercised by a reasonably cautious and prudent person under the same circumstances.

(July 1, 1886.)

NOTE.—Liability for injuries by electric wires in highways.

- I. General rules.
- II. Danger of current.
- III. Degree of care.
- IV. Liability for broken, fallen, or sagging wires.
 - a. Liability of owner.
 - b. Presumption of negligence as to broken or fallen wires.
 - c. Liability of party breaking them.
 - d. Negligent delay in removing or repairing them.
 - e. Municipal liability.
- V. Failure to guard wires from falling wires of other owners.
- VI. Concurrent liability.
- VII. Wires charged by lightning.
- VIII. Contributory negligence.

The subject of this note is limited to injuries received from electricity carried by wires in highways.
31 L. R. A.

A PPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

Messrs. Wolcott & Vaile and Henry F. May, for appellant:

No duty of insurer as is set forth in the complaint exists; in order to recover, plaintiff must show some negligent act or omission on defendant's part, such as either an improper construction or a negligent allowing the wire to remain after notice of an existing unsafe condition, and neglect to remedy same.

Dickey v. Maine Teleg. Co. 46 Me. 483.

Where there is proper authority for the erection, the defendant would not be liable unless for some negligent act or omission on its part.

North Side Street R. Co. v. Tippins (Tex.) 14 S. W. 1067; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *Cowan v. Muskegon R. Co.* 84 Mich. 583; *Egner v. Western U. Teleg. Co.* 2 Colo. 141.

It is to be presumed, in the absence of allegations to the contrary, that defendant was doing only what it was lawfully authorized to do.

Co. Litt. 232; *Bliss*, Code Pl. § 175; *Howan v. Weiler*, 41 Pa. 470.

The court, if necessary in order to ascertain the true meaning of the complaint as finally amended, may consider as explanatory thereof the matters charged in the earlier complaint, but omitted in the latter one.

Stephen, Pl. Tyler's ed. p. 160; *Ferguson v. Meredith*, 68 U. S. 1 Wall. 25, 17 L. ed. 604; *Bliss*, Code Pl. §§ 417 *et seq.*

A party cannot have relief beyond what the terms of his pleadings entitle him to.

Tucker v. Parks, 7 Colo. 62; *Thomas v. Mackey*, 3 Colo. 390.

A presumption can never be allowed to prevail over positive and uncontradicted evidence, and the evidence of the defendant was amply sufficient to negative and overthrow any possible presumption which might have been raised from the mere fact of the broken wire and the accident.

Lawson, Presumptive Ev. Rules 119, 120;

It does not include merely mechanical injuries by contact with wires in highways, if the injuries are not caused by electricity. Nor does it include injuries by electric wires on roofs of buildings or in any other place than a highway. Nor does it include injuries to employees of electric companies, since these are governed to a large extent by different rules because of the relation of master and servant. Another kindred question, which is not within this note, is the matter of police regulations over electric wires in streets, including the right to place such wires in the streets. Still another subject related to this, although distinct from it, is the relative rights of telephone companies and electric railway companies in the use of the same streets. These various subjects will be considered in separate notes hereafter.

I. General rules.

While the subject of the liability for injuries by electric wires in highways has been developed in

McPadden v. New York C. R. Co. 44 N. Y. 478, 4 Am. Rep. 705. *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160.

It is not shown by any evidence to whom the notice, if any, was given on behalf of the defendant, and it is certainly incumbent on plaintiff, not only to show that notice was given, but that it was given to and received by some one authorized to receive it on behalf of the defendant company.

Congar v. Chicago & N. W. R. Co. 24 Wis. 157, 1 Am. Rep. 164; *Colorado C. R. Co. v. Ogden*, 3 Colo. 499.

There is no such thing in existence as an absolute standard of ordinary care and prudence to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested.

Holly v. Boston Gaslight Co. 8 Gray, 125, 69 Am. Dec. 233; *United Electric R. Co. v. Shelton*, 89 Tenn. 423; *Ward v. Atlantic & P. Teleg. Co.* 71 N. Y. 81, 27 Am. Rep. 10; *Pennsylvania R. Co. v. Coon*, 111 Pa. 480; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506.

Degrees of negligence are correlative to degrees of care, and the drawing distinctions between degrees of negligence is disapproved in Colorado.

Colorado C. R. Co. v. Holmes, 5 Colo. 197.

Even in the case of a carrier of passengers, the rule requiring a railroad company, "as far as human foresight and care would enable it, to carry plaintiff with safety," goes too far.

Louisville City Railway v. Weams, 80 Ky. 420; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138; *White v. Fitchburg R. Co.* 136 Mass. 321; *Reiss v. New York Steam Co.* 128 N. Y. 103; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160.

McSara, E. Cayless, H. N. Sales, and E. Keeler, for appellee:

The facts alleged constituted a prima facie case of negligence.

Garland v. Towne, 55 N. H. 55, 20 Am. Rep. 164; *Dugert v. Schenck*, 23 Wend. 445, 35 Am. Dec. 575.

Campbell, J., delivered the opinion of the court:

This was an action by the appellee to recover damages for personal injuries. The

evidence tends to show that the appellant, for the purpose of furnishing light, was engaged in the business of conveying and distributing electricity throughout the city of Denver by means of wires attached to and suspended from poles placed in the streets and alleys of the city. While the plaintiff was lawfully passing along one of the public alleys in the city, without any fault on his part, he came in contact with one of the defendant's wires, heavily charged with electricity, which wire had become disconnected and detached from its overhead fastening, and was hanging down to within about 2 feet of the ground in said alley. As the result of such contact, plaintiff received a severe shock from the electricity carried by the wire, and was seriously injured. The negligence charged against the defendant, of which there was some proof consisted in its failure properly to construct its line, and its omission to take the necessary precautions to prevent the wires from falling and causing injury in case they became detached from their fastenings. There was a verdict for the plaintiff in the sum of \$2,800, upon which the court entered judgment, to reverse which the appellant prosecutes this appeal.

The principal errors assigned relate to the overruling by the trial court of the defendant's demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action; to the admission of evidence, over the defendant's objection, tending to show that the defendant had notice of this defect in its line in time to make repairs before the accident; to the refusal of the court to submit to the jury, at the request of the defendant, certain questions for their answer; and to the giving of certain instructions by the court, over defendant's objection, defining the duty of the defendant to the traveling public.

The defendant's objection to the sufficiency of the complaint arises out of the supposition indulged in by its counsel that counsel for the plaintiff assumed that the defendant was an absolute insurer of the safety of the public from all danger from its wires, and drew his complaint upon that theory. If such were the fact, the complaint would be bad, for the defendant is not an insurer;

very recent years, the body of decisions upon the subject already made may be fairly said to establish the following rules which are merely applications of the general law of negligence to this class of cases:

Rule 1.

A person or corporation constructing and maintaining wires for the transmission of electricity upon, along, and over public highways is not an insurer against accidents therefrom, but is bound to use reasonable care proportioned to the danger of injury therefrom, that is, such care as a reasonable man would use in the construction and maintenance of such a line, taking into consideration the use to which it is to be put, its remoteness or proximity to travelers in the highway, the harmless or dangerous nature of the current which is to be transmitted over the line, and other circumstances affecting the case. Anything short of this degree of care is negligence, and will render such person or corporation liable to any person who, being in

the exercise of due care, is injured by such negligence.

Rule 2.

The question of negligence in respect to electric wires in streets is, like all other questions of negligence, for the jury to decide upon the facts of each particular case, except when reasonable minds could not possibly differ in their conclusions upon such facts. The same is true of the question of contributory negligence of persons injured by such electric wires.

II. Danger of current.

It is evident that in the application of the foregoing rules, one of the most important factors in considering the question whether the owner of the electric line has been guilty of negligence or not is the strength of the current which is transmitted over the line. The electric currents used on the various electric lines differ greatly in their tension or voltage. The electric current on telegraph and

but, aside from certain allegations found in the complaint, which, by themselves alone, might bear such construction, there are specific allegations to the effect that the presence in the alleyway of the wire which caused the injury was due to the negligence of the defendant in omitting to exercise due care in building its line, and culpable negligence in failing to maintain it in good repair. The original complaint contained an allegation that the defendant had notice of this fallen wire in time to repair the defect before the accident, but failed to do so. In the amended complaint this averment was omitted, and therein a general allegation was inserted to the effect that the defendant was negligent not only in failing to keep its wires in good repair, but was also negligent in constructing the same. Before, or possibly during, the trial, in a conversation between counsel for the plaintiff and the defendant, the counsel for the defendant insists that he was led to believe that no evidence would be offered by the plaintiff tending to show that any notice was given to the defendant of this defect. At the trial, however, the plaintiff did offer testimony as to such notice, which notice was alleged to have been transmitted over the telephone by the witness Hedges to the office of the company, prior to the accident, which evidence the defendant subsequently moved to withdraw from the jury for the reasons above given, and because such evidence tended to prove no issue in the case. We think the defendant was not prejudiced by this evidence. It tended directly to establish the issue of the negligence charged, and there was no attempt by counsel for plaintiff to mislead the defendant, nor is it so claimed by appellant. Besides, while counsel for the defendant may have been, in a sense, surprised by this evidence, yet his affidavit on this point does not point out that he would be able on a new trial to produce evidence from any officer or employee of the company that such notice was not actually received at the office of the company. Had a continuance been granted after this evidence was offered, the defendant claims he would have been able to produce evidence that the record at the police headquarters, where a memorandum of such complaints is kept, would show that no such complaint or notice was sent in on the night in question by the policeman Olsen, who testified that he reported to police head-

quarters this defect in the wires before the accident occurred. This is no such showing as would warrant the court in granting a new trial on the ground of newly discovered evidence, nor is it sufficient to warrant us in saying that the court committed error in admitting testimony in regard to the notice.

The defendant requested the court to submit to the jury certain interrogatories, to be answered by them along with their general verdict. These were whether the defendant was guilty of negligence, and, if so, in what particular; at what time the accident occurred; at what time the wire was first down; whether the defendant had notice of the fallen wire before the accident, and, if so, how long before; and whether, if the defendant had such notice, it allowed an unreasonable time to pass before the accident without repairing the same. Section 199, Code 1887, provides: "In any case in which the jury render a general verdict, they may be required by the court to find specially upon any particular questions of facts to be stated to them in writing." This is substantially like the Nebraska Code, and in *Floaten v. Ferrell*, 24 Neb. 347, it was held that the giving to or withholding from the jury questions for special findings of fact was within the discretion of the court. We may add that we perceive no special objection to the interrogatories submitted by the defendant to the court, and it certainly would not have been error had the court submitted them to the jury; but we cannot say that the refusal to give them was such an abuse of discretion as to justify a reversal on that ground. The return of a verdict for the plaintiff under the instructions as given to the jury must necessarily have been equivalent to an answer by the jury of each of these questions against the defendant. Hence, we fail to perceive that the defendant was prejudiced in any substantial right.

The most important and difficult questions concern the instructions given by the court. The defendant requested a number of instructions, some of which the court refused altogether. Others it gave with modifications. This branch of the case we will consider under two general heads,—Alleged error of the court in instructing upon what constitutes prima facie negligence in cases of this kind; alleged errors in instructing as to the nature and extent of the duty of the defendant to the general public using the highway

telephone lines, police, fire, and burglar alarms, and other lines for the transmission of intelligence by electricity is very weak and entirely harmless, so far as electrical effects from contact with the lines is concerned, and therefore the question of negligence in relation to those lines arises most frequently when mechanical contact of the wires or poles with travelers is occasioned by the falling of the poles, or the sagging, breaking, or entanglement of the wires on the highways. The current on the electric railway lines, however, has a tension of in the neighborhood of 500 volts, and this current is strong enough to give a smart shock to human beings, sometimes producing temporary unconsciousness, but never so far as the recorded cases show, permanent ill effects. It has, however, often killed horses and other animals. The cur-

rent on electric lighting lines has a very high tension, in the neighborhood of 2,500 to 3,000 volts in the direct current, and greater destructive force in the alternating current. It is evident, therefore, that a contact with either of the latter classes of wires, although so slight as to produce no ill mechanical consequences, may electrically produce serious injury, and even fatal results.

III. Degree of care.

The dangerous character of a powerful current of electricity when carried where travelers on a public street may possibly come in contact with it makes an unusually important test of the doctrine of negligence, especially in respect to the degree of care required. In the management of such dangerous agencies by which the lives of innocent

over and across which its wires are strung. In substance, the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had become disconnected or detached from its fastenings, and hung down in a public alley so as to endanger public travel, that, of itself, was prima facie evidence of negligence on the part of defendant. Strictly speaking, except in some relations springing out of contract, the mere happening of an accident is not any evidence of negligence. *Thomp. Carr.* p. 209, § 9. But in some cases of tort it has been held that the existence of certain facts, unexplained, is some evidence of negligence. *Thomas v. Western U. Teleg. Co.* 100 Mass. 156, and *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810, are cases in point, and are authority for the instruction given in this case. This is the first case in this court where it has become necessary to determine the duty to the traveling public resting upon a person or corporation distributing electricity by means of wires suspended above a public street or alley. The employment of electricity for supplying light is of comparatively recent origin. The best methods of constructing lines for its distribution, and the precautionary steps to be taken to guard the public from the dangers incident to its use, may not be known or fully understood. But enough is known to justify the statement that the business of distributing electricity on wires strung over the streets of a city is a dangerous business, and attended by peril to travelers along the highway. This court does not recognize any degrees of negligence, such as slight or gross, and logically it ought not to recognize any degrees in its antithesis, care. The court instructed the jury in this case that the defendant was not an insurer of the safety of plaintiff, but that, in constructing its line and maintaining the same in repair, it was held to the utmost degree of care and diligence; that in this respect it is bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wire and other appurtenances, and in carrying on its business, so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such degree of care, it was not liable. If it failed therein, it was liable

for injuries caused thereby. We think the court was unfortunate in attempting to draw any distinctions in the degrees of care or negligence. It would have been safer and the better practice to instruct the jury,—which ought hereafter to be observed,—even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger. But, in effect, this is what the court did. Under the facts of the case, the law required of the defendant, conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and the present state of the particular art. This is the measure of the duty owed by a common carrier to a passenger for hire. *Thomp. Carr.* p. 208, and cases cited.

Not for the same reason, or because the doctrine rests upon the same principle, but with even greater force, should this rule apply to a person or corporation engaged in the equally, if not more, dangerous business of distributing electricity throughout a city by means of wires strung over the public alleys and streets, in so far as is concerned its duty to the traveling public. In those courts where degrees of negligence are not countenanced, nevertheless, in cases where the duty of a common carrier of passengers is laid down, the jury are told that carriers are bound to the utmost degree of care which human foresight can attain. This is upon the theory that reasonable or ordinary care in a case of that kind is the highest care which human ingenuity can practically exercise, and that, as a matter of law, courts will hold every reasonably prudent and careful man to the exercise of the utmost care and diligence in protecting the public from the dangers necessarily incident to the carrying on of a hazardous business. Where the facts of a case naturally lead equally intelligent persons honestly to entertain different views as to the degree of care resting upon

persons are imperiled, a very high degree of responsibility is demanded by the general sense of justice. But courts agree that the liability is not that of an insurer. The distinction once made between gross negligence and ordinary negligence is now generally repudiated by the courts. This general subject of distinctions between negligence is discussed at length in *Crowell on Electricity*, chap. 17, §§ 383-395. The simplest and best expression of the rule as to the degree of care required is that it should be proportionate to the danger. And this is substantially adopted in the cases which have passed upon this particular question of negligence in respect to electricity. This results in holding that the use of a very dangerous current of electricity requires very great care and precautions against injuries from it.

31 L. R. A.

Thus, a degree of care and diligence proportionate to the danger or mischief that is liable to ensue is declared in *Cook v. Wilmington City Electric Co.* 9 Houst. (Del.) 306, to be required of an electric light company when placing its poles and wires along the streets and thoroughfares of the city. The court says: "The law requires that they should use every way to protect and save the public from loss or injury; they must use every means, regardless of expense, to protect and make safe the public citizens passing over the streets of the city, who are not aware of danger; they must use due care and ordinary diligence in such case, with the legal meaning in law following and attached to such words as I have stated." As to the meaning of these words the court says: "The words 'usual and ordinary care' mean in such cases nothing more

a defendant, the court ought not to lay down a rule prescribing any particular or specific degree in that case. But where all minds concur—as they must in a case like the one we are now considering—in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was therefore not prejudicial error for the court to tell the jury in this case what the law re-

quires of the defendant, *viz.*, the highest degree of care in conducting its business. The late case of *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365, rightly interpreted, supports this doctrine, and the case of *Haynes v. Raleigh Gas Co. supra*, expressly lays down the rule observed by the trial court in the instructions given in this case.

The foregoing considerations dispose of all the errors assigned which we deem necessary to notice.

The judgment will be affirmed.

ARKANSAS SUPREME COURT.

CITY ELECTRIC STREET RAILWAY COMPANY, *Appl.*,

v.

George CONERY.

(.....Ark.....)

1. Evidence that electricity was communicated from a trolley wire to a telephone wire which had hung over it and become broken may be sufficient without any positive testimony as to their contact, where there is no other reasonable theory to explain how the telephone wire became charged with electricity.
2. The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented so far as it can be done by the exercise of reasonable care and diligence.
3. The care exercised to prevent the escape of a dangerous current of electricity from wires suspended over streets in populous cities or towns must be commensurate with the great danger that exists, although the owners of such wires are not insurers against accidents.
4. For an injury resulting from the concurring negligence of two parties, which would not have occurred in the absence of either, both are liable to a third party injured thereby.

(December 14, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Pulaski County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

nor less, than if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law."

To similar effect, after saying that it has been questioned by not a few eminent judges whether there can properly be said to be any degrees of care or negligence, the court, in *Hand v. Central Pennsylvania Teleph. & S. Co.* (Pa. Com. Pl.) 1 Lack. L. News, 351, says: "Care according to the attendant circumstances is a comprehensive measure of duty beyond which little, if anything, remains. It embraces the question of ordinary or extraordinary care (if any such distinction there be) where one or the other is pointed out as necessary by existing conditions. It matters little, therefore, if this standard be laid down to the jury, by what descriptive term the care required is called."

31 L. R. A.

The facts are stated in the opinion.

Messrs. J. M. Rose and J. F. Soughborough for appellant.

Mr. H. F. Auten, for appellee:

The failure to maintain guard wires, in this case, was negligence *per se*.

United Electric R. Co. v. Shelton, 89 Tenn. 428.

Battle, J., delivered the opinion of the court:

The City Electric Street-Railway Company is a corporation, and operates a street railway in the city of Little Rock, in this state, by means of electricity. Its railway traverses an extensive territory, and extends through many streets. One of the appliances used in its operation is a trolley wire, suspended by means of poles, and charged with strong currents of electricity. A part of the railway was constructed in Fourth street. Above it were suspended the trolley wires. Intersecting Fourth street at right angles is Cross street, running north and south, while Fourth runs east and west. At the southwest corner of Fourth and Cross, O. E. White resided. Three blocks distant, on the corner of Markham and Cross streets, was a drug store, which he owned and occupied. The residence and store were connected by a private telephone wire, which was suspended by passing it through loops of wire attached to insulators on poles, and was extended over the trolley wire of the street railway at Fourth and Cross streets; its distance above it, at the lowest point, being between 6 and 12 feet. In the course

A charge to the jury that electricity is a "subtle and dangerous agency" which requires the "utmost caution to control" is held correct in an action against a telephone company whose broken wire has caused injury to a traveler on a sidewalk by conveying a heavy current of electricity to him from an electric light wire, especially where the jury are further told that the conduct is to be measured by that of a "cautious and prudent man." *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 276, 22 L. R. A. 635.

That a company maintaining an electric wire and carrying a dangerous current over a public street or alley is bound to the utmost degree of care and diligence, that is, to the highest degree of care, skill, and diligence, so as to make the same safe against accidents so far as such safety can be se-

of time the telephone wire began to sag, sagged 2 or 3 feet between poles, and was finally broken near the corner of Markham and Cross by two electricians attempting to make it straight. The broken end was tied to a post, and in a few days became untied or was again broken at or near the same place, and hung suspended in the street, the north end resting upon the ground. Two days afterwards Arthus Conery, a lad of about ten years,—playing perhaps, in the street in front of the home of his father and mother,—stepped upon it, and was shocked, thrown down, and burned. His mother, hearing his cries, went to his rescue, and attempting to relieve him, was likewise thrown down. A workman laboring near by next went to his assistance, and cut the wire and relieved him. After this he sued White and the railway company for damages, recovered a judgment for \$300, and the company appealed.

The appellant denies that the evidence shows that the trolley communicated to the telephone wire the electricity with which it was charged when appellee was shocked and burned. It says that it was not proved "that there was any contact between the two wires." It is true that there was no positive evidence to that effect, but there was only one other electric wire in that vicinity, and it was an "electric light wire," which was suspended above the telephone, and there is no evidence that it ever sagged or fell sufficiently low to come in contact with any wire below it. According to the evidence, there is only one reasonable theory upon which the condition of the telephone wire at the time appellee was injured by it can be accounted for; and that is, it came in contact with the trolley wire, while down, and received the electricity with which it was charged at the time. This fact is sufficient to sustain the verdict in that respect.

This fact being established, the next question is, Upon what duty of the appellant to the appellee can this action be based? The answer to it is, upon the duty enjoined by the rule which requires every one to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal, accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. So

it is lawful for any person to gather water on his own premises for useful and ornamental purposes, but it is his duty to construct the reservoirs for that purpose with sufficient strength to retain the water under all circumstances which can reasonably be anticipated, and afterwards to preserve and guard them with due care. "For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible." It is the duty of railway companies to keep their tracks and rights of way free from inflammable matter, so as to prevent the communication of fire from their locomotives to adjoining property, and for a failure to discharge this duty they are liable for injuries occasioned by the neglect.

This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross arms, and wires, and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property. If they negligently allow their wires to fall or sag, or poles or other apparatus to fall, to the injury of another, they are responsible in damages for the wrong done, if the party injured is guilty of no culpable negligence contributing to the injury. *Uggle v. West End Street R. Co.* 160 Mass. 351; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810; *Western U. Teleg. Co. v. Eyser*, 91 U. S. 495, 23 L. ed. 377.

In *Texarkana Gas & E. L. Co. v. Orr*, 59 Ark. 215, it appeared that the defendant owned, maintained, and operated in the city of Texarkana a system of electric lights. During the night of the 22d of August, 1891, or early in the morning of the next day, its wires became disabled and out of repair, and, being either broken or disengaged from their fastenings, fell to the ground or sidewalks of the city, and lay there from 12:30 o'clock A. M. until after daylight in the morning, when the street on which they lay was thronged with people. The company ascertained that the wires were down about 2 o'clock A. M. of the same day, but not the exact locality. Ed Walker, a boy, walking along the street about 6 o'clock in the morning of the day the wires had fallen, after some conversation with a bystander about the danger of the wires, picked up a dead wire. Being told to throw it down, he obeyed, but

cured by the use of such care and diligence, although the company is not an insurer of passers-by, is held to be a correct statement of the law in *DENVER CONSOL. ELECTRIC CO. v. SIMPSON*, p. 566, although it is said to be a better statement in instructing the jury that the company is bound to exercise the care and caution which reasonably cautious and prudent persons would exercise under the circumstances.

That the law requires a high degree of care commensurate with the danger when a highly dangerous agent like electricity is used by a street railway company to move its cars is the doctrine declared by *Larson v. Central R. Co.* 56 Ill. App. 263, and therefore it is said that a party employing such agency "should use the highest degree of care to avoid exposing the public" when a wire charged

with electricity would, if allowed to hang loose in the street, cause instant death to persons or horses coming in contact with it.

Substantially the same doctrine is declared in *Godfrey v. Streator R. Co.* 56 Ill. App. 378, where it is said that the street railway company was in the use of a highly dangerous agency, and "was bound to corresponding great care to so use it as not to endanger the life and property of the people who might pass or drive over the street."

A strong case in respect to the liability of an electric railway company for an injury caused by a broken telephone wire that had fallen across its trolley wire is that of *CITY ELECTRIC STREET R. CO. v. CONERY*, p. 570. In that case a telephone wire which had sagged over the street was broken by electricians employed by the owner of the wire

"flipped" it, as a witness said, into the air as he did so, and the wire struck a live wire before he let it go, and thereby transmitted through him an electric current which killed him instantly. The company was held responsible for damages on account of the injury.

The main difference between the case last cited and this is, the electricity was communicated to the party injured in the former by the electric company's own wire, and in the latter by the wire of another, but the principle upon which the liability is based is the same in both cases. All persons have the right to use the streets, in or over which the wires were suspended, as public highways. Subjecting the dangerous element of electricity to their control, and using it for their own purposes, by means of wires suspended over the streets, it is their duty to maintain it in such a manner as to protect such persons against injury by it, to the extent they can do so by the exercise of reasonable care and diligence. This duty is not limited to keeping their own wires out of the streets, or other public highways, but extends to the prevention of the escape of the dangerous force in their service through any wires brought in contact with their own, and of its transmission thereby to any one using the streets. Only in this way can the public receive that protection due it while exercising its rights in the highways in or over which electric wires are suspended. *United Electric R. Co. v. Shelton*, 89 Tenn. 423; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365.

Electric companies are bound to use "reasonable care in the construction and maintenance of their lines and apparatus,—that is, such care as a reasonable man would use under the circumstances,—and will be responsible for any conduct falling short of this standard." This care varies with the danger which will be incurred by negligence. In

cases where the wires carry a strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required. This is especially true of electric railway wires suspended over the streets of populous cities or towns. Here the danger is great, and the care exercised must be commensurate with it. But this duty does not make them insurers against accidents, for they are not responsible for accidents which a reasonable man, in the exercise of the greatest prudence, would not, under the circumstances, have guarded against. *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810; *Ugola v. West End Street R. Co.* 160 Mass. 351.

In this case the cause of the accident was the falling of White's telephone wire, and the contact of the same with the trolley wire of the appellant. The jury found both of them guilty of negligence,—White, in permitting his wire to fall and remain down until appellee was hurt; and the appellant, in allowing the same to become charged with electricity by contact with its wire at the time of the injury. If this be true, the injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two was the proximate cause of the same, and both parties are liable. *Shearm. & Redf. Neg.* 4th ed. § 31; *Thomp. Neg.* p. 1088.

We have examined the evidence in this case, and the instructions of the trial court based on the same. Without setting out either, it is sufficient to say that, tested by what we have said in this opinion as to the law, we find no reversible error in the instructions, taken as a whole, and that the evidence is sufficient to sustain the verdict of the jury, in this court.

Judgment affirmed.

MARYLAND COURT OF APPEALS.

WESTERN UNION TELEGRAPH COMPANY OF BALTIMORE CITY *et al.*,
Appts.,

v.

STATE of Maryland to Use of Edward
NELSON.

(82 Md. 233.)

1. An amendment adding the words

in attempting to tighten it. They tied the broken end around a post but in a few days it became untied or was again broken and hung down in the street. Two days afterwards a boy stepped upon it and was injured. A verdict by a jury that the electric railway company, as well as the owner of the telephone wire, was negligent, was sustained. But the court expressly says that the electric railway company is not an insurer against accidents, but that "the danger is great and the care exercised must be commensurate with it."

A very high degree of care is also imposed by *WESTERN U. TELEG. CO. v. STATE, NELSON*, p. 31 L. R. A.

"of Baltimore city" to the name of the defendant sued as the "Western Union Telegraph Company," and which was the party intended to be sued, although the person served was general manager in the state of a foreign corporation bearing that name, as well as president and manager of the Baltimore company, does not add a new party or operate as the equivalent of bringing a new suit with respect to a plea of the statute of limitations.

572, in which the court of appeals of Maryland says that a company whose wires though insulated carry a deadly current over a street owe it to travelers that their "lawful use of the street should be substantially as safe" as it was before the wires occurred it.

It is said in *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers

2. A grant of the privilege to encumber the public highway with poles and electric wires which, though insulated, carry a deadly current, imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully on the street, and making the street substantially as safe for them as it was before.

3. An injury from contact with a broken telephone wire hanging over and in contact with the feed wire of an electric railway affords a prima facie presumption of negligence on the part of the owners of the wires.

4. That a broken telephone wire, from which a person received a deadly charge of electricity, obtained the electric charge from its contact with the feed wire of an electric railway, may be inferred by the jury, without violence, from evidence that it had been hanging over the feed wire for two weeks and rubbing against it when swayed by the wind, although the insulation of the feed wire is not proved to be imperfect, where there is nothing to show any other source of the electric charge.

(January 8, 1896.)

APPEAL by defendants from a judgment of the Baltimore City Court in favor of plaintiff in an action brought to recover damages for the death of Michael Nelson, a child, which was alleged to have been caused by the defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. John K. Cowen, W. Irvine Cross, E. J. D. Cross, and George Dobbin Penniman, for appellants:

In matters of proof we are not justified in inferring from mere possibilities the existence of facts; there must be proof of the essential facts to fix liability upon a party charged with the commission of a wrongful act.

Baltimore & O. R. Co. v. State, Savington, 71 Md. 599; *Baltimore & P. R. Co. v. State, Abbott*, 75 Md. 158.

It is undisputed that the same feed wire which was up at the time of the accident had not been changed at the date of the trial. The evidence of the defendants' witnesses on this point, being uncontradicted, must be accepted as true.

Baltimore & O. R. Co. v. State, Good, 75 Md. 587.

There could be no escape of electricity without such an abrasion of the insulation as could be detected upon examination, and it was impossible to afterwards patch up such an abrasion.

The plaintiff did not offer the slightest bit of evidence to the effect that the surface of the insulation of the feed wire at the place where the

small wire rested upon it showed the slightest abrasion or defect of any kind. Having offered no evidence showing that any defective apparatus of the railway company had caused the death of young Nelson, the railway could not be held liable.

Baltimore & O. R. Co. v. State, Good, supra.

The facts of this case do not warrant the application of the maxim *res ipsa loquitur*.

Howser v. Cumberland & P. R. Co. 80 Md. 146, 27 L. R. A. 154.

The law only allows actions for death by negligence provided such action shall be commenced within twelve calendar months after the death of deceased.

2 Pub. Gen. Laws, art. 67, § 2.

Messrs. Isidor Rayner and Isaac L. Straus for appellee.

Page, J., delivered the opinion of the court:

This action was brought against the Western Union Telegraph Company and the City & Suburban Railway Company, to recover damages for the alleged neglect of the defendants, whereby one Michael Nelson lost his life. In the narr. and summons the telegraph company is referred to as "The Western Union Telegraph Company," but in the bill of particulars, filed with the narr., the words "a corporation of the state of New York" are appended to the corporate name. The summons was served on Richard Bloxham, "its manager." During the trial it appeared from the evidence that there are two companies, one whose corporate name is "The Western Union Telegraph Company," a corporation of the state of New York, and another whose corporate name is "The Western Union Telegraph Company of Baltimore City," a corporation of the state of Maryland. Richard Bloxham (on whom the writ was served), is the general manager of the former in this state, and the president and manager of the latter. The evidence established the facts that the pole on which the fatal wire was suspended is the property of the Maryland corporation, and that the New York company neither owned nor controlled poles in that vicinity. Thereupon the counsel for the plaintiff asked leave to amend the declaration and bill of particulars to conform to the proof, and stated, at the time, that the Maryland company was the one intended to be sued, and it was only because of his want of knowledge as to the correct name of the corporation that the words "of Baltimore City" had been omitted. There being no objection, the leave was granted, and the amendment made. Mr. Cross, who was the

along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it."

A corollary of this rule as to great care in the use of a dangerous current of electricity is the presumption of negligence that is raised by the fact that a dangerous wire has broken and fallen into the street, as to which see, *infra*, IV., b.

IV. Liability for broken, fallen, or sagging wires.

a. *Liability of owner.*

In case the owner of an electric wire hanging over a street and bearing a dangerous current of
31 L. R. A.

electricity, or liable to receive such a current from contact with other wires, is negligent in allowing it to become broken and to fall into the street where it may cause injuries, the liability for injuries directly resulting from such negligence to those who have not been guilty of contributory negligence is unquestionable. The chief questions which arise in such cases are the negligence of the owner of the wires, the proximate cause of the injury, and the contributory negligence of the person injured.

Injuries to persons from contact with wires charged with electricity and hanging in the street have been held to make the owner of the wires

counsel for the defendants, then had his appearance entered for the Western Union Telegraph Company of Baltimore City, and filed the three following pleas, viz.: First, the plea of limitations; second, that the cause of action did not accrue within twelve months "before the filing of the plaintiff's amended declaration, by which it was made a party to the suit;" and, third, the general issue plea. The plaintiff, having joined issue on the first and third of these pleas, moved to strike out the second; and the action of the court in granting this motion constitutes the defendants' second exception.

It is contended on behalf of the telegraph company that by the amendment a new party was made, and was, in fact, so far as it was concerned, the equivalent of bringing a new suit, and therefore a plea which averred that the cause of action did not accrue within twelve months before the filing of the amended declaration did not improperly set out that provision of the Code which provides that actions like the present must be commenced within twelve months after the death of the deceased person. Code, art. 67, § 3. But to this we cannot agree. The 36th section of article 75 of the Code provides that no action shall abate by reason of the misnomer of a defendant, but the court, at its discretion, on suggestion, etc., or other proof to the satisfaction of the court that "by mistake the plaintiff has sued in a wrong name or that the party summoned in virtue of said writ or action is in fact the party intended to be sued by such writ or in such action may, at any time before judgment, direct the writ or any of the proceedings to be amended by inserting therein the true name" of any defendant. In this case, the summons was served on a person who was an officer of both companies, and upon him as manager of the defendant corporation. He was, in fact, the manager of both. The service was efficient to bring into court either one of the companies. Under these circumstances, it might well happen that an attorney who was closely connected with both, and knew the very slight differences in the two corporate names, might fall into error as to which company was intended to be sued; but if he did, his mistake could not operate to deprive the plaintiff of his right, when he discovered there were two companies with names so nearly alike, of designating which

of the two he was suing. When, therefore, the suggestion of misnomer was made, with the statement that it was the Maryland corporation which was intended to be sued, and the court, in its discretion, ordered the amendment to be made, not for the purpose of adding a new party, but to correct the name of a party actually summoned, the defendant could thereby acquire no right to interpose any other or different plea than it would have had if it had been correctly named in the first instance. If, upon the amendment being made, the ends of justice required further time, to enable the defendant properly to prepare its case, the court had full power to order a continuance. It does not appear, however, that the counsel for the defendant asked for or desired delay. He could not have been surprised. The narrative disclosed that the negligence complained of was in connection with a wire on Eastern avenue near Luzerne street, and Bloxham, who was manager of both companies, knew, or ought to have known, that the telegraph poles and wires in that locality were owned or controlled by the Maryland company, and that the New York company had none in that vicinity. He therefore must have known that it was the Maryland company that was intended to be sued, and it did not require much mental acuteness to enable him to understand that the misnomer occurred by reason of the very slight difference in the two names. It is plain that the error of the plaintiff's attorney was due to the fact that he did not know that the company he intended to sue had the words "of Baltimore City" as a part of its name, and, as soon as he became better informed, he so stated to the court, and prayed the amendment. To hold, under such circumstances, that the amendment brought in a new party, and thereby enabled it to plead limitations, to be computed from the filing of the amended declaration and not from the commencement of the action, would be a gross injustice to the plaintiff. It follows from what has been said that we find no error in the 2d and 4th exceptions, or in the rejection by the court of the 2d and 3d prayers of the telegraph company. By the 4th exception it appears that the defendants were not permitted to offer in evidence the charter of the New York company. But it was not a party to the suit, and the contents of its charter were wholly irrelevant to

liable, in *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810; *Bourget v. Cambridge*, 156 Mass. 393, 18 L. R. A. 605; *Texarkana Gas & E. L. Co. v. Orr*, 59 Ark. 215; *Henning v. Western U. Teleg. Co.* 41 Fed. Rep. 864; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 276, 22 L. R. A. 635; *Western U. Teleg. Co. v. Thorn*, 64 Fed. Rep. 287; *Cook v. Wilmington City Electric Co.* 9 Houst. (Del.) 306; *Graham v. Boston*, 156 Mass. 75; *MITCHELL v. CHARLESTON LIGHT & P. Co.* p. 577.

If a wire charged with electricity is broken down by a cyclone that could not be anticipated or reasonably foreseen, the liability of the company owning it for an injury to a person in the street who comes in contact with it depends on the question of negligence in failing to discover and remove the danger within a reasonable time. *MITCHELL v. CHARLESTON LIGHT & P. Co.* p. 577. 31 L. R. A.

In case of injury to a person when returning from night work at about six o'clock on a dark and drizzly morning following a storm which had prevailed during the night by coming in contact as he walked along the street with a live electric light wire which had parted from the pole supporting it, it was left for the jury to say whether the electric light company was in fault for the breaking of the wire or whether this was broken by reason of unavoidable accident or unusual storm, and also whether or not there had been an unnecessary delay, amounting to negligence on the part of the company, in removing the broken wire. The contributory negligence of the person injured was also left for the determination of the jury. *Cook v. Wilmington City Electric Co.* 9 Houst. (Del.) 306.

On taking a telephone wire from a residence a telephone company is bound to look after it, and

any of the issues before the court or jury. The 1st exception was not referred to in argument, and we understand was abandoned.

The remaining exceptions present for our consideration the several instructions granted and rejected by the court, and this renders necessary a statement of the main facts of the case. On August 24, 1893, Michael Nelson, a child of eleven years, while walking on Eastern avenue near Luzerne street, came in contact with a telephone wire which hung from a pole owned and controlled by the Western Union Telegraph Company of Baltimore City. Along that part of Eastern avenue the City & Suburban Railway Company operates one of its lines of electric railway. Its iron poles are placed at intervals along the curb line, and carry wires strung across the street to support the trolley wire in the middle of the street. Besides these, they also support the railway's feed wires, which stretch from pole to pole along the street, over the curb line and parallel to it. The function of these feed wires is to supply electricity to the trolley wire, so that the potential of that wire may be always constant; and when the road is being operated they carry a voltage of 500 volts, sufficient to produce upon any one receiving it serious injury or death. By means of a preparation of braided cotton, saturated with insulating material, and covered with a waterproof compound, feed wires are kept insulated, so that, when the insulation is properly done, and in good condition, there can be no escape of electricity. If exposed, however, long to atmospheric influence, it becomes depreciated, and will not serve its purpose. Defects are also sometimes to be attributed to improper handling of the wire in the process of construction, so that the covering becomes broken, and the frictional contact of another wire rubbing against it would cause serious damage to the insulation, and in such a case the current would commence to be carried off before the insulation was "probably absolutely worn through." If imperfect insulation were due to such rubbing, so that the charged wire was laid bare, or so worn that the current found a path to the overhanging wire, there would be no sparks at the point of contact, unless there was an "arcing or air space" between the two. The defendant offered evidence tending to show that the particular feed wire was erected in 1893. It was not contended that the in-

sulating material was not of the best, or that it was not originally put up in a proper manner. The defendants also offered evidence to show that at the time of the accident the insulating material was intact at the place where the telephone wire rested on it. It was shown the swinging wire did not belong to the telegraph company, but was suspended from a bracket or lug on one of its poles. It was erected, with the permission of the company, by a gentleman for his private uses. It had long been unused, but was permitted by the company to remain, a dead wire, on the poles where it was first placed. In some manner it parted and one of the ends, suspended from the lug, passed over or around the feed wire, and extended to the pavement, where it swayed to and fro in the wind. In this position it remained for at least two weeks. At first, it seems not to have been charged with electricity, for a policeman, at some time during that period, gathered up the swinging end and placed it in a tree box near by, so as to get it out of the way of persons passing along the street. The unbroken portion of the wire passed along for some distance into the city, but, further than to show there was no contact with other wires for two squares, there was no evidence tending to prove that it received its deadly charge elsewhere than at the place where it crossed the feed wire. It is not contended that Nelson was guilty of contributory negligence. How he came in contact with the wire does not clearly appear. Some of the witnesses thought it was blown against him by the wind. However that may be, it passed between his fingers, and as he recoiled from the shock he drew it about his neck and throat. He was badly burned. In a few days lockjaw set in, and he died. At the conclusion of the plaintiff's testimony, the court was asked by the defendants to instruct the jury that there was no legally sufficient evidence to show that the death of Nelson was caused by the negligence of the defendants, or either of them; and this the court refused to do. To entitle the plaintiff to recover, it was requisite that the proof should establish some duty on the part of the defendants in respect to the person injured, and that the injury was occasioned by reason of the failure of the defendants to perform that duty. This principle is stated in *Maenner v. Carroll*, 46 Md. 212, as follows: "To constitute a good cause of action, in a case of this nature, there

if it leaves it hanging upon an electric light company's pole it is liable for an injury to a traveler upon a sidewalk by contact with it after it has been removed by the employees of the electric light company and hung upon a telephone pole and becomes charged with electricity by contact with the electric light wire or electric railway wire. *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 276, 22 L. R. A. 635.

Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk is the proximate cause of an injury to him from an electric shock, although this was occasioned by the accidental contact of the telephone wire with the wires of an electric light company or of a street railway company,—at least where it does not appear that these were out of their proper position. *Ibid.*

31 L. R. A.

So, a telegraph company is held to be liable for the acts of its employees in leaving wires hanging down in the street in contact with wires of an electric light company if a passenger on the street is injured by contact with them. *Henning v. Western U. Teleg. Co. supra.*

Where a messenger call wire owned by a telegraph company hung above an electric light wire supported on the same pole, and became rusted and rotten so that it broke and fell across the electric light wire charging it with a dangerous current of electricity, the telegraph company was held liable for injury to a boy who attempted to break off a piece of the broken wire hanging down between two poles. It was held to be a fair question for the jury to decide whether the company had failed in its duty to the public by allowing its wire to get into such a condition that it would easily

should be stated a right on the part of the plaintiff, a duty on the part of the defendants in respect to that right, and a breach of that duty by the defendants whereby the plaintiff has suffered injury." Now, the deceased, at the time of the injury, was upon a public highway, at a spot where he had a right to be, and was going along it, to his home in a lawful and proper manner. The sidewalks of the streets in a city are for the use of all persons who have occasion to pass along them, and Nelson, while in the exercise of this unquestioned right, was entitled to be protected and safe from all injury on account of dangerous obstructions. On the other hand, both of the defendants were using the streets, under the permission of the state and municipal authorities, for purposes of private gain, by means of agencies such as could and would become dangerous to human life if not properly and carefully employed. The railway company pursued its business by means of cars propelled by electricity partially supplied through feed wires over and along the edge of the pavement. The telegraph company had its poles also along the curb line, and its wires, extending along the street, were over and along the feed wire, which, though insulated, carried a deadly current. The privileges, so granted thus to encumber the public highway with appliances so likely to become dangerous to the public safety, unless properly employed and controlled, imposed upon them, and each of them, the duty of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty, not only to properly erect their plants, but to maintain them in such condition as not to endanger the public. It follows from this that if the property of the defendants was not in proper condition, and by reason thereof Nelson was injured, these facts alone, in the absence of other evidence to show that the defect originated without the fault of the companies, afford a prima facie presumption of negligence. In such a case the doctrine of *res ipsa loquitur* ("a simple question of common sense." Whittaker's Smith, Neg. 423) fairly applies. In the leading case of *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, Affirmed in the exchequer chamber (L. R. 6 Q. B. 759), and cited ap-

provingly in *Houser's Case*, 80 Md. 148, 27 L. R. A. 154, Cockburn, Ch. J., said: "Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen." In *Burne v. Boodle*, 2 Hurlst. & C. 722, also cited in *Houser's Case*, the plaintiff, while walking in the street was injured by a barrel falling from an upper window of a warehouse belonging to the defendant, and on these facts alone it was held there was evidence of negligence to go to the jury. In *Thomas v. Western U. Teleg. Co.* 100 Mass. 156, where two horses driven along the highway became entangled in a telegraph wire, swinging across a public way at such a height as to obstruct and endanger ordinary travel, it was held these facts alone, unexplained and unaccounted for, were evidence of neglect on the part of the company, and should have been submitted to the jury.

Haynes v. Raleigh Gas Co. 114 N. C. 203, 26 L. R. A. 810; *Uggle v. West End Street R. Co.* 160 Mass. 353; 2 Thomp. Neg. 1220 et seq.; *Thompson, Electricity*, § 178; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 1 C. C. A. 684, 50 Fed. Rep. 813, 16 L. R. A. 345, 2 U. S. App. 205; *Stephens & C. Transp. Co. v. Western U. Teleg. Co.* 8 Ben. 502, Fed. Cas. No. 13,371; *Western U. Teleg. Co. v. Euser*, 2 Colo. 163; *Blanchard v. Western U. Teleg. Co.* 60 N. Y. 510; *Wolfe v. Erie Teleg. & Teleph. Co.* 38 Fed. Rep. 322.

Was there evidence before the jury, when these instructions were asked, from which they could find that the property of the defendants was out of proper condition at the time of the accident, and that by reason thereof Nelson was injured? There was evidence that the telephone wire had been hanging over the feed wire for at least two weeks; that in that position it was swayed by the wind, causing it to rub against the insulating material; that such rubbing for two weeks would cause a very serious damage to the insulation. No information had been given to the jury of any means by which the telephone wire was charged, otherwise than from the feed wire, and that could have been possi-

break and in breaking would be likely to fall across the electric light wire and become dangerously charged. *Western U. Teleg. Co. v. Thorn*, 64 Fed. Rep. 247.

b. *Presumption of negligence as to broken or fallen wires.*

"The construction and maintenance of electric lines in the highways being a matter wholly under the control and care of the parties building them, and the maintenance being wholly under the care of the parties owning them, the court usually holds that the fact of an electric wire falling or sagging into the street in such a way as to obstruct travel, and cause injury, is prima facie evidence of negligence on the part of the company.

The court, in *Haynes v. Raleigh Gas Co.* 114 N. C. 31 L. R. A.

203, 26 L. R. A. 810, says: "Proof that there was a live wire (carrying a deadly current) down in the highway surely raised a presumption that some one had failed in his duty to the public. When to this was added proof that this death-carrying wire was put above the street by the defendant and was its property and under the management and control of its servants, and that by contact with that wire the deceased, having a right to be on the street, was killed, a complete prima facie case of negligence was made out, and the burden was cast upon the defendant to show that this live wire was in the street through no fault of its servants and agents." This was a case where the guy wires of an electric light company had come in contact with a trolley wire and conveyed the electric current to a boy in the street.

ble only by a defect in the insulation. This was, assuredly, evidence tending to prove that the telephone wire was charged through the feed wire. Whether sufficient, or not, to establish it as a fact, was for the jury to determine. It was within the province of the defendants to rebut the plaintiff's case in any manner they were able, to show that the insulation was perfect, or, if that could not be done, that the defect was caused by circumstances over which they had no control; or that it existed for so short a time that they could not be reasonably expected to have been informed of it, and thereby have had an opportunity to mend it. To raise the presumption of negligence in this case however, it was not necessary for the plaintiff to negative all possible circumstances which could excuse the defendants. If the jury were informed of but one point where the telephone wire was in contact with a live wire, it would not be a wild speculation for them to infer—in view of all the circum-

stances, and in the absence of any evidence of contact elsewhere with the feed wire, or with other live wires—that that was the source from whence the electricity came, although it may have been a physical possibility that there might have been such contact with other wires further along the line. This the defendants might have shown, if they could, by way of defense; but, in the absence of all evidence on the point, the jury could infer, without violence, that the electrical charge was in fact obtained by contact of the telephone wire with the feed wire. We find no error in the rejection of the instructions set out in the third exception. We deem it unnecessary to refer particularly to the action of the court in granting or rejecting prayers in the case. What we have said is sufficient to dispose of them. We are of opinion the case was fairly put to the jury.

Finding no error in the rulings of the court, *the judgment will be affirmed.*

SOUTH CAROLINA SUPREME COURT.

John S. MITCHELL, *Respt.*,

v.

CHARLESTON LIGHT & POWER COMPANY, *Appt.*

(.....S. C.....)

1. An instruction that if a "cyclone that could not be anticipated or reasonably foreseen" was the cause of a wire charged with electricity falling, and defendant company was not negligent in allowing it to remain for an unreasonable time, it would not be liable; but if the accident was due to the wires being improperly erected or maintained, or to their being allowed to remain on the streets an unusually long time, the company would be liable,—is not misleading.
2. An instruction that no blame would attach to defendant from the falling of a wire charged with electricity, and its remaining on the ground in a public thoroughfare, unless it was allowed to remain there "after notice" for an unreasonable time, is properly refused.
3. An electric light company may be guilty of actionable negligence in failing to take proper steps to receive information concerning the condition of its wires, as well as

in not repairing them within a reasonable time after receiving notice of their bad condition.

4. An instruction the substance of which is contained in an instruction given is properly refused.
5. The trial judge is not required to strike out from a request to charge a part which renders it defective and charge the remainder.
6. An explanation of a charge given without objection is not error where it does not lay down a different proposition of law from that contained in such instruction.

(September 17, 1895.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Charleston County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion and in the charge of the court below, which was as follows:

"It is a matter of congratulation to you, as well as to those engaged in this case, that it is about to draw to a close. After the able argu-

A prima facie presumption of negligence on the part of the owners of the wires is also held to exist in *WESTERN U. TELEGRAPH CO. v. STATE, NELSON*, p. 572, where an injury was received from contact with a broken telephone wire hanging over and in contact with the feed wire of an electric railway.

An electric light wire hanging down in a public alley so as to injure public travelers is also held to be prima facie evidence of negligence upon the part of the company maintaining it, in *DENVER CONSOL. ELECTRIC CO. v. SIMPSON*.

So, it was held that a prima facie case of negligence on the part of a street railway company is also presented when a horse steps on a broken wire charged with electricity by contact with a trolley wire over which it hangs in the street. *Larson v. Central R. Co.* 56 Ill. App. 263.

31 L. R. A.

But in opposition to the doctrine of the above cases a Pennsylvania common pleas court, in *Hand v. Central Pennsylvania Teleph. & S. Co.* (Pa. Com. Pl.) 1 Lack. L. News, 351, denies that a telephone company can be held liable for the breaking of its wire which thereby was heavily charged with electricity by contact with the wire of an electric railway, although the telephone wire was badly rusted, if it is not shown that it was originally faulty or had remained in place so long that the company ought to have known its defective condition and removed it. The court says: "It is said that inspection would have disclosed the defect, but this is more a matter of argument than of proof. Upon this also the plaintiff's case is barren of anything tangible. We are not informed in what manner or how often wires of this character should be examined, much

ment made on the facts, I trust you will not be delayed in your deliberations in forming a conclusion. Before charging you on what I conceive to be the law of the case, it may be proper to state to you what are the material issues made by the pleadings. The complaint charges that on the 16th day of December last, about a year ago, while walking on one of the thoroughfares of the city of Charleston, the plaintiff came in contact with a wire erected by the defendant, and, by such contact, received injuries to the extent of \$20,000. The defendant joins issue with him, both as to the amount of his injuries, and sets up the affirmative defense that he, the plaintiff, contributed to his own injury, if he sustained any, and that thereby the company was absolved. The defendant sets up the further defense that the injury complained of was due to no fault on the part of the company, but to an act of God, over which the company had no control, and could not reasonably anticipate. These are the issues of fact presented to you.

"I charge you, as matter of law, that a company of this kind, using a thoroughfare or public highway for the purpose of its business, is charged in law with great care, not only in erection of the wires, but in maintaining and keeping them in repair. They must be so kept and conducted that a citizen pursuing the ordinary vocations of life will not come in contact with them. It is the business of the company to so erect them as not to interfere with the safety of the citizens of the community while pursuing their vocations in the ordinary walks of life. The question for you is, Were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God,—that is, such an act that a business man of ordinary forethought and prudence could not anticipate,—then the company would not be liable under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather,—rain, heat, cold, and wind. It is alleged on the part of the company that that wire was broken in consequence of a severe windstorm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated. The law does not require impossibilities. If a cyclone that could not be antic-

ipated or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under these circumstances it would not be liable. But if the accident was due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call your attention to before passing upon the points of law that I have been requested to charge you. Before reading these requests, I desire to state to you what is negligence, in words you will readily understand. Negligence is the want of due care. That expresses it in a few words.

"The plaintiff requests me to charge you as follows: 'Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under existing circumstances, would not have done, the essence of the fault being either in the omission or commission.' That I charge you as law. '2d. If the jury believe that the defendant company was notified by telephone from Mr. Street's office that there was trouble with its wires, and failed to take immediate steps to investigate such trouble and rectify the same, if trouble existed, and if a sufficient time between the notice to the defendant of the trouble to its wires and the accident to the plaintiff, for its investigation and attention, had elapsed, and thereafter, by reason of the failure of the defendant to attend to its said wires, such wire or wires, charged with electricity, hung suspended over the scene of the accident, so as to become dangerous to passengers on the street, then the defendant would be guilty of negligence.' I charge you that which, in plain words, is that if the company was notified that its wires were down, and did not take steps, in a reasonable length of time, to repair them, it would be guilty of negligence, if an accident occurred, in not repairing its wires in a reasonable length of time. '3d. The degree of care which the law requires in order to guard against injury to others varies greatly according to the circumstances of the case, and if the jury believes that electricity was the power used by the defendant in its business, and is a highly

less is it shown that such examination on the part of the company was wanting." This case is directly in conflict with the others above cited on this subject, and is clearly against the weight of authority on this particular point.

c. Liability of party breaking them.

By the plainest application of the general doctrines of law as to negligence, a party who breaks an electric wire causing it to drop into the street where it injures other persons must be held liable for the damages thus caused, if he was guilty of negligence either in breaking the wire or in failing to remove it or guard against injuries by it after it was broken. In two cases such liability has been sustained against a defendant who broke the wires but did not own them.

L. R. A.

Thus, the breaking of a telephone wire by a trolley pole which flew up and struck it as by accident it got off the trolley wire, and leaving it down, where it fell across a trolley wire until a horse stepped upon it and was killed, was found by the jury to be due to negligence of the electric railway company, and its liability was not prevented by the fact that the city or the telephone company may have been negligent in leaving the telephone wire suspended in the manner it was, and that the railway company had no right to remove it. *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484. So, where a trolley pole slipped off the trolley wire, flew up and broke a suspension wire so that it fell across a trolley wire and was charged with electricity by contact with it, only three or four minutes before it was stepped on by a horse, which

dangerous agency to life, unless exercised with constant and extreme care, then, to such extent, a high degree of care, in its supervision, management, and use, is required of defendant, and a failure on its part to exercise such high degree of care would be negligence.' That, I charge you, is a good proposition of law. '4th. If the jury believe that the defendant was negligent, according to the definitions given above, and that in consequence of such negligence the plaintiff accidentally came in contact with wires charged with electricity, operated and controlled by defendant, and was injured thereby, then the plaintiff would be entitled to recover.' That I charge you to be the law. The 5th and 6th requests I refuse to charge as having no application to this case. '7th. When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory negligence, such as will prevent him from recovering.' That I charge you as law. If a man is in danger, and in order to avoid that danger, bona fide, does something which is dangerous, that would not be considered, in law, contributory negligence. No issue involving the 8th proposition is made in the pleadings nor in the evidence, and is hence refused. '10th. If the jury find that the defendant is liable, then they should give the plaintiff such damages as he has proved in this case, not exceeding \$20,000; and, in estimating such damages, they must take into consideration the permanent injury to the plaintiff, the shock to his system, his pain and anguish, and a fair recompense for loss of what he might otherwise have earned, and has been deprived of the capacity for earning by the wrongful act of the defendant.' That, I charge you, is to be the rule in estimating damages, if you find that the defendant was negligent, and the plaintiff did not contribute to his injury. You may give him a reasonable amount of compensation for his pain and anguish, and you may take into consideration what he might have earned, and has been deprived of earning by reason of the accident, in estimating your damages. '11th. An injury is said to be caused by an act of God when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care by the party charged with liability by reason of his negligence in permitting said injury to occur; and a defendant so charged with liability,

if he invokes the act of God as a defense, has the burden of proof upon him to show, not only that the act of God was the cause, but that it was the entire cause, of the injury, because it is only when the act of God is the entire cause of the injury, and said injury could not have been prevented by the exercise of prudence, diligence, and care by the defendant, that the said defendant can be shielded.' I charge you that, as I have already explained to you. For instance, the law would require the company to guard against ordinary windstorms when it erects an electric wire in a public thoroughfare.

"The defendant requests me to charge you certain propositions of law, and it may appear to you paradoxical that I charge the law on both sides. I put to you a hypothetical case. If you find a certain state of facts to exist, then the law which I give you follows from those facts. The defendant's requests are as follows: '1st. The law does not require impossibilities of any person, natural or artificial, nor does it require that the defendant should have ready for service at every moment, and at every point of exposure, an adequate force to overcome a sudden fracture of wire, or any other like casualty, in the shortest possible time. All that it can be required to do in this connection is to maintain an efficient system of oversight, and to be prepared with competent and sufficient force, ready to furnish, within a reasonable time, a proper remedy for all such casualties, defects, and accidents as, from experience, there was any reasonable ground to anticipate might occur.' That I charge you to be law. '2d. I refuse this request for reasons assigned upon the margin. ['Refused for the reason that there is no legal obligation on plaintiff to show notice to defendant that the wire was down.'] '3d. Upon that request I charge you as follows: 'That the defendant was entitled to a reasonable time, after the fall of the wire, to repair it, or to remove it out of the way of persons using the street; and if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action.' If they removed or repaired the wire in a reasonable time, and were not negligent in allowing it to lie upon the streets, then they would not be liable, because want of due care would not be established. '4th. If the jury find that between the time when the defendant received notice of the breaking of the wire, and the time at

was killed in consequence, and the street car conductor was not aware of the accident until a bystander told him that his trolley pole was off the wire, when he replaced it and moved on without examining to see whether any damages had been done by it, it was held that the street railway company was liable for the damages. *Larson v. Central R. Co.* 56 Ill. App. 233.

d. Negligent delay in removing or repairing them.

It is clear that although the maintenance of lines is wholly in the care of the electric company owning it, yet its supervision cannot be constant on all parts of the line, and that while most fallen or sagging wires show that the construction or repair of the line was not properly cared for by the company, yet in some cases, as where wires are

loosened or thrown down by high storms, or other natural causes, the company is not to blame for its mere falling or sagging, but only for allowing it to remain in the highways an unreasonable time afterwards. Therefore the presumption of negligence raised by a fallen or sagging wire may be rebutted by showing that the falling was not caused by any faulty construction or lack of repair, and also that the falling or sagging took place so brief a time before the accident that the company could not with reasonable diligence, have discovered the imperfection.

The failure of an electric light company to take proper steps to receive information concerning the condition of its wires as well as its failure to repair them within a reasonable time after receiving notice of their bad condition was held to be negli-

which the plaintiff came in contact therewith, there was not reasonable time in which the defendant could have repaired the wire, or could have removed it out of the way of persons using the streets, then their verdict must be in favor of the defendant.' That I charge you to be the law. 5th. I have refused this proposition for reasons assigned. ['Refused for the reason that the evidence showed that the defendant did not know, nor had any means of knowing, that the wire was charged with electricity. It was not the contact with the wire that caused the injury, but the electricity, which was a hidden force.'] 6th. If the jury find that a want of ordinary care on the part of the plaintiff in any degree contributed to the injury, then the plaintiff cannot recover in this action.' That I charge you to be the law. 7th. If the jury find that the wire was broken by some object, such as a slate or tile, hurled upon it by a storm, the wire being in good condition, the break would be attributable to the act of God.' I charge you that it would be the duty of the defendant to use precautionary measures not to allow the wire to remain on the streets after it was broken; and if it remained there longer than a reasonable time, and could have been removed sooner, by a due exercise of care, then that was negligence, and the defendant would be responsible. If you find for the plaintiff, you will say, 'We find for the plaintiff' so many dollars and cents; writing it out in words. If you find for the defendant, simply say, 'We find for the defendant,' and sign your name as foreman."

The words written on the margin of defendant's 2d and 5th requests to charge were not repeated by the judge to the jury on the trial of the case.

Messrs. Ficken & Hughes for appellant.

Messrs. Buist & Buist, for respondent:

Detached portions of the charge will not be considered apart from their context.

Bauskett v. Keitt, 22 S. C. 187; *Hume v. Providence Washington Ins. Co.* 23 S. C. 204; *State v. Welsh*, 29 S. C. 4; *James v. Mickey*, 26 S. C. 270; *State v. Turner*, 29 S. C. 35; *State v. Murrell*, 33 S. C. 83; *State v. Banister*, 35 S. C. 291; *State v. Williams*, Id. 345; *Wallace v. Columbia & G. R. Co.* 37 S. C. 343; *Price v. Richmond & D. R. Co.* 38 S. C. 201; *Whaley v. Bartlett*, 42 S. C. 454; *Alabama G. S. R. Co. v. O'Brien*, 69 Fed. Rep. 223.

It was incumbent upon defendant to use a very high degree of care in its supervision, management, and use.

Grand Trunk R. Co. v. Richardson, 91 U. S.

469, 23 L. ed. 361; *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810; *Ray*, Negligence of Imposed Duties, p. 53.

It was the duty of the company to construct its wires so as to resist ordinary storms.

Thompson, Electricity, § 80.

There was no legal obligation on plaintiff to show notice to the defendant that the wire was down.

Thompson, Electricity, § 78; *Pennsylvania Teleph. Co. v. Varnau* (Pa.) 15 Atl. 624; *Branch v. Port Royal & W. C. R. Co.* 35 S. C. 405; *Price v. Richmond & D. R. Co.* 38 S. C. 201; *Whaley v. Bartlett*, *supra*; *Tucker v. United States*, 151 U. S. 164, 38 L. ed. 112.

It was proper in the presiding judge to leave out the words "being informed of" in the third request to charge, as there was no legal obligation on plaintiff to show notice to the defendant that the wire was down.

Thompson, Electricity, § 78; *District of Columbia v. Woodbury*, 136 U. S. 463, 34 L. ed. 477; *Whaley v. Bartlett*, *supra*.

There must be some evidence in the case of contributory negligence on the part of the plaintiff for the defendant to be entitled to the benefit of a charge on that point.

Carter v. Columbia & G. R. Co. 19 S. C. 29, 45 Am. Rep. 754; *Crouch v. Charleston & S. R. Co.* 21 S. C. 497; *Kaminitaky v. Northeastern R. Co.* 25 S. C. 53.

When one is placed by the negligence of another in a situation of peril, his attempt to escape danger, even by doing an act which is in itself dangerous, and, from which injury results, is not contributory negligence such as will prevent him from recovering.

Cook v. Parham, 24 Ala. 84; *Karr v. Parks*, 40 Cal. 188; *Wesley City Coal Co. v. Healer*, 84 Ill. 126; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Pennsylvania R. Co. v. Werner*, 89 Pa. 59; *Wilson v. Northern P. R. Co.* 26 Minn. 278; *Voak v. Northern C. R. Co.* 75 N. Y. 320; *Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Pennsylvania Teleph. Co. v. Varnau*, *supra*.

Gary, J., delivered the opinion of the court:

The appellant is a corporation engaged in generating and furnishing electricity in the city of Charleston, S. C., for the purpose of illumination and motive power. On the 16th of December, 1893, during the prevalence of a violent windstorm, one of the electric wires of the defendant, fully charged with electricity, broke, and the two severed ends rested on the ground in one of the thoroughfares of the city.

gence in *MITCHELL v. CHARLESTON LIGHT & P. Co.*, p. 577.

A similar question as to delay in removing dangerous wires which have fallen arises in respect to the duty of a company which does not own them, but which owns other wires across which they have fallen; as to these, see the cases referred to *infra*, V.

The question whether or not an electric light company should have discovered and removed a broken electric light wire before an accident at six o'clock in the morning after the wire had been broken by a storm during the night was held, in *Cook v. Wilmington City Electric Co.* 9 Houst. (Del.) 306, to be one of the questions for the jury to determine.

31 L. R. A.

Where an electric wire was broken during a very severe storm about midnight, which threw down the lines of the company in many places and frightened the employees of the company in the power station by its effect on the machinery, it was held that it was a question for the jury to say whether an accident which happened about 6 o'clock in the morning of the same day, caused by one of the fallen wires, was or was not so immediately consequent upon the time of falling that the company could not, by the exercise of reasonable diligence, have prevented the accident. *Texarkana Gas & E. L. Co. v. Orr*, 59 Ark. 215.

The evidence showed in this case that the employees at the power-house had made tests which showed a ground along the lines somewhere, and

The defendant's testimony tended to show that the wire broke about 2 o'clock, while the testimony of the plaintiff tended to show that it broke at an earlier hour in the day, and that between 12 and 1 o'clock on the day of the accident the defendant was notified that there was some trouble with its wires, and that they were dangerous. At about 8 o'clock p. m. the plaintiff, while passing through this thoroughfare, was injured by the fallen wire. He was instantly shocked, upon coming in contact with it, and fell to the earth unconscious. For some time thereafter he was confined to his bed, during which period he suffered greatly. His hand was badly burned, and he lost the use of two fingers. This action was instituted to recover damages for such injuries. The plaintiff charged negligence on the part of the defendant, in that it permitted its wires charged with electricity to hang suspended over a thoroughfare of the city, so as to become dangerous to passers on the street, and that the plaintiff, a passenger, in consequence thereof, was seriously injured by the said wire charged with electricity, and was damaged to the extent of \$20,000. The defendant joined issue on these allegations, and set up the defense of contributory negligence on the part of the plaintiff; also, set up the further defense that the injury resulted from the act of God. The jury found a verdict in favor of the plaintiff for \$10,000. The defendant moved for a new trial before his honor, Judge Gary, who granted an order for a new trial unless the plaintiff would remit \$2,500 of the verdict, which the plaintiff did. The charge of the presiding judge will be set out in the report of the case.

The appellant's 1st exception is as follows: "(1) That the presiding judge erred in charging the jury as follows: 'If a cyclone that could not be anticipated or reasonably foreseen was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, then, under those circumstances, it would not be liable.'" It is not contended that the detached portion of the charge, in itself, states an erroneous principle of law, but that it is misleading, inasmuch as the jury might have inferred that if a cyclone which might have been anticipated, or reasonably foreseen, was the cause of the wire falling, and the company was not negligent in allowing it to remain there for an unreasonable length of time, still, under those circumstances, it would be liable. The appellant also contends "that the presid-

ing judge, in confining his declaration to the effect of the class of storms commonly designated as 'cyclone,' rejected the proposition that any other class of storm, or that a storm of not quite the same degree of violence as a cyclone, would operate to relieve the defendant from liability, were it in other respects free from negligence." Under the numerous decisions of this court the principle is well established that the charge of the circuit judge to the jury must be considered as a whole. When an exception is taken to a certain portion of the presiding judge's charge to the jury, it is the duty of this court, in considering the exception, to look to the entire charge, to ascertain whether or not the detached portion of the charge correctly states the views of the law which the presiding judge intended to convey to the jury. In his charge to the jury touching this question, his honor said: "The question for you is, Were these wires erected so as to anticipate any ordinary occurrence in the weather? Was it the act of God, or was it the careless or loose manner in which the wires were erected, which caused this wire to break? If it were the act of God,—that is, such an act as a business man of ordinary forethought and prudence could not anticipate,—then the company would not be liable, under those circumstances. But, on the other hand, the company is charged with so placing their wires, and so keeping them in repair, as to withstand the ordinary weather,—rain, heat, cold, and wind. It is alleged on the part of the company that the wire was broken in consequence of a severe storm. Was it an ordinary windy day, such as is liable to occur at that time of the year, or was it one that could not be anticipated? The law does not require impossibilities. If a cyclone that could not be anticipated, or reasonably foreseen, was the cause of that wire falling, and the company was not negligent in allowing it to remain there for an unreasonable time, then under those circumstances, it would not be liable. But if the accident was one due to the wires being improperly erected, or improperly maintained in repair, or, having been properly erected, were broken, and allowed to remain on the streets an unusually long time, then, if the injury to the plaintiff occurred under those circumstances, the company would be liable to compensate him in damages. These are the general observations that I desire to call to your attention before passing upon the points of law I have been requested to charge you."

had not followed up these tests by examination of the lines to find where the ground was during the four hours which elapsed between their finding out about the ground and the happening of the accident.

e. Municipal Liability.

The liability of a municipality for the unsafe condition of its streets because of dangerous electric wires which have fallen into them seems to be governed by the same principles that govern its liability for the unsafe condition of a street on account of other wires or obstructions of any kind, except when the municipality is itself the owner of the dangerous wires.

In *Bourget v. Cambridge*, 156 Mass. 393, 16 L. R. A. 606, a city was held liable to a traveler who was injured by an electric shock from a loose telephone 31 L. R. A.

wire hanging in a street so low as to endanger travelers. The opinion says nothing about the ownership of the wire, and it may be presumed that the city did not own it.

Likewise, in *Graham v. Boston*, 156 Mass. 75, the city was held liable for injuries to children by an electric shock from a wire hanging in a street, and nothing is said about the ownership of the wire, but the case turns chiefly on the right of the children injured to be regarded as travelers. It is held that although they were playing tag as they went along, returning to their homes from a place at a considerable distance therefrom, they had the rights of travelers, especially as the one first touching the wire was walking straight ahead when he came in contact with it and the others received shocks in attempting to assist him.

When that portion of the charge set out in the exception is considered in connection with the entire charge on the question, we see no ground for sustaining the objection to it that it might have misled the jury. We come next to a consideration of the appellant's second objection to the language of the presiding judge contained in the 1st exception. The presiding judge used the word "cyclone," in his charge to the jury, because the witnesses had testified that the day when the injury as sustained was cyclonic. The charge was therefore based upon the testimony and applicable to this case. When the charge was considered in its entirety, we do not see how it can be construed as announcing the proposition of law that, if the defendant was free from negligence, it would still be liable, if the falling of a wire was caused by a class of storm other than a cyclone, or by a storm of not quite the same degree of violence as a cyclone. The 1st exception is overruled.

The 2d exception is as follows: "(2) That the presiding judge erred in refusing to charge the defendant's second request to charge, viz., that 'if the jury find that the wire in question was broken by a storm, or from some cause beyond the control of the defendant, then no blame can attach to the defendant from the fact that the wire fell, and remained lying on the ground in a public thoroughfare, unless it was allowed to remain there, after notice, for an unreasonable length of time; that is, for a period of time longer than would furnish a reasonable opportunity for the removal of the wire.'" The words "after notice" rendered the proposition of law therein stated unsound, for the reason that the negligence of the defendant might have consisted in its failure to know the facts connected with the breaking of the wire. In other words, the defendant might have been negligently ignorant. *District of Columbia v. Woodbury*, 130 U. S. 463, 34 L. ed. 477; *Branch v. Port Royal & W. C. R. Co.* 35 S. C. 405. It was not the duty of the circuit judge to strike out that part of the request to charge which rendered it defective, and then charge so much thereof as embodied a sound proposition of law. *Gunter v. Graniterille Mfg. Co.* 15 S. S. 443, and numerous other cases in this state. The second exception is overruled.

The 3d exception is as follows: "(3) That the presiding judge erred in refusing to charge, and in striking out from the defendant's 3d request to charge, the words 'being informed of,' where they occur in said request, immediately

following the words 'a reasonable time after.'" The 3d request to charge is as follows: "That the defendant was entitled to a reasonable time after [being informed of] the fall of the wire, in which to repair it, or to remove it out of the way of persons using the streets; and, if the jury find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action." This exception cannot be sustained. The jury might have found that the injury to the plaintiff occurred before the expiration of a reasonable time after the defendant was informed of the fall of the wire; yet this would not necessarily have precluded the plaintiff from recovering damages, because the negligence of the defendant might have consisted in failing to take proper steps to receive the information concerning the condition of its wires. Under this request to charge, if the defendant was not informed of the wire until a week or a month thereafter, it would still have been entitled to a reasonable time to remove the obstruction, after such notice, although it might have been negligently ignorant. The defendant was bound to exercise due diligence to receive information as to the condition of its wires, and its failure to use proper diligence in this respect would constitute negligence. The 3d exception is overruled.

The 4th exception is as follows: "(4) That the presiding judge erred in refusing to charge the defendant's 5th request to charge, viz., that 'if the jury find that the plaintiff was injured by coming in contact with defendant's wire, and that by the exercise of ordinary care he could have avoided such contact, then the plaintiff is not entitled to recover anything in this action.'" It would have been error on the part of the circuit judge to refuse this request, were it not for the fact that he, in substance, charged the proposition of law therein contained in another part of this charge to the jury, to wit, in charging the defendant's 6th request to charge, which is as follows: "If the jury find that a want of ordinary care on the part of the plaintiff in any degree contributed to the injury, then the plaintiff cannot recover in this action." Whether or not the plaintiff had knowledge that the wire was filled with electricity, was a fact to be considered by the jury in determining the question of negligence on the part of the plaintiff in coming in contact with the wire, but the failure to make mention of the electricity in the request to charge did

V. Failure to guard wires from falling wires of other owners.

There is little room for dispute that the owner of a wire is liable for an injury caused by its breaking and falling into the street, if the owner was negligent in respect to its maintenance; but the liability of the owner of other wires bearing a high current of electricity across which such broken wire falls and becomes charged with a dangerous current is more debatable. This question seems to turn on the further question whether or not the owner of such unbroken wires was guilty of negligence in failing to prevent other wires from coming in contact with them. In several cases this has been held to be negligence, and the railroad company held liable for an accident caused by broken tele-

phone or telegraph wires falling across the unbroken wires of the railway company. A strong illustration of this is *CITY ELECTRIC STREET R. CO. v. CONKRY*, p. 570.

In that case a broken telephone wire had for two days been hanging suspended, and for some days before that after it was broken had been tied to a post, and an electric railroad company, on the verdict of a jury, was held negligent and liable for the injury, where a boy was injured by the telephone wire, which conveyed electricity to him from the trolley wire.

If a telephone wire broken down by storm is allowed by an electric railway company to remain across its trolley wire charged with a dangerous current therefrom after it should have discovered and removed it, it will be liable for the accident if

not render the proposition of law therein stated unsound. For the reason that this request was substantially presented to the jury, the 4th exception is overruled.

The 5th exception is as follows: "That the presiding judge erred in commenting upon the plaintiff's 7th request to charge, and explaining the same, as follows: 'If a man is in danger, and in order to avoid that danger, bona fide, does something which is dangerous, that would not be considered, in law, contributory negligence.'" These words are to be construed in connection with the 7th request to charge, which is as follows: "When one is placed by the negligence of another in a situation of terror, his attempt to escape danger, even by doing an act which is in itself dangerous, and from which injury results, is not contributory

negligence, such as will prevent him from recovering." It will be observed that the exception does not question the correctness of the law as charged in the 7th request, but only complains of error on the part of the presiding judge in using the foregoing words after charging said request. When the words used by the circuit judge are considered in connection with the 7th request, it will be seen that they do not lay down a different proposition of law from that contained in said request, and that they are simply explanatory of said request. Even if considered alone, these words do not state an erroneous principle of law, although, in themselves, they are not as comprehensive as might have been desired.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

WISCONSIN SUPREME COURT.

Frank HUBER, *Respt.*,

v.

LA CROSSE CITY RAILWAY COMPANY, *Appt.*

(.....Wis.....)

1. **Reasonable care and caution in the use of an electric current** by a street railway company is required for the safety of the employees of an electric light company which was engaged by the railway company to move electric lamps during the operation of the railway.
2. **Negligence is the proximate cause of an accident** only when under all the circumstances the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough that the accident is the natural consequence of the negligence.
3. **The coiling of a trolley wire over a span wire pending the continuation of the line**, thereby charging the span wire with electricity, is not negligence which will render the street railway company liable to an experienced workman familiar with such wires and their insulation who is injured by contact with the span wire while standing on a wooden pole moving electric lamps, where the span wire had circuit breaks to prevent its charging the iron post which sustained it, and injury from it could be sustained only by one who completed the circuit between it and the iron post by touching them both at the same time.

(March 27, 1896.)

A PPEAL by defendant from a judgment of the Circuit Court for La Crosse County in favor of plaintiff in an action brought to recover damages for injuries caused by contact with electric wires alleged to have been negligently left unprotected by defendant. *Reversed.*

Statement by **Pinney, J.:**

An action to recover damages sustained by the plaintiff by reason of alleged negligence of the defendant. The complaint charges that at the time of the injury the plaintiff was an employee of the Brush Electric Light Company, which maintained, at the northwest corner of the intersection of Main and Fourth streets, in La Crosse, a wooden pole, to support one end of a wire stretching across the intersection of the streets from northwest to southeast, from the center of which an electric street lamp was suspended, and, to the knowledge of the defendant, the employees of the light company were obliged to and did climb said wooden pole to attend to such street lamp; that the defendant erected an iron post or pole close to and adjoining such wooden pole, and to which one end of a span of wire was attached, which supported its trolley wire in and over the center of Fourth street, and such span wire was so near to the wooden pole as to be dangerous to employees of the light company while climbing it, unless it was properly insulated and free from the electric current in

a horse is killed by stepping upon it. *Godfrey v. Streator R. Co.* 56 Ill. App. 378.

In this case the accident happened in the morning about half past eight o'clock when there had been a heavy storm of wind and sleet the night before. The court held that the street railway company knew, or should have known, that the wire was down in time to have removed it and prevented accidents, and that in an action against it it was error to direct a verdict for the defendant.

Similar to the above case, except that the electric railway company was also in fault for breaking the wire which fell across its trolley wire and caused the death of a horse which stepped upon it, are the cases of *Larson v. Central R. Co.* 56 Ill. App. 263, and *Kaukaee Electric R. Co. v. Whittemore*, 45 31 L. R. A.

Ill. App. 484, which are more fully described, *supra*, IV. c.

The cases are not altogether harmonious in respect to the duty of the owner of electric wires to place guard wires above them to guard against the falling upon them of other wires which may conduct a dangerous current from them to persons in the streets. The question is clearly one as to negligence. In the cases above the negligence was, in part at least, in allowing broken telephone wires or other wires to lie across a trolley wire when the fact was known or ought to have been known. But several cases have touched upon the duty to have guard wires or other precautions to keep overhanging telephone or other wires from striking the trolley wire if they fall or sag.

The duty of an electric railway company to have

the trolley; that the defendant negligently allowed said span wire to become charged with a powerful current from the trolley wire, which it supported, and the plaintiff, a lineman of the light company, while climbing the wooden pole, without fault on his part, came in contact with said span wire and said iron pole, so as to form a circuit, and he received a shock which caused him to fall a distance of about 20 feet, to the ground, whereby he was seriously injured; that, at the time, said light company, by its agents and employees, of whom the plaintiff was one, was engaged, at the request of the defendant, the railway company, in removing the said lamp from its position. The acts of negligence relied on were: (1) The erection of said iron pole in such close proximity to the pole of the light company as to render the climbing of the latter dangerous, unless the defendant's span wire was properly insulated from the trolley; (2) in operating a portion of its railway before it was fully completed, with the span wire in question uninsulated, and charged with a heavy current that escaped from the trolley wire. The answer denied the negligence charged, and averred that the defendant, at the time, had constructed and maintained its posts, trolley wires, and other appliances in accordance with the city ordinance; that at the time the light company, by the plaintiff as its employee and by its superintendent, was engaged in carrying out a contract between it and the defendant for the removal of its wires, lamps, etc., where they interfered with the erection of the defendant's line, and that, while so engaged, the plaintiff carelessly came in contact and connection with said span wire at a point beyond which it was insulated, and received the alleged shock; that he well knew the point at which the span wire was insulated, and the consequences of making a connection with the same, and that he was guilty of contributory negligence. The defendant moved for a nonsuit, at the close of the plaintiff's case, which was denied, and at the close of the evidence requested the court to direct a verdict for the defendant, which the court refused. The plaintiff had a verdict and judgment, from which the defendant appealed.

The evidence was that the trolley wire and span wire and the street lamp and poles were situated as stated in the complaint,—the wooden pole of the light company being about 30 feet high and 10 feet higher than the iron pole, and had a return wire from the

lamp to the pole passing down it, to a ratchet near the bottom, so that the lamp could be raised and lowered to renew the carbons without climbing the pole, but to remove anything that got on the wires they would have to climb the pole; and at many street intersections in the line of the defendant's trolley, the light company maintained street lamps in a similar way, the position of which had to be changed when the defendant built its line, but at the defendant's cost. Accordingly, the defendant entered into a contract with the light company to make such changes or removals, and it entered upon the work thereof, the defendant not interfering with or taking any part in it. The defendant had constructed its line south on Fourth street to Main street, which runs east and west, and it was intended that its line should turn upon Main street in both directions. The method of construction was that iron poles or posts were erected opposite each other on both sides of the street at intervals. Wires called "span wires," cross the street at the top of these poles and support the main or trolley wire, which is attached to them by a "bell hanger" or "bell insulator," which, when properly constructed, and in good condition, will prevent any escape of the trolley current to the span wire; and, as an additional precaution, where the poles are iron, as in this case, and to guard against any possible leakage or defect in the "bell insulator," there was placed in the span wire, and between the trolley and each iron pole or post, about 16 or 18 inches from the post, a "circuit break," so that any current that escaped from the bell insulator would be arrested and would not reach the iron post. The evidence was that these appliances used by the defendant were of the best kind, and in good order, and tended to show that the construction and management of the defendant's line was under the control of a competent electrical engineer. The wooden pole of the light company, in question, was crooked, inclining towards the east and south, and its base was 7 or 8 inches east, and a little south, of the defendant's iron pole or post. About 10 feet from the ground, by reason of the crook in the wooden pole, the two were in contact, and by reason of the inclination of the wooden pole to the south and east, there was an interval, from the point between them, gradually increasing to about 8 inches at the top of the iron post, and opposite the span wire,—the iron post being west and a little north of the wooden pole. The span wire,

guard wires between its trolley wire and a telephone wire which it knew to be unsound that hung above the trolley wire is declared in *United Electric R. Co. v. Shelton*, 89 Tenn. 423, but in this case the court seems to base the duty upon the fact that the telephone wire was known to be unsound and liable to break and fall, and it does not declare any general rule as to the duty to maintain guard wires.

This case was followed by *MCKAY v. SOUTHERN BELL TELEPH. & TELEG. CO.*, p. 589, holding both telephone company and trolley company jointly liable for negligence, where an insecure telephone wire was allowed to hang over a trolley wire without any guard wires between. It was alleged in this case that the mayor had made a lawfully authorized order or direction requiring the trolley company

to maintain such guard wires and the telephone company attempted to escape liability by claiming that the injury was caused by the trolley company's failure to obey this order, but the court held that such negligence on the part of the trolley company would not excuse the negligence of the telephone company and that both companies were liable.

In *Block v. Milwaukee Street R. Co.*, 89 Wis. 371, 27 L. R. A. 385, it was held that lack of guard wires between trolley wires and telephone wires will render a trolley company liable for injury to a person in a street by contact with a broken telephone wire which lies across the trolley wire, provided that the omission of the guard wires was negligent and was also the proximate cause of the injury.

running east from the top of the iron post, passed on the north side of the wooden pole, and about 8 or 4 inches distant. The west end of the circuit break in the span wire was $7\frac{1}{2}$ inches to the east of the wooden pole, and the end of the span wire east of the circuit break was $13\frac{1}{2}$ inches from the wooden pole, and the pole could be climbed from the south or east side without coming in contact with the span wire. A person climbing the wooden pole on the north side would have to pass over the span wire, and would usually come in contact with it in some way, but only with the portion of it between the iron post and the circuit break, which was dead or uncharged; but, in case of defect in both bell insulator and circuit break, should it be charged or "live," the person coming in contact with it, while adhering to the nonconducting wooden pole, would be safe, unless he at the same time came in contact with the iron post. The bell insulator and circuit break were in good order, and the span wire between the circuit break and the iron post which passed on the north side of the wooden pole was "dead." When the defendant company had reached the point in question with the construction of its line, its trolley wire was attached to this span wire by the bell insulator over the center of Fourth street and on the north side of Main street, and quite a length of the trolley wire, intended to be used in curving on to Main street to the west, remained projecting south of the span wire, and was coiled up as far back as the bell insulator, and laid around and over the bell insulator, and upon the span wire and trolley wire to the north, so that, while the defendant operated its line so far as constructed, as it did continuously from August 8 to August 19, when the accident occurred, this span wire became and was charged with the trolley current up towards said posts or poles as far as the circuit break. This coil of the trolley wire was bright new copper $\frac{1}{2}$ inch wire, about 4 feet in diameter, projecting 2 feet over on the span wire on each side, not more than 22 feet from the poles or posts, and in plain sight, and there was nothing to indicate that it was insulated from the span wire on which it rested. A person climbing the wooden pole of the light company could be injured by the current in the span wire in but one way, namely by touching the span wire east of the circuit break, and at the same time, touching the iron post in the opposite direction to the west, so as to form a circuit with his body be-

tween the iron post and the live span wire beyond the circuit break. After the defendant's wires had been put up the street lamp of the light company could not be lowered, because it would come in contact, and might cause an accident, and it was necessary to put the light away from the defendant's wires. At the time of the accident, McMillan, the superintendent of the light company, with nine years' experience as an electrician, and fully acquainted with the subject of insulation, with the plaintiff, undertook to make the necessary change in removing and changing the position of the street lamp. The plaintiff had done nearly all this work up to this time. He had had about five years' experience in attending to lamps, repairing, setting poles and other work, and had worked about a month in changing the lamps of the light company. He understood the method of construction and insulation of the defendant's lines, and the subject of insulation generally, had noticed both bell insulators and circuit breaks, and knew how they were attached and what they were for, and had examined the manner of insulating the defendant's span wires. By direction of McMillan the plaintiff climbed the wooden pole on the north side, over and above the span wire and iron post, nearly to the top of the wooden post, drew the lamp in from the center of the street, and let it down to McMillan, and came down the pole on the north side, climbing over the span wire again. McMillan then climbed the wooden pole on the east side, passed the span wire, and prepared to hang the lamp at the side of the wooden pole. Having occasion to let fall a piece of the lamp wire twisted into a spiral form or coil, he dropped it, intending to let it go down on the south side of defendant's span wire; but, for want of careful management, it caught the span wire at a point $3\frac{1}{2}$ or 4 feet east of the wooden post, and beyond the circuit break, so that from his position he was unable to get it off. He therefore directed the plaintiff to climb the pole again, and to take this coil off the span wire. The plaintiff climbed upon the north side of the wooden pole, as before, until his feet were about 17 feet above the ground, and his head was higher than the top of the iron pole. He testified: "I stood on my left spur, reached out, lifted this wire (an insulated one) off, and dropped it down, and came back to the pole, somewhere near, with the intention of getting in position, and I got caught. I supposed the span wire was a dead wire. I

But whether or not the omission of guard wires between trolley wires and telephone wires in a street is negligent is held in this case to be a question for the jury, and so is the further question whether or not the want of the guard wires is the proximate cause of a shock to a traveler from contact with a broken telephone wire which had fallen across the trolley wire.

But, on the other hand, the liability of an electric railway company for the killing of horses which stepped upon a telephone or telegraph wire which had broken and fallen across its trolley wire is denied in *Albany v. Watervliet Turnp. & R. Co.* 76 Hun, 136, although the wire which broke was suspended above the trolley wire without any guard wires between. The court held that it did not make any case for the jury, and said: "I find 31 L. R. A.

no evidence that such guard wires are either necessary or usual in the construction of single trolley lines for propelling street cars." It was held that the proximate cause of the injury was the falling of the telegraph or telephone wire, and that for this the railroad company was not responsible.

The duty of an electric railway company to use reasonable care and prudence to adopt all ordinary and usual appliances and methods to prevent contact between its trolley and feed wires and the wires of a telephone company stretched along or across the same highway is enforced in *Central Pennsylvania Teleph. & S. Co. v. Wilkes-Barre & W. S. R. Co.* 11 Pa. Co. Ct. 417, by an injunction against operating the railway until necessary precautions in this regard had been taken. It being conceded by the railway company that actual con-

don't know how I made the connection by which the current went through me. I did not put my other hand on the wire. There was a burn across three fingers on the back of the right hand. The left arm or wrist was burned on the inner portion. I had not noticed the coil of trolley wire that lay coiled, in part upon the span wire and in part upon the trolley. I did not see it at all. I don't remember that I had ever been at this place while the defendant was operating its line." Both the plaintiff and McMillan knew that the trolley was in operation, and cars had been running to that point for eight days. The plaintiff testified that "if I had seen this coil of trolley wire lying upon the span wire at that point, I probably would have known and understood that the current of electricity would have been conveyed to the span wire up to the circuit break; but I don't know. . . . In order to form a circuit my bare person had to come in contact both with the iron post and the span wire. Was wearing woolen clothes. Woolen clothes against the iron post would not form a circuit, if it was dry. Clothing was dry, and the iron post too." That he lifted the wire off the span wire with his left hand, having, at the time, his right arm around the wooden pole. That he did not then take hold of the span wire or touch it with his left hand. "I got my left hand back somewhere near the pole. Can't tell you whether I was leaning against the span wire. Don't remember whether I touched the span wire or not."

Messrs. Losey & Woodward and E. C. Higbee, for appellant:

In order to render a negligent act the proximate cause of an injury it must appear "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 475, 24 L. ed. 259; *Wood v. Chicago, M. & St. P. R. Co.* 51 Wis. 196; *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 250, 26 L. R. A. 101; *Lambeck v. Grand Rapids & I. R. Co.* (Mich.) 64 N. W. 479.

Messrs. Fruit & Brindley, for respondent:

It is not necessary that injury in the precise form in which it in fact resulted should have

been foreseen. It is enough that it now appears to have been a natural and probable consequence.

Hill v. Winsor, 118 Mass. 251; *Ray, Negligence of Imposed Duties*, p. 610.

Appellant owed the exercise of reasonable care to the employees of the Brush Electric Light Company.

Heaven v. Pender, L. R. 11 Q. B. Div. 503; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 852; *Martin v. North Star Iron Works*, 31 Minn. 407; *Pastene v. Adams*, 49 Cal. 87; *Johnson v. Northwestern Teleph. Exch. Co.* 48 Minn. 433; *Burrows v. March Gas & C. Co.* L. R. 5 Exch. 67; *Lane v. Atlantic Works*, 111 Mass. 136; *Stetler v. Chicago & N. W. R. Co.* 48 Wis. 497.

If the Brush Electric Light Company was negligent and such negligence was caused by the act of McMillan, its employee, plaintiff would still be entitled to recover if the negligence of the street railway company was the proximate cause of his injury.

Chicago, St. P. & K. C. R. Co. v. Chambers, 68 Fed. Rep. 148, 15 C. C. A. 327.

The defendant's negligence was the proximate cause of the injury and was properly submitted to the jury.

Giraudi v. Electric Imp. Co. 107 Cal. 120, 28 L. R. A. 596; *Illingsworth v. Boston Electric Light Co.* 161 Mass. 533, 25 L. R. A. 552; *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L. R. A. 101; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 22 L. R. A. 635; *Sturgis v. Kountz*, 165 Pa. 276, 358, 27 L. R. A. 390; *Prue v. New York, P. & B. R. Co.* 18 R. I. 380; *Louisiana Mut. Ins. Co. v. Tread*, 74 U. S. 7 Wall. 52, 19 L. ed. 67.

The question of the contributory negligence of the plaintiff was, under all the authorities, a question of fact for the jury which they have passed upon.

Illingsworth v. Boston Electric Light Co. supra; *Clements v. Louisiana Electric Light Co.* 44 La. Ann. 692, 16 L. R. A. 43; *Ugla v. West End Street R. Co.* 160 Mass. 351; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365; *Southwestern Teleph. & Teleph. Co. v. Robinson*, 50 Fed. Rep. 810, 16 L. R. A. 545, 2 U. S. App. 205; *Bourget v. Cambridge*, 156 Mass. 391, 16 L. R. A. 605; *Augusta R. Co. v. Andrews*, 89 Ga. 653.

tact could in most instances be prevented by guard wires, the injunction was continued until the guard wires were put up. At the same time the court held that if the danger of contact between the wires could be obviated by insulation of the telephone wires or by stretching them on higher poles, and could not be obviated by the exercise or reasonable care and prudence in constructing the railway, the telephone company would have the duty to change the construction of its line, although it was first in the occupancy of the street. The relative rights of telephone companies and electric railway companies in a highway are not considered in this note, but are left for future annotation.

VI. Concurrent liability.

It is clear that there may exist a concurrent liability of different owners of electric wires for an injury caused by their contact to a person who touches one of them, provided both have been guilty of negligence toward the person injured. 31 L. R. A.

As to the owner of the wire which is not touched by the person injured, but from which the electricity is conveyed by another wire which has fallen upon it, the question is substantially that involved in the preceding division. That liability in such a case may exist seems clear. The question is as to negligence in each particular case. In several cases the existence of such negligence has been found, and both held liable for the accident.

Thus, in *CITY ELECTRIC STREET R. Co. v. CONERY*, p. 570, the jury found the owners of both wires guilty of negligence—the owner of a telephone wire in permitting that to fall and remain down, and the owner of a trolley wire in allowing the telephone wire to become charged with electricity by contact with the trolley wire. The court says: "If this be true, the injury was the result of the concurring negligence of the two parties, and would not have occurred in the absence of either. In that case the negligence of the two

Pinney, J., delivered the opinion of the court:

1. The plaintiff was engaged as a servant of the light company, and using its poles and appliances under the direction of its superintendent, performing an engagement that company had entered into with the defendant company to change the location and method of hanging the electric street lamps so that their use and management would not interfere with or embarrass the use and operation of the defendant's electric railway, for a consideration to be paid by the defendant. Under the circumstances, the defendant was bound to the exercise of reasonable care and caution in the management and control of its railway, and of the electric current which was its motive power, so as not to injure the employees of the light company while engaged in such work. It was bound to avoid acts the natural and probable consequences of which might be to inflict injury on persons thus employed, and, if it omitted such precautions as were reasonably necessary, under the circumstances, it would be liable for such damages as any one thus engaged might suffer, being the proximate result of such neglect of duty. The rule was stated by Brett, M. R., in *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 509, "that, whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This principle was referred to in *Zieman v. Kieckhefer Elevator Mfg. Co.* 90 Wis. 503, in *Bright v. Barnett & R. Co.* 88 Wis. 307, 21 L. R. A. 524, and in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. In *Heaven v. Pender*, *supra*, Cotton and Bowen, JJ., declined to approve the view expressed by the master of the rolls to its broadest extent. But, in the subsequent case of *Thruswell v. Hundyside*, L. R. 20 Q. B. Div. 359, 363, the view of Brett, M. R., was expressly approved; Hawkins, J., saying: "that where a man is employed to do certain work, and knows that the work which he is doing is dangerous to

others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under an obligation to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in which he is engaged."

2. As was said by Newman, J., in *Block v. Milwaukee Street R. Co.* 89 Wis. 378, 27 L. R. A. 365: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence." *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 163, 50 Am. Rep. 352; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19; *McGowan v. Chicago & N. W. R. Co.* (Wis.) 64 N. W. 891. A mere failure to ward against a result which could not have been reasonably expected is not actionable negligence. Whether the negligence of the defendant was the proximate cause of the injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference from undisputed evidence is in doubt. It is not, however, necessary that injury, in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 258, 259. The evidence on this subject is not conflicting, and the real question is as to the inferences which may be fairly drawn from the evidence, and whether they are in doubt. It appears that the defendant had substantially complied with the statute (Laws 1889, chap. 375, § 1), and by bell insulators and circuit breaks had provided by suitable insulation against injury to persons or property by reason of the leakage or escape of the current of electricity from the trolley wire. The trolley wire and the span wires were sustained at an elevation of about 20 feet in the air. The bell insulators were to prevent the escape of the electric current from the trolley wire, and the circuit breaks to prevent the span wires, if

was the proximate cause of the same, and both parties are liable."

Without any discussion of the concurrent liability, both telegraph company and electric railway company was held liable for the damages in case of such an accident from a broken telephone wire falling across a trolley wire, in *WESTERN U. TELEG. CO. v. STATE, NELSON*, p. 572.

So, both companies were held liable for the damages when a horse was killed by contact with a telephone wire which had fallen across the trolley wire of an electric railway company in the street when there was no guard wire over the trolley wire while the telephone wire was suspended above it and had become much impaired. *United Electric R. Co. v. Shelton*, 89 Tenn. 423. The court said: "While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley wire 31 L. R. A.

was in like manner protected from such contingency. . . . Both companies knew of the unprotected trolley wire, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable."

To the same effect, approving this case, is *McKAY v. SOUTHERN BELL TELEPH. & TELEG. CO.* p. 589.

The fact that a telephone company or the city may have been negligent in leaving a telephone wire suspended in a dangerous manner was held in *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484, to constitute no defense to an electric railway company when by accident a trolley flew up against it and broke it, and it was left where it fell across the trolley wire until a horse stepped upon it and was killed.

Somewhat similar to these cases, although dis-

they should become charged from the trolley, from charging the iron posts by the sidewalks. All reasonable and proper precautions had been taken, it must be conceded, against any probable injury to persons or property in the streets or on the sidewalks or elsewhere, except, possibly, to those whose duty it was to repair and give suitable attention to the span and trolley wires of the defendant, and the wires of the light company, so far as necessary in the operation of the respective lines. All such persons were understood to be, as the plaintiff was, familiar with the application of electricity to such uses, and with the theory of insulation, as well as the use and functions of the bell insulators and circuit breaks. The introduction and use of circuit breaks must be regarded, of itself, to the apprehension and judgment of these trained and experienced operatives, as a signal of danger,—a warning that any given span wire may be charged with a heavy current from the trolley, by leakage or otherwise. They cannot come near a span wire without being thus admonished, and of the general judgment in construction, that circuit breaks are necessary to secure immunity from electric shocks, and to prevent the iron posts from being charged with an electric current down to the streets. These are all parts of the lines with which they are familiar. It is to be considered that they understand the peril and the provided protection as well. The plaintiff was injured because the span wire became charged by coiling, over it and the trolley wire, a portion of the latter, designed to make the curve down Main street. There was no other apparent method of disposing of it for the time being, and no reasonable grounds for supposing that any prudent and careful operative would have failed to notice it under the circumstances; and, if he did not, the circuit breaks provided protection against the charged span wire, unless he came in contact with the span wire beyond the circuit break and the iron post at the same time. This we think the defendant had no reasonable ground to suppose, in the present instance, that the plaintiff would do. The defendant had been operating its railway to the point in question for eight days, beyond which it had not been completed, and the plaintiff had been at work all this time and for some time previous, along the line, in changing the location of the street lamps of the light company, and knew that the trolley

wire had been kept charged to operate the railway, and the defendant must have understood that he was familiar with these facts, as well as the near proximity of the iron and wooden poles, and the space between the iron poles and the outer end of the current break. These were obvious facts, and not to be mistaken or misunderstood. The injury could occur in only one way, as the plaintiff substantially tells us, namely, by his bare hand coming in contact with the span wire beyond the "circuit break," and his other hand, or part of his bare person, coming in contact in the same instant with the iron post, so as to pass the electric current through him. Could the defendant have reasonably anticipated, under these circumstances, the occurrence of an accident such as this? Ought the defendant to have foreseen it, in the light of attending circumstances? We think not. It clearly appears that the use of the wooden pole in climbing up or coming down was not dangerous, nor was it possible for the plaintiff, while climbing or clinging to it, to have received a shock even by touching the charged span wire, unless he completed the circuit, at the same instant, by touching the iron post with his naked hand or person. The defendant had no right to expect that an inexperienced operative would have climbed to such a point, much less that an experienced and competent one, with his knowledge of the situation, at the only possible point of danger with the warning of the circuit break before him, would practically eliminate it as a means of safety, and, by placing his body substantially in its place, complete the electrical circuit, so that the current would necessarily pass through his body. It was not expected that he would have occasion to touch or come in contact with the span wire beyond the circuit break, or the iron post, for any purpose, and certainly not so as to complete an electrical circuit with his body.

We think the case of *Illingsworth v. Boston Electric Light Co.* 161 Mass. 583, 25 L. R. A. 552, where the right of use was given to the operatives of both companies in common, for that and other reasons, is distinguishable. We hold, therefore, that the evidence did not make a case to go to the jury to show that the negligence of the defendant relied on was the proximate cause of the plaintiff's injury.

The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

inct from them, is the decision in *Roodhouse v. Christian*, 158 Ill. 137, that in case of an injury to a person thrown against a telephone wire charged with electricity and burned in consequence of a defective sidewalk, an action against the city for damages on account of the defective sidewalk was not affected by a prior judgment obtained by plaintiff against the owner of the wire, where this is not shown to have been satisfied and there is no joint negligence or joint liability alleged.

VII. Wires charged by lightning.

Injury caused by electricity generated by a thunder storm in a telephone wire, which was negligently allowed to hang across a highway so low that a traveler came in contact with it in the dark, renders the telephone company liable, as the wire furnished the means by which the dangerous force was communicated and the injury caused, 31 L. R. A.

although it was a new force or power which intervened. This new force or power would have been harmless but for the displaced wire. *Southwestern Telek. & Teleph. Co. v. Robinson*, 60 Fed. Rep. 813, 16 L. R. A. 545, 2 U. S. App. 205.

Somewhat similar to this case, although it is not a highway case, is that of *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 23 L. R. A. 101, in which a telephone company which had left an unused telephone wire hanging from a barn to a county fair building about 325 feet distant, while a ground wire in the latter building was left intact, although the telephone and the insulated wire in the interior of the building had been taken away, was held liable for the burning of the barn by lightning conveyed to it by this wire from the fair ground. In this case the owner of the barn had given no permission to attach the wire to it and did not know that it was so attached.

ALABAMA SUPREME COURT.

McKAY & ROCHE, *Appts.*,

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY *et al.*

(.....Ala.....)

1. **A telephone company is not excused for negligence** in the maintenance of a wire insecurely fastened above a dangerous trolley wire because the railroad company was chargeable with the duty of maintaining guard wires between the electric wires and failed to do so.
2. **An electric railway company maintaining a trolley wire charged with a dangerous current** without guard wires between it and an insecure telephone wire over it, and negligently permitting the telephone wire to remain suspended over the trolley wire after it has fallen upon it, cannot escape liability by showing how other trolley wires are erected and maintained by prudent and well-managed electric railway companies.
3. **A telephone company and an electric railway company are jointly liable** for negligence when both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and a telephone wire insecurely suspended over it, and especially when they permit a broken telephone wire to remain suspended across the trolley wire.
4. **Direct proof that defendants charged with negligence in respect to electric wires** were the parties who maintained them is not necessary when the defendants, although pleading the general issue, impliedly admit that fact by the conduct of the trial, including cross-examination of witnesses, and fail to suggest that the wires were maintained by any other parties.

(April 8, 1896.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Mobile County in

favor of defendants in an action brought to recover damages for the injury of plaintiffs' horses by defendants' negligently permitting live electric wires to hang in a public street. *Reversed.*

The facts are stated in the opinion.

Mr. L. H. Faith, for appellants:

The pleas do not traverse the allegations of the complaint that it was the duty of both defendants respectively to so guard and protect their respective wires as not to allow the telephone wire to fall on the trolley wire, but they set up merely that it was the duty of the railroad to put up guards, etc., which duty it failed to discharge.

1 Chitty, Pl. pp. 252-254, 518; *Savage v. Walshe*, 26 Ala. 619.

The telephone company was under no compulsion to keep its weak, frail telephone wire stretched over the unguarded trolley wire of the railroad company.

Mayer v. Thompson-Hutchison Bldg. Co. 104 Ala. 611, 28 L. R. A. 483.

Even if the telephone company had priority of right, public security is of infinitely more importance than the question as to which company ought to put the guard between the wires.

Consolidated Electric Light Co. v. People's Electric Light & G. Co. 94 Ala. 372; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759.

Whether or not the use of guard wires or other barriers placed between the telephone wire and the trolley wire is useful and will keep the wires from coming in contact is not a question of science but one of legal or moral obligation,—of common observation upon which the lay or uneducated mind is capable of forming a judgment.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U.

VIII. *Contributory negligence.*

The question of the contributory negligence of a person injured by an electric shock from a wire in a highway is within the ordinary rule as to contributory negligence. It depends upon the facts of each case and is ordinarily a question for the jury.

Thus, the direction of a verdict for the defendant in an action for injury to a person who stooped down and attempted to pick up and throw out of the way a loose telephone wire in the highway was held to be error in *Bourget v. Cambridge*, 156 Mass. 398, 16 L. R. A. 606. The supreme judicial court in sustaining the exception said: "It must be assumed that the jury might have found that the plaintiff was using due care, unless the contrary appears as matter of law." This case decides that the question is for the jury, and the other cases on the subject are all nearly to the same effect.

Thus, where a boy going along the street about six o'clock in the morning after a storm which had thrown down electric wires picked up a dead wire after it had been suggested to him that wires were dangerous, and when told by a policeman to throw it down started to do so but "flipped" it into the air so that it struck a live wire before he let go of it and thereby transmitted a deadly current which killed him, the court held that the question of his contributory negligence was for the jury, and that 31 L. R. A.

the question of his knowledge or ignorance of the position and condition of the wires was an element in the question of his negligence. *Texarkana Gas & E. L. Co. v. Orr*, 59 Ark. 215.

But where a boy ten years old took hold of the guy wire of an electric light pole which was on the sidewalk, it was held that it was not contributory negligence in the absence of anything to show that it was charged with electricity, although in fact by contact with another guy wire it was charged with electricity from a trolley wire. In this case it was said that the judge should have told the jury that there was no evidence of contributory negligence. *Haynes v. Raleigh Gas Co.* 114 N. C. 208, 26 L. R. A. 810.

The contributory negligence of a person injured on a dark and drizzly morning as he was going home from night work by coming in contact as he walked along the street with a live electric light wire which had been thrown down by a storm during the night was held to be a question for the jury. *Cook v. Wilmington City Electric Co.* 9 Houst. (Del.) 906.

The failure of the driver of a horse to see a broken telephone wire in the street, on which the horse steps and is killed, is held not to be so remarkable as to require a jury to find him negligent. *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484.

B. A. R.

S. 469, 24 L. ed. 256; *Mayer v. Thompson-Hutchison Bldg. Co. supra*.

The question whether the failure to put guards between the trolley wire and the overhead wires was negligence or not, ought at least to have been left to the jury.

O'Brien v. Tatum, 84 Ala. 186; *United Electric R. Co. v. Shelton*, 89 Tenn. 423.

Said pleas, while professing to answer the complaint, wholly fail to traverse or confess and avoid the very gist of the complaint, namely, knowledge by the defendant of the likelihood of the telephone wire falling upon the trolley wire and the probable danger that would result therefrom, and the duty of the railroad company to guard against such apparent danger, which it omitted to do.

White v. Yarbrough, 18 Ala. 109; *Werth v. Montgomery Land & I. Co.* 89 Ala. 373; *Savage v. Walshe*, 26 Ala. 619; *Gibson v. Marquis*, 29 Ala. 668.

The pleas relying upon a license or ordinance of the city and the defendants' charter as authority for constructing the trolley wires, and averring that the railroad and trolley wires were constructed as authorized by said charter and ordinance, are defective in not setting out so much of the charter or ordinance as may have prescribed how the railroad and trolley wires should be constructed.

Hardy v. Montgomery Branch Bank, 15 Ala. 722; *Kohn v. Haas*, 95 Ala. 478; *Furman v. Huntsville*, 54 Ala. 263.

The ordinance granting to the street railroad company the privilege of using electricity as the motive power to run the cars provided that it should put up guard wires at all points where there are electric lamps.

In an action for injuries to the person or property of others this breach of duty would be evidence of negligence.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410; *Northern P. R. Co. v. Sullivan*, 53 Fed. Rep. 219, 10 U. S. App. 473.

Section 494 of the city ordinance provides that these electric, telephone, motor wires, etc., should be "so constructed and placed as to prevent the electric motor, or power, and telephone or telegraph lines coming in direct contact in case either should break or become detached from fixtures."

This ordinance would be evidence tending to show that a duty was imposed by positive law upon all these companies using wires over the streets, to so construct them as to prevent them coming in direct contact in case either should break or become detached from fixtures.

Clements v. Louisiana Electric Light Co. 44 La. Ann. 692, 16 L. R. A. 43; *Hayes v. Michigan C. R. Co. supra*; *Louisville & N. R. Co. v. Webb*, 90 Ala. 185, 11 L. R. A. 674; *Elyton Land Co. v. Minge*, 89 Ala. 521.

The plea of not guilty operates as a denial only of the wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement.

1 Chitty, Pl. pp. 489, 528; 1 Addison, Torts, p. 88; 2 Addison, Torts, p. 1149; *Howland v. Wallace*, 81 Ala. 238; *Louisville & N. R. Co. v. Trammell*, 93 Ala. 353; *Tatner v. Little*, 5 Bing. N. C. 678; *Lewis v. Alcock*, 8 Mees. & W. 188; 18 Am. & Eng. Enc. Law, p. 537.

Even were it necessary for plaintiffs to show R. A.

some evidence that the telephone wire was the property of the defendant the telephone company, was not the fact proved or admitted on the trial?

Killebrew v. Carlisle, 97 Ala. 535; *Tolizer v. State*, 94 Ala. 111.

Facts which are averred in a complaint need not be pleaded in defense, or if set up in a plea, as a general rule, need not be proved by the plaintiff.

Dundee Mortg. & T. Invest. Co. v. Nixon, 95 Ala. 318; *Smith v. Kaufman*, 100 Ala. 408.

The fact that the telephone wire broke and fell upon the trolley wire and conducted the electricity therefrom to the ground and caused the injury complained of, was evidence of negligence.

Rose v. Stephens & C. Transp. Co. 11 Fed. Rep. 439; *Western Transp. Co. v. Downer*, 72 U. S. 11 Wall. 129, 20 L. ed. 160; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *South & North Ala. R. Co. v. McLendon*, 63 Ala. 275; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L. R. A. 810; *Arkansas Teleph. Co. v. Ratteree*, 57 Ark. 429; *Volkmar v. Manhattan R. Co.* 134 N. Y. 418; *Ahern v. Oregon Teleph. & Teleg. Co.* 24 Or. 293, 22 L. R. A. 640; *Hogan v. Manhattan R. Co.* 6 Misc. 295; *Uggle v. West End Street R. Co.* 160 Mass. 351; *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 12 L. R. A. 189; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 442, 35 L. ed. 462; *Louisville & N. R. Co. v. Reese*, 85 Ala. 502; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 286.

The court takes judicial notice of the fact that applied electricity as used by street railroads, electric light companies, etc., is dangerous,—at least as dangerous as steam power.

Consolidated Electric Light Co. v. People's Electric Light & G. Co. 94 Ala. 372.

Messrs. Gregory L. Smith, H. T. Smith, and Russell & Deshon for appellees.

Head, J., delivered the opinion of the court:

This is a joint action against the two appellees for damages to property alleged to have been caused by their negligence. The contest seemed to have been largely waged by and between the two defendants, each accusing the other, but the result was victory to both over the plaintiffs.

The complaint shows that the Mobile Street Railroad Company operated an electric street railway along Government street, in Mobile, with the electric motive power supplied by means of an overhead trolley wire, such as is generally in use, which wire was so heavily charged with electricity as to render contact with it highly dangerous to animal life. It was suspended from poles, over the middle of the street, in the usual way. Government crossed Lawrence street. The telephone company had suspended from poles, along Lawrence, crossing Government, as such wires are usually suspended, a wire which is used in its telephone business. This was stretched a few feet over and above the railway trolley wire which it crossed. The complaint charges, in the first count, that this was a frail, weak wire, and was not securely fastened upon its poles, and was liable to break and fall upon and across the said trolley

wire, and to extend down to the ground, heavily charged with electricity, by reason of its contact with the trolley wire, and thereby become exceedingly dangerous to the lives of all persons and animals passing upon and along said streets, all of which was well known to both defendants; that it was the duty of the defendants, respectively, to so maintain, guard, and protect their said respective wires as not to allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, and become charged with electricity from the latter; yet it is averred that at the time of the injury complained of, the defendants failed and neglected so to do, whereby the telephone wire, which broke, fell across the trolley wire, and extended to the ground, heavily charged with electricity, communicated from the trolley wire, and with which plaintiffs' two horses, while being driven along Government street by plaintiffs' servant, came in contact, producing electric shocks, which killed one of them, and seriously injured the other, and did injury to the harness. The second count charges the negligence of the defendants to have been that they "wrongfully and negligently suffered said telephone wire to fall upon and across said trolley wire, and extend therefrom down to the ground, heavily charged with electricity, from said trolley wire, and to be and remain in that condition." The third count charges that the negligence consisted "in suffering the telephone wire to be and remain lying upon and across the trolley wire, and extending down therefrom to, upon, and across Government street, heavily charged with electricity, from the said trolley wire." There were demurrers to these several counts, which were overruled. The defendants filed separate pleas. The telephone company pleaded, first, the general issue. Its second plea, as subsequently amended, set up contributory negligence on the part of plaintiffs' driver, upon which issue was joined. Its third plea averred that its wire was in good order and condition, was properly located and maintained, and was necessarily stretched across, over, and above the trolley wire; that it was charged only with such a low current of electricity as to be harmless to life or property brought in contact with it. The nature and dangerous electric charge of the trolley wire, as alleged in the complaint, are repeated, and the plea avers that it was the duty of the railroad company, which it could have performed, to so construct and maintain, guard and protect its said trolley wire as not to allow contact to be made with it and the telephone wire, if, by accident, the latter should fall where it crossed the former; yet the plea avers that the railroad company failed and neglected so to do, whereby, when the telephone wire did fall, it fell across the trolley wire, and communicated the electric current of the latter to plaintiffs' horses, doing the injury complained of by the plaintiffs. The fourth plea sets up the failure of the railroad company to obey an alleged lawfully authorized order or direction of the mayor of Mobile, requiring it and all other companies using trolley wires to guard and protect them by what is known as "guard wires." It avers that that company, by compliance with said order, in the construction of

31 L. R. A.

such guard wires, could have so protected its trolley wires that, in case the small telephone wire should fall, it would not come in contact with the trolley wire; and this failure is charged to have been the direct cause of plaintiffs' injury. The fifth plea is substantially the same as the third, with the additional averment that the telephone company was established and in operation along Lawrence street, crossing Government, before and at the time the railroad company constructed its road and erected its trolley wire. The sixth plea is substantially the same as the fifth, with an additional averment of municipal authority for the construction and operation of its telephone lines.

As we have seen, the complaint contains several charges of negligence against both defendants: (1) That the telephone wire was frail and weak, and not securely fastened to the poles, and was liable to break and fall across the trolley wire, etc., which facts were known to both defendants; and that it was the duty of defendants, respectively, to so maintain, guard, and protect their respective wires as not to allow the telephone wire, if it should break and fall to the ground, to come in contact with the trolley wire, etc., showing failure to observe these duties, with the resultant injury. (2) That defendants wrongfully and negligently suffered the telephone wire to fall upon and across the trolley wire, etc., and to be and remain in that condition. (3) That they suffered the telephone wire to be and remain lying upon and across the trolley wire, etc.

It is plain that neither the third, fourth, fifth, nor sixth plea of the telephone company answers either of these charges. The third does state that the telephone wire was in good order and condition, and properly located and maintained; but this cannot be accepted as a denial of the allegations that, known to the defendants, it was frail and weak, not securely fastened to the poles, and liable to break and fall across the trolley wire, and that it was the duty of the defendants to so maintain, guard, and protect their wires as to prevent such an occurrence. Nor is it excuse to the telephone company, derelict in these respects, that the railroad company was guilty of the negligence charged in its several pleas. Those allegations but emphasize the averments of the complaint, and accentuate the charges of the telephone company's own neglect. The fourth plea is, perhaps, more vicious than the third. It shows the violation, by the railroad company, of a lawful order of the mayor to erect guard wires to prevent just such catastrophes as now brought to view; and yet it confesses that the party pleading maintained a weak, frail wire, insecurely fastened, and, as known to both defendants, liable to fall across the trolley, and violated a duty to protect it against such consequences. And, more than this, it confesses that the party pleading, as well as its codefendant, after the wire fell across the trolley wire, extending to the ground, charged with the dangerous current of electricity, suffered it to be and remain in that condition, causing the plaintiffs' injury. The same may be said of the fifth and sixth pleas. The demurrers sufficiently raise these objections, and the court erred in overruling them.

It is apparent there is no answer in either of

the special pleas of the defendant the Mobile Street Railroad Company to either of the charges of negligence contained in the complaint. It is not material to this controversy that the company had lawful authority to construct and operate its road with the motive power employed. It does not appear, unless by the statement of a conclusion of the pleader merely, that the charter and municipal ordinance authorized the defendant, knowing that a frail, weak, insecurely fastened telephone wire, liable to fall across its trolley wire, and extend to the ground, carrying a deadly current of electricity to persons and property lawfully passing along the highway, was being maintained by another, to maintain and operate its own wire without taking any steps to prevent destructive consequences; and particularly does no authority appear to suffer the wire of the telephone company to be and remain lying across its own, extending to the ground. Nor is it material that the defendant had no connection with the telephone company, and that the latter's wire broke and fell without the defendant's fault, and that it did nothing to cause it to break and fall as it did. Nor does the fact that defendant erected and maintained its wire in the manner that other trolley wires are erected and maintained by many prudent and well-managed electric railway companies, conducting the same character of business over and along the streets of other cities, justify it in knowingly suffering a wire to be suspended over its own, in a condition likely to fall across its own, with the attendant dangers mentioned, without providing proper safeguards, or, after its fall, suffering it to be and remain in that condition. The demurrers to these pleas ought to have been sustained.

It is said that the pleas are good, in that they show there was no joint liability of the defendants. The injurious act complained of consisted in one aspect of the complaint, in the concurrent maintenance of two wires, so related to each other, and so erected, that the one was likely to fall across the other, producing the dangers charged. This wrong was in the concurrent, common knowledge, contemplation, and intent of both defendants. Both knew that the one wire was likely to fall across the other, and cause such damage as the plaintiff sustained, and it was the common duty of both to abate the dangerous condition. It is not material by what special act or omission on the part of either, in the maintenance of its own wire, the dangerous condition was produced. So far as concerned the public, it was the maintenance of the two wires, so related to each other, in respect of injurious consequences, that they were inseparable. Known to both defendants, the two wires mutually depended upon each other for those consequences. Whether the condition was primarily brought about by the neglect of one or the other or both defendants, it yet existed with knowledge on the part of both, and both contributed to the continuance of its existence. The supreme court of Tennessee in *United Electric R. Co. v. Shelton*, 89 Tenn. 423, had occasion to consider a case substantially identical with this. The opinion being short, we reproduce it, as delivered by Turney, Ch. J.,

R. A.

as follows: "Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident, the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley wire, and, while resting on it, the horse came in contact with it, and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge, without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence, and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also the duty of the electric company to see that its trolley wire was in like manner protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed, with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley wire, and the consequences of a contact of the wires of the one with those of the other. . . . Both were bound to guard against such likelihood, and, having failed to do so, are liable."

It is unnecessary to discuss the joint liability of the two defendants under the phase of the complaint which charges that they suffered the wire of the one, after falling, to be and remain across and in contact with that of the other, causing the injury. It is too clear for discussion that such liability is joint. The pleas were interposed to the whole complaint.

The special replications bring forward nothing new, and were improperly interposed. They might well have been stricken from the file. They will, probably, not be insisted upon.

There does not appear to have been any real question upon the trial as to the operation of the railway and telephone lines by the defendants, respectively; and the plaintiffs omitted to make direct proof thereof, at least as to the telephone company. There is clearly sufficient evidence, howsoever weak, to send the question to the jury as to the operation of the rail-

road by the Mobile Street Railroad Company at the time of, and for months prior to, the injury, and to authorize an inference by the jury of a failure of duty, as alleged, on the part of the company, proximately causing the injury. As to the telephone company, there was evidence tending to show that a telephone wire was being, and had been for months before the injury, maintained as alleged in the complaint, and that it fell across the trolley wire as alleged. The defendant the Southern Bell Telephone & Telegraph Company, being sued and charged with maintaining the wire, came into court, by counsel, and entered upon a trial of the general issue, as well as of special issues. So, also, as to the other defendant, the Mobile Street Railroad Company. The conduct of the trial by these defendants from beginning to end; the character and manner of the development and production of the testimony; the cross-examination of the plaintiffs' witnesses; the absence of a suggestion, express or implied, in the conduct of the trial, on the facts, that any other than the defendants maintained and operated the wires, respectively,—all tended to show an implied admission that they were the parties, and authorized the jury so to infer. It is certainly true that the plea of the general

issue puts in issue all the material allegations of the complaint, and imposes upon the plaintiffs the necessity of proving them. But the rule is a reasonable one. No set form of proof is prescribed. The defendant may, by his course of conduct on the trial, show to the satisfaction of the jury that he does not really controvert a particular fact strictly within the issue, but waives formal proof thereof; and in such a case it should be left to the jury to say whether it is waived or not. Suppose an extrajudicial investigation, of precisely the same nature and incidents as the trial in question, had occurred by and between the parties to this suit, in reference to this subject; would not the conduct of the defendants thereon be admissible, upon a subsequent judicial investigation of the matter, to authorize the inference of an implied admission that they were the parties who maintained the wires? We think so. We will not therefore declare that the rulings upon the pleadings were erroneous without injury.

The city ordinance which was excluded may be so connected on another trial as to render it admissible, if it was not on the trial appealed from.

Reversed and remanded.

TENNESSEE SUPREME COURT.

TRADESMAN PUBLISHING COMPANY

et al.

v.

KNOXVILLE CAR-WHEEL COMPANY

et al., Appts.,

and

KNOXVILLE SAVINGS BANK *et al.,*

Plffs. in Err.

(95 Tenn. 634.)

1. A creditor of a corporation may, without obtaining judgment against it, maintain a bill under the Tennessee statutes to wind up its affairs, if, after sustaining large losses, it has suspended business with no preparation for resumption, and has executed trust deeds in favor of certain creditors covering practically all its assets, while its claim to solvency is based upon extravagant valuations of its assets.
2. Trust deeds in favor of certain creditors, executed by a corporation after sustaining heavy losses and suspending business and when it cannot meet its accruing liabilities, will be set aside.
3. The term "capital stock paid in," in the charter of a corporation making directors liable for debts in excess of such stock, means the amount subscribed by the stockholders, and not the total value of the assets.
4. The term "indebtedness," in the charter of a corporation making directors liable personally for indebtedness in excess of capital stock paid in, includes bonded indebtedness.

5. Although the directors' liability for indebtedness of a corporation in excess of the capital stock is available only in favor of creditors whose debts were illegally contracted, yet it cannot be enforced by each creditor individually, but must be enforced by a bill filed for the benefit of all creditors similarly situated.

6. Consent to the creation of indebtedness of a corporation in excess of its assets, which will make directors individually liable therefor under a statute imposing such liability, must be given in their capacity as directors.

7. Dividends paid by the directors of a corporation when it is realizing a net profit on its business, and when the assets as honestly estimated by them exceed its liabilities, will not render them individually liable under a charter imposing such liability for dividends paid when the company is insolvent, although the assets prove to have been largely overestimated and the company in fact insolvent.

8. A purchaser at chancery sale of the unexpired term of a leasehold is not chargeable with the contract rental of the original lease for the balance of the term.

9. A claim for rent for property leased to a corporation which has been placed in the hands of a receiver in a suit in which the lessor joins, which accrues subsequently to his appointment, cannot be made a preferred claim against the funds in his hands, unless he in fact adopts the lease.

(November 12, 1895.)

NOTE.—On the question whether bonded indebtedness is within the provision making directors liable for indebtedness of a corporation in excess of its capital stock, the above decision is believed to be substantially one of first impression.

For some cases on the liability of directors for debts, see *Leighton v. Campbell* (R. I.) 9 L. R. A. 187, and *note*; also *Gold v. Clyne* (N. Y.) 17 L. R. A. 787.

APPEAL by defendants Knoxville Car-Wheel Company and its directors from a decree of the Chancery Court for Knox County declaring the defendant corporation insolvent and fixing certain personal liability upon its directors in favor of creditors, and writ of error by certain of the creditors to review so much of the decree as set aside deeds of trust which had been made by the corporation in their favor. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. Washburn, Pickle, & Turner, and Webb & McClung, for appellants:

The assets of an insolvent moneyed corporation become, from the date of its assured insolvency, a fixed trust fund for equal *pro ratu* distribution among its creditors, unless otherwise provided by law or stipulated by valid contract.

Marr v. Bank of West Tennessee, 4 Coldw. 471; *Moseby v. Williamson*, 5 Heisk. 286; *Comfort v. Patterson*, 2 Lea, 672; *City Sav. Bank v. North Ala. Lumber & Mfg. Co.* 91 Tenn. 15; *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 787.

This principle has not been applied in this state to other than "moneyed corporations." The defendant company does not belong to that class.

But if the principle shall be extended to other than moneyed corporations much greater liberality should be shown in its application to corporations whose assets are not supposed to consist of money.

City Sav. Bank v. North Ala. Lumber & Mfg. Co. 91 Tenn. 12.

The corporation had abundant assets to pay its debts. Its suspension of business was enforced by a common calamity and was temporary.

City Sav. Bank v. North Ala. Lumber & Mfg. Co. supra; 2 Spelling, Priv. Corp. § 712; 2 Morawetz, Corp., 2d ed. § 786; *Walt, Insolvent Corp.* § 84.

The appointment of a receiver in this case is a flagrant abuse of the process of the court of chancery. The complainant was a general creditor.

2 Cook, Stock & Stockholders, 3d ed. § 863; *Gluck & Becker, Receivers*, § 25.

The general allegation of insolvency is insufficient.

2 Spelling, Priv. Corp. § 840; *Downing v. Dunlap Coal Co.* 93 Tenn. 221.

There is no question that a corporation, while solvent, may borrow money of a director and give a mortgage to secure its payment. The giving of the mortgage is viewed with suspicion; but it is legal when it is perfectly free from actual fraud.

2 Cook, Stock & Stockholders, 3d ed. § 661; *Brown v. Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 23 L. R. A. 823.

The directors of the Knoxville Car-Wheel Company are not personally liable for debts of the corporation as having assented to their creation in excess of the paid-up capital stock of the company.

2 Spelling, Priv. Corp. § 921, note 2; 1 Cook, Stock & Stockholders, 3d ed. p. 271; *Hand v. Cole*, 88 Tenn. 402, 7 L. R. A. 96; *Jackson v. Meek*, 87 Tenn. 71; *Allison v. Coal* 31 L. R. A.

Creek & N. R. Coal Co. 87 Tenn. 62; *Woods v. Wicks*, 7 Lea, 49.

Should they be held to a rigid rule of accountability, it is said that it would be difficult to get men of character and pecuniary responsibility to fill such positions.

North Hudson Mut. Bldg. & Loan Assn. v. Childs, 82 Wis. 460; *Briggs v. Spaulding*, 141 U. S. 146, 35 L. ed. 668; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 649; *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 690.

The burden is upon the creditors to make out a case of personal liability against directors by satisfactory proof.

Wallace v. Lincoln Sav. Bank, 89 Tenn. 654; *Bruce v. Baxter*, 7 Lea, 477.

"Capital stock" and "capital" are often used as interchangeable terms. "Capital stock" has received a variety of definitions, depending upon the connection in which it is used.

2 Beach, Priv. Corp. §§ 465, 466; 1 Cook, Stock & Stockholders, 3d ed. § 9, notes.

In *Williams v. Western U. Teleg. Co.* 93 N. Y. 162, Earl, J., defines capital stock as "the property of the corporation contributed by its stockholders, or otherwise obtained by it, to the extent required by its charter."

The directors' liability does not constitute a general fund for the benefit of creditors. It is a specific liability to each individual creditor, whose debt was illegally contracted. Other creditors, whose debts were legally contracted, cannot avail themselves of it.

Allison v. Coal Creek & N. R. Coal Co. 87 Tenn. 63.

The requisite directors' assent must be given by them, not as individuals, nor even as stockholders, but in their character as directors assembled and organized as a board and acting in an official way.

2 Cook, Stock & Stockholders, 3d ed. § 172; 1 Lawson, Rights, Rem. & Pr. p. 699; 17 Am. & Eng. Enc. Law, p. 88, and note; *Smith v. Los Angeles Immigration & L. Co. Op. Assn.* 78 Cal. 289; *Buttrick v. Nashua & L. Railroad*, 62 N. H. 413; 1 Spelling, Priv. Corp. § 424.

Assuming that the corporation has contracted specific debts with the assent of its directors in excess of its capital stock paid in, the directors are still not personally liable unless it further appears that the specific debts thus contracted have not been paid or otherwise discharged by the corporation.

Allison v. Coal Creek & N. R. Coal Co. 87 Tenn. 62; *Parrott v. Colby*, 71 N. Y. 597; *Hanson v. Donkersley*, 37 Mich. 184; *Hardman v. Sage*, 47 Hun, 230; *Stilphen v. Ware*, 45 Cal. 110.

The directors' liability under said charter provision is secondary to that of the corporation, and cannot be enforced unless the corporation assets have been first exhausted, and have proved insufficient to pay the corporate debts.

Allison v. Coal Creek & N. R. Coal Co. 87 Tenn. 63; *Albiztiguí v. Guadalupe Y Calvo Min. Co.* 92 Tenn. 602; *Jackson v. Meek*, 87 Tenn. 78; *Johnson v. Churchwell*, 1 Head, 146; *Blake v. Hinkle*, 10 Yerg. 218; 1 Cook, Stock & Stockholders, § 219, and notes.

Assuming that the directors have assented in their official character to the creation of specific

debts by said corporation in excess of its capital stock paid in, they are protected against personal liability by reason of the fact that they acted in good faith and under a mistake.

Wallace v. Lincoln Sav. Bank, 89 Tenn. 649; *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 684; *Vance v. Phoenix Ins. Co.* 4 Lea, 385; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 682.

The defendant company's rights in the leased property were as effectually defeated by the unwarranted process of the court invoked by Staub as if he had destroyed the premises.

Staub's action was clearly an eviction.

Edmison v. Lowry, 3 S. D. 77, 17 L. R. A. 275; *Hayner v. Smith*, 63 Ill. 480, 14 Am. Rep. 124.

Messrs. Lucky & Sanford, Comfort & Spilman, Shields & Mountcastle, and Green & Shields, for plaintiffs in error:

The Knoxville Car-Wheel Company, on May 10, 1892, when this general creditor's bill was filed, was insolvent and had so ceased to use its franchises as that a general creditor's bill could be filed and maintained.

Mill. & V. Code, §§ 4168, 5087, 5038; *Smith v. St. Louis Mut. L. Ins. Co.* 6 Lea, 564.

The directors of the Knoxville Car-Wheel Company are individually liable for the amount of all indebtedness of the corporation created in excess of its paid-in capital stock of \$107,000, unpaid and outstanding.

Code, § 1858.

The meaning of the charter and the statute by the phrase "stock paid in" is the capital stock actually subscribed and paid for by those becoming stockholders.

2 Beach, Priv. Corp. § 466; 1 Cook, Stock & Stockholders, § 9; *Mechanics' & F. Bank v. Townsend*, 5 Blatchf. 318; *State v. Morristown Fire Assn.* 23 N. J. L. 195; *State Bank v. Milwaukee*, 18 Wis. 282; *State Bank v. Charleston*, 3 Rich. L. 846; *Barry v. Merchants' Exch. Co.* 1 Sandf. Ch. 280; *State v. Norwich & W. R. Co.* 30 Conn. 290; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *Com. v. Lehigh Ave. R. Co.* 129 Pa. 405, 5 L. R. A. 367; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Ohio L. Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 2; *Union Bank v. State*, 9 Yerg. 490; *Memphis v. Ensley*, 6 Baxt. 553, 32 Am. Rep. 532.

The word "indebtedness" in the clause of the charter imposing personal liability on the directors assenting to the indebtedness in excess of the capital stock paid includes bonded indebtedness.

Stone v. Chisolm, 113 U. S. 306, 28 L. ed. 992.

The directors with the most ample and detailed information as to the company's financial affairs, and a thorough comprehension of what they were doing, authorized the creation of not only the bonded indebtedness of the company, but the large floating indebtedness now outstanding, and they unquestionably assented thereto.

Not one of them comes forward now to prove that he ever, in any manner, opposed the management of the affairs of the company which brought about this large indebtedness. Their failure to do so is of itself evidence of assent.

Beach, Priv. Corp. § 623; Cook, Stock & Stockholders, §§ 712, 714; *Bank of Yolo v.* 31 L. R. A.

Weaver (Cal.) 31 Pac. 160; *Allis v. Jones*, 45 Fed. Rep. 148; *Melledge v. Boston Iron Co.* 5 Cush. 158, 51 Am. Dec. 59; *Hubbard v. Camperdown Mills*, 26 S. C. 581; *Longmont S. Ditch Co. v. Coffman*, 11 Colo. 551; *Sampson v. Boudinham Steam Mill Corp.* 36 Me. 78.

The court will presume assent, for, in the very nature of things, all this could not be done without it.

Beach, Priv. Corp. § 263; Cook, Stock & Stockholders, p. 1058; *Patterson v. Stewart*, 41 Minn. 84; *Witlers v. Soules*, 43 Fed. Rep. 405; *Stephens v. Overstolz*, Id. 771.

The statute imposing personal liability upon directors should not be strictly construed.

Woolverton v. Taylor, 132 Ill. 197; *Hornor v. Henning*, 93 U. S. 228, 23 L. ed. 879; 1 Beach, Priv. Corp. § 264.

The liability for the excess of the indebtedness of a corporation over and above its capital stock paid in is a trust fund in which all the creditors are entitled to share.

Hornor v. Henning, 93 U. S. 231, 23 L. ed. 879; *Stone v. Chisolm*, 113 U. S. 308, 28 L. ed. 998; *Low v. Buchanan*, 94 Ill. 76; *Woolverton v. Taylor*, *supra*; *Perry*, Tr. § 927.

The deeds of trust of January 27, 1892, made to R. S. Payne and L. H. Spillman were valid.

2 Morawetz, Priv. Corp. § 802; *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 682; 4 Am. & Eng. Enc. Law, p. 220; *Comfort v. McTeer*, 7 Lea, 660; *City Sav. Bank v. North Ala. Lumber & Mfg. Co.* 91 Tenn. 15.

Mr. Tully R. Cornick, for appellees:

The deeds of trust executed under the circumstances surrounding the execution of these instruments bring the case within the principles laid down in *Wait on Insolvent Corporations*, § 163, p. 141.

The assets of an insolvent moneyed corporation, under our statutes and decisions, become from the date of insolvency a trust fund for the benefit of creditors in the order prescribed by law or otherwise *pro rata*.

Comfort v. Patterson, 2 Lea, 672; *Smith v. St. Louis Mut. L. Ins. Co.* 3 Tenn. Ch. 502; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; 2 Morawetz, Priv. Corp. § 364.

Such preference cannot be given by the voluntary act of the debtor.

Lippincott v. Shaw Carriage Co. 25 Fed. Rep. 577; *Hove v. Sanford Fork & T. Co.* 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7; *Potter v. McDowell*, 31 Mo. 73.

There was not a present ability of the debtor to pay out of its own means all its liabilities, nor sufficient property to respond on execution for such satisfaction.

Eddy v. Baldwin, 32 Mo. 369; *Walton v. First Nat. Bank*, 13 Colo. 265, 5 L. R. A. 765.

The deed of trust was, in effect, a confession of insolvency. It conveyed all the company had to meet only a part of its liabilities.

When a corporation, in its business affairs, is thus in *articulo mortis* whatever may yet be maintained as to its right to dispose of its property so as to give a preference to some general creditor, the law is too well settled, at least in this jurisdiction, to admit of extended discussion, that its directors cannot make a disposition of the assets so as to secure to them-

selves, directly or indirectly, a preference over general creditors.

Williams v. Jackson County P. of H. 23 Mo. App. 132; *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229; *Roan v. Winn*, 93 Mo. 503; *White, P. & P. Mfg. Co. v. Henry B. Pettes Import. Co.* 30 Fed. Rep. 865; *Adams v. Kehlor Mill. Co.* 35 Fed. Rep. 433; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Kochler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 339; *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 392, 19 L. ed. 117; *Twinn-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 329; *Graham v. La Crosse & M. R. Co.* 102 U. S. 161, 26 L. ed. 111; *Surger v. Hoag*, 84 U. S. 17 Wall. 620, 21 L. ed. 736.

Insolvent corporations cannot prefer one creditor to another.

Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 5 L. R. A. 378; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Curran v. Arkansas*, 56 U. S. 15 How. 312, 14 L. ed. 709; 2 Story, Eq. Jur. 1252; Pom. Eq. Jur. § 1046; *Taylor, Priv. Corp.* §§ 654, 655; *Goodin v. Cincinnati & W. Canal Co.* 18 Ohio St. 198, 98 Am. Dec. 95; 2 Morawetz, Priv. Corp. § 803; *Wait, Insolvent Corp.* § 162, 654.

The doctrine that the assets of a corporation constitute a trust fund is well established.

Perry, Tr. § 242; *Wood v. Dummer*, 3 Mason, 310; *Taylor v. Miami Exporting Co.* 5 Ohio, 162, 22 Am. Dec. 787 (1831); *Taylor, Priv. Corp.* §§ 668, 759; 2 Morawetz, Priv. Corp. § 803; *Catlin v. Eagle Bank*, 6 Conn. 233; *Wait, Insolvent Corp.* § 162.

The word "capital," as used in respect to corporations, signifies the aggregate of the sums subscribed, and actually contributed or agreed to be paid in by the stockholders.

Wait, Insolvent Corp. § 141; *State v. Morristown Fire Asso.* 23 N. J. L. 196; *Williams v. Western U. Teleg. Co.* 93 N. Y. 188; *Cook, Stock & Stockholders*, §§ 9, 199; *Beach, Priv. Corp.* § 466; *Albitzigue v. Gaudalupe Y. Caloo Min. Co.* 92 Tenn. 602.

Mr. T. A. Gratz also for appellees.

McAlister, J., delivered the opinion of the court:

This is a creditors' bill, filed—First, to have the Knoxville Car-Wheel Company declared an insolvent corporation and its assets equally distributed among all its creditors; and, second, to hold the directors of said company, who are made defendants, individually liable for all debts created in excess of the capital stock paid in. The complainant also seeks to have annulled certain mortgages, for the reasons: First, that they were executed by said corporation after its ascertained insolvency; and, second, because preferences are thereby created in favor of certain debts for which the directors are sureties: The directors are also sought to be held liable upon the ground that they had declared and received certain dividends from said corporation at a time when it was insolvent. It is alleged in the bill that on June 19, 1882, said car-wheel company issued bonds to the amount of \$100,000, and to secure said bonds executed a trust deed on all of its real and personal property to R. C. Jackson, as trustee, and that this trust deed would ma-

ture July 1, 1892. It is then alleged that on January 27, 1892, said corporation, being then insolvent, executed a trust deed to R. S. Payne, trustee, conveying other real and personal property to secure the sum of \$31,872.23, due the East Tennessee National Bank, the Mechanics' National Bank, the City National Bank, and Daniel Briscoe & Co. It is further alleged that on January 27, 1892, said corporation, being insolvent, executed to L. H. Spillman, trustee, a deed of trust on other real and personal property to secure the sum of \$23,025.77, due to Knoxville Savings Bank, City National Bank, McNulty & Ransom, and Peter Staub. It is then charged that the last two deeds of trust were executed for the purpose of giving the creditors therein secured an illegal preference, and, having been made by an insolvent corporation, are fraudulent in law. There is no charge of fraud or bad faith; on the contrary, the bill recites, *viz.*: "Complainant expressly disclaims any reflection upon the integrity and high character of the individuals who compose the directors of said defendant, the Knoxville Car-Wheel Company, or of the individuals and officers of the corporation who constitute its creditors of the preferred class; but the charge is that the effort to thus prefer one class of creditors of a corporation over others less favored and influential is illegal and void, and will not be tolerated by a court of equity." It is next alleged that the capital stock of said company is \$107,000, while its indebtedness amounts to \$190,000 (less \$10,000 paid by said Spillman, trustee), and that said directors assented to the creation of said indebtedness, and are therefore liable for the sum of \$73,000, the excess of debts over the paid-in capital stock; that it will be necessary to sell all of the property of said company to pay debts, and, if that shall not suffice, then said directors are liable for the excess of the indebtedness above the capital stock. The bill asks the appointment of a receiver, the marshaling of assets, and the sale of the corporate property, and that the trust deeds to Payne and Spillman be adjudged void. L. H. Spillman was appointed temporary receiver for the corporation. The defendant car-wheel company answered the bill, and, among other defenses, denied its insolvency, and averred that its assets were worth more than double its debts, and that its business had been uniformly profitable until the recent panic which swept over the country, causing the railroads to cut off their purchases, and to default in the payments of goods already purchased; that this fact so depleted its revenues that it was deemed best to temporarily suspend operations until business should resume its normal conditions; that it had always done a good business, and paid the interest on its bonded debt, and promptly met all of its obligations; that it was in no sense insolvent, and its suspension of business was only temporary, and was not intended to be permanent. On May 23, 1892, the directors filed a joint demurrer and answer to the bill. The defenses are that they never assented to the creation of complainant's debt, and they further deny that the indebtedness of the company exceeds the capital stock in the sense of the statute, denying that the bonded debt of the company can be computed

in ascertaining the liability of the directors under the statute, but that only the floating debt is to be considered. They further insist that the company has assets sufficient to pay all its bonded and floating debt and to redeem all its stock. On May 23, 1892, the Mechanics' National Bank, City National Bank, Knoxville Savings Bank, Daniel Briscoe & Co., beneficiaries under the trust deed aforesaid, filed their answers to the original bill, in which they deny the insolvency of the car-wheel company, affirm the validity of the trust deeds securing their debts, and resist the appointment of a receiver, and reserve the right to insist upon the liability of the directors for their debts, if it should become necessary. It appears that on June 6, 1892, upon motion of complainant, and upon the pleadings hereinbefore stated, the chancellor declared the car-wheel company an insolvent corporation, appointed L. H. Spillman permanent receiver, enjoined the company from exercising its corporate franchises, and assumed jurisdiction to wind up the affairs of said company as an insolvent corporation. A reference was ordered to ascertain assets and debts. On July 20, 1893, the clerk and master filed his general report, showing, *viz.*: First, the assets of the car-wheel company on May 1, 1892, were \$317,424.73; second, the secured debts, including bonds and the debts mentioned in the trust deeds to R. S. Payne and L. H. Spillman, \$162,100.51; third, the unsecured debts, \$17,468.03. Total debts, \$179,568.54. Complainants excepted to so much of the clerk's report as fixed the assets of the company at \$317,424.73. On June 25, 1894, a decree was pronounced by the chancellor adjudging the trust deeds to Payne and Spillman void, and that the directors were warranted in paying the dividends to stockholders, and were not liable to the creditors of the company on that account. The court reserved the question of liability of the directors upon the ground that the debts exceeded the assets, and referred the cause to the master to report—First, the paid-up capital stock of the corporation; second, what debts were created in excess of the capital stock with the assent of the directors. August 7, 1894, the clerk reported, *viz.*: First, the paid-up capital stock of the car-wheel company was \$107,000; second, the indebtedness has exceeded the paid-up capital stock at all times since April 30, 1885, and that all the debts were created with the assent of the directors, at a time when the indebtedness exceeded the paid-up capital stock, though there were assets sufficient to pay the debts. August 10, 1894, a decree was entered overruling the exceptions filed to this report by the directors, the chancellor adjudging that the capital stock was \$107,000, and that all debts created after April 30, 1885, were created at a time when the debts exceeded the capital stock, and were created with the assent of the directors. The car-wheel company and the directors C. H. Brown, W. P. Washburn, W. W. Woodruff, D. A. Carpenter, and M. L. Ross, appealed, and have assigned errors.

The defendant banks whose debts were preferred in the deeds of trust have brought the case up by writs of error, and assign errors upon the action of the chancellor in adjudging their preferences illegal, and in ordering said deeds

to be set aside. The second assignment is that the chancellor erred in adjudging the car-wheel company an insolvent corporation at the date of the execution of the second trust deeds herein attacked, and in holding the latter void for that reason, and on account of illegal preferences. It is insisted that the car-wheel company was solvent, and a going concern, and it had the right to make preferential assignments to its creditors, and that said deeds of trust are therefore valid. Mr. Morawetz, in his work on Private Corporations, referring to the cases which hold that corporate preferences are valid, says: "This doctrine, in the opinion of the writer, is wholly indefensible on principle. The capital provided for the security of the creditors of the corporation is a fund held for the benefit of all the creditors equally. That the unsecured creditors of a corporation are entitled to an equal distribution of the common security has often been recognized by the courts of equity in adjusting the rights of creditors among themselves and in relation to the company's shareholders. After a corporation has become insolvent, and has ceased to carry on business, the rights of its creditors become fixed. If a corporation, whose assets are not sufficient to satisfy all of its creditors in full, can prefer certain creditors, leaving others unpaid, this must be by virtue of a power reserved by implication to the company and its agents. But this power cannot justly be included in the general powers of management which a corporation must necessarily possess over its property in order to carry on its business and further the purposes for which the company was formed. The purposes of a corporation are not furthered in any manner by giving it or its agents the power, after the company has become insolvent and has ceased to carry on business, and after its shareholders have lost their interests in the corporate estate, to prefer a portion of the creditors, according to interest or mere whim, and to pay their claims in full, leaving the others wholly without redress." 2 Morawetz, Priv. Corp. § 803. The settled law of this state is that the assets of an insolvent corporation become from the date of its assured insolvency a fixed trust fund for equal *pro rata* distribution among its creditors, unless otherwise provided by law, or fixed by valid contract. *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Moseby v. Williamson*, 5 Heisk. 286; *Comfort v. Patterson*, 2 Lea, 672; *City Sav. Bank v. North Ala. Lumber & Mfg. Co.* 91 Tenn. 15; *Smith v. St. Louis Mut. L. Ins. Co.* 2 Tenn. Ch. 737. It has been held, however, in this state, that although the liabilities of a corporation may greatly exceed its assets, it is not insolvent in such sense as that its assets become a trust fund for *pro rata* distribution among its creditors so long as it continues to be a going concern, and conducts its business in the ordinary way. There must be some positive act of insolvency, such as the filing of a bill to administer its assets, or the making of a general assignment, or the permanent cessation to do business. *Comfort v. McTeer*, 7 Lea, 660.

With this preliminary statement of the law, we proceed to inquire whether, at the date of the execution of the trust deeds in question, to wit, on January 27, 1892, the Knoxville Car-

Wheel Company was an insolvent corporation, and if this fact had been signalized by a suspension of its corporate business, and the transfer of all its available assets. The complainants took the deposition of Charles H. Brown, the president, secretary, treasurer and general manager of the corporation. It appears from the testimony of Mr. Brown that this corporation had lost money continuously since October, 1890. This witness further testified that about January 30, 1891, the company suspended business. He was then asked, "Why did you suspend?" His answer was: "Because I did not have the money. Outstanding notes went to protest, and bills became payable faster than we could make collections. The railroads were all in a cramped condition, and, instead of paying their bills at the first of the month, as they had done, they kept us waiting, and we are waiting for some of them yet." The witness was then asked if the deeds of trust were executed for the purpose of giving preferences. He answered, "I believe it to be construed that way."

Question: "Did you, before suspending, consult with the directors as to the advisability of suspending?"

Answer: "Yes, sir. I called the directors together, explained the financial situation; that notes were coming due, and no funds to meet them, and the East Tennessee National Bank had refused to let us have any more money. We then decided to assign, or at least to execute trust deeds. The trust deeds were not executed until after the company suspended."

Witness states his impression, without giving actual figures, that the company had sufficient assets to cover the liabilities left unsecured after the execution of the deeds of trust. He is asked to specify any assets reserved by the company to pay the unsecured debts. The witness is unable to mention any item, but says "the only way to find out would be to take the deeds of trust and the balance sheet, and check them off." When the balance sheet is checked off, it is ascertained that the principal items not contained in the deeds of trust are the items of account due from the Georgia Railroad Company and the Ducktown Sulphur, Copper, & Iron Company, and which had been transferred, by authority of the directors, January 25, 1892, to the Mechanics' National Bank, and the item of account against the Richmond Locomotive & Machine Works, transferred to W. R. Turner, to secure the payment of a note in favor of William Fain, administrator, which was then past due. The record discloses that in these deeds of trust the company had conveyed its entire plant, including the wheels on hand and those in process of manufacture, its tools, stock in trade, all accounts and bills receivable and lands owned by the company which were not then under mortgage. The property conveyed in the deeds of trust apparently embraced everything owned by the corporation. The trustees were placed in possession of the property conveyed to them, and the business of the company was suspended.

It further appears that during the year ending April 30, 1891, the company had sustained a net loss of \$12,831.04, and during nine months from April 30, 1891, to February 1,

1892, it had sustained a net loss of \$20,987.83; making a total loss sustained by the company during the twenty-one months preceding the suspension of business on January 30, 1892, of \$33,818.87. On the latter date the directors ordered the factory to be closed, stopped all salaries excepting the salary of a bookkeeper, which was to be continued only until such time when the books were written up. The president of the company was requested to remain in charge during the month of February, the salary to be arranged hereafter; and he was authorized to reopen the machine shop, and to complete such unfinished work as was on hand; and also empowering him to sell the Carter county property, which was all covered by the trust deeds made to Jackson and Payne. On March 30, 1892, the directors authorized the execution of an additional deed of trust to secure payment of claim of Jennifer Iron Company for \$1,080. It further appears that no meetings of the directors were held from March 30, 1892, to May 10, 1892, when the present bill was filed. During this time no preparations were made for the resumption of business, but there was every indication of permanent suspension and a final liquidation of the affairs of the company.

The claim of the company that it was solvent is, in our opinion, based largely upon extravagant valuations of its assets, and especially upon an overestimate of the value of certain lands owned by the company in Carter county. The valuation put upon this land by the stockholders was entirely arbitrary, and without any sufficient reason to justify such an exaggerated figure. The evidence shows that there was no market for such real estate in 1892, that on account of the general depression in business it was impossible to sell real estate, and that such an asset was entirely unavailable. When this bill was filed the company's matured and unsettled floating indebtedness exceeded \$70,000, its bonded indebtedness of \$100,000 would mature in two months, the entire assets of the company were covered with deeds of trust, and the company was entirely without resources to liquidate this heavy indebtedness. The question, then, is whether a creditor, on May 10, 1892, after the trust deeds had been executed, and the assignees had taken possession of the entire property of the company, could file and maintain a bill to wind up the affairs of the company as an insolvent corporation. We think the right to maintain the bill is clear and unquestionable. Complainant, without obtaining a judgment at law upon its demand, had the undoubted right to file this bill, and have the company wound up as an insolvent corporation, and its assets distributed ratably among all the creditors. As stated in the brief: "While this bill was originally filed only to collect a debt of \$400, there are now before the court \$190,000 of creditors on whose behalf it was also filed, and who now join with the original complainant in the demand that it be sustained, and the assets of this insolvent corporation applied to the payment of its just debts." The bill is clearly maintainable under the following sections of the (Mill. & V.) Code:

"Sec. 5037. The creditors of a corporation may also, without first having obtained

a judgment at law, file a bill in the court of chancery, to attach the property of the corporation, and subject the same, by sale or otherwise, to the satisfaction of their debt, when the corporate franchises are not used, or have been granted to others in whole or in part."

"Sec. 5038. In such cases the court may appoint a receiver, take an account of the affairs of the corporation, and apply the property and effects to the payment of debts *pro rata*, and divide the surplus, if any, among the stockholders."

"Sec. 4168. A corporation is not dissolved by the non-use or assignment to others, in whole or in part, of its powers, franchises, and privileges, unless all the corporate property has been appropriated to the payment of its debts; and any creditor, for himself and other creditors, whether he has recovered judgment or not, or any stockholder, for himself and other stockholders, may file a bill under the provisions of this chapter, to attach the corporate property, and have such property applied to the payment of the debts of the corporation and any surplus divided among the stockholders."

In *Smith v. St. Louis Mut. L. Ins. Co.* 6 Lea, 569, it was said that under these sections of the Code "the court may find [as] a fact that the corporation is involved, or has ceased to do business, or has granted its franchises in whole or in part to others, and upon the adjudication of any of these facts the right to administer its effects for the benefit of creditors follows."

We are also of the opinion that the execution of these deeds of trust under the circumstances was an overt act of insolvency, and was a preferential diversion of the corporate assets to the payment of debts of any class to the exclusion of other classes. The execution of the deeds of trust under the circumstances was a confession of insolvency. We therefore adjudge the several deeds of trust executed by the car-wheel company to Payne, Spillman, and McMillan void, and the decree of the chancellor in setting them aside was correct.

We do not decide, and do not wish to be so understood, that a corporation, although actually insolvent, so long as it is a going concern, may not deal with its property, and transfer it for value, in due course of business, to general creditors. A mere excess of liabilities over assets would not alone be sufficient to justify an interference and stoppage of business at the suit of a creditor. "A corporation is authorized to continue the management of its affairs, to deal with its property, and to assign it for value in due course of business, notwithstanding its actual insolvency, so long as there is an honest intention and a reasonable expectation on the part of the company of redeeming its fortunes; and it is only when a corporation is about to defraud its creditors by waste of its assets, or when the insolvency of the company is hopeless, so that further prosecution of the enterprise would clearly be at the expense of the creditors, that the latter may interfere to protect their lien." 2 Morawetz, *Priv. Corp.* 2d ed. § 786; Wait, *Insolvent Corp.* § 34, quoting the above with approval. 2 Spelling, *Priv. Corp.* § 712. "It has accordingly been held that a corporation which is insolvent, and unable to pay all of its creditors in full,

may continue its operations and pay off debts in regular course of business, though a part of the creditors be thereby deprived of their security." 2 Morawetz, *Priv. Corp.* § 786. We hold, however, that this corporation, at the date of the filing of the bill, was not only actually insolvent, but had committed an overt act of insolvency by preferential assignments to creditors.

The next question presented is in respect of the individual liability of the directors. The charter of the Knoxville Car-Wheel Company contains the following clause, to wit: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess." The chancellor found that the capital stock of the company subscribed and paid in amounted to \$107,000, and that all debts created after April 30, 1885, were in excess of the capital stock paid in; that the directors had assented to the creation of such indebtedness, and were individually liable. He decreed, however, that this liability upon the part of the directors was secondary, and that the sum could not be ascertained until the property of the corporation was sold, and its proceeds distributed. The finding of the chancellor that the capital stock of the company was \$107,000 is fully sustained by the record. The capital stock is shown by the first report made by the secretary and treasurer of the company to stockholders, on May 19, 1882, to be \$107,000, and it appears at the same sum in every subsequent annual report from that time to February 1, 1892, upon which date the last report was made. The capital stock is proved to have been \$107,000 by C. H. Brown, who was secretary and treasurer or president of the corporation from its organization. It is insisted in behalf of complainants that the excess of indebtedness over capital stock for which the directors are liable amounts to the sum of \$78,000. It is conceded by defendants that if the term "indebtedness," employed in the statute, should be held to embrace the fixed bonded indebtedness of the company as well as its floating debts, then its indebtedness does exceed the capital stock paid in. The insistence in behalf of the directors on this branch of the case is twofold, to wit: First, that the term "capital stock paid in" includes, not merely the capital stock paid in by the subscribers, but the entire capital and available assets of the company; second, that the term "indebtedness" used in the statute, does not include the bonded indebtedness, but merely the floating debts of the company. The proper solution of this question involves the determination of the correct meaning of the terms "indebtedness" and "capital stock paid in" as employed in the charter of the company. What, then, is the meaning in this connection of the term "capital stock paid in?" The insistence of defendants' counsel is that the assets on hand and available for payment of debts, no matter how derived, must constitute the fund called "capital stock paid in." In support of this contention counsel cites 2 Beach, *Priv. Corp.* § 465, viz.: "In respect of corporate capital the word [capital] is in general use as signifying the sums paid in by the subscribers, with the addition of all gains and

profits realized, with such diminutions as have resulted from losses incurred in transacting business. In this sense the capital of a corporation is the fund with which it transacts its business and embraces all its property, real and personal, constituting the assets of the corporation such as are subject to execution at law. So much of the capital as is represented by the capital stock issued must always be kept unimpaired during the existence of the corporation; but that portion of the capital which represents the surplus arising from the operation of the business of the corporation is subject to the discretion of the managers in regard to its disposition. Therefore profits remain a part of the fund constituting the capital until actually divided among the stockholders." We do not think the quotation from Beach sustains the position. It will be observed that Mr. Beach in this quotation is dealing with the word "capital," and he does not treat this term as synonymous with "capital stock." In the very next section the same author says, *viz.*: "There is a distinction between the capital of a corporation and its capital stock, though they are often used as interchangeable terms. The capital stock is clearly not the same as property possessed by the corporation; for the capital stock remains fixed although the actual property of the corporation varies in value and is constantly increasing or diminishing in amount. What the amount of the capital shall be is within the discretion of the managers, but the amount of the capital stock is limited and determined by the charter and the laws governing it. It follows, therefore, that a limit imposed upon the capital stock of a corporation does not restrict the amount of property which it may own." 2 Beach, *Priv. Corp.* § 466.

This distinction is clearly shown in § 781 of Morawetz on Private Corporations, in these words: "The amount of the capital stock of a corporation is usually fixed at a definite sum by the charter or other instrument which has been agreed to by the shareholders as containing the essential conditions of their contract of association. It is so fixed, partly for the purpose of determining the scope of the company's business and the relative rights and obligations of its shareholders as among themselves, and partly also for the purpose of obtaining commercial credit on behalf of the corporation, by indicating to the community what security has been provided for those who deal with it. Every person who becomes a shareholder in a corporation, and every person who deals with a corporation, understands that the fund contributed or agreed to be contributed as the company's capital shall be charged with the payment of corporate debts. It is likewise understood, where there is no express provision to the contrary, that the funds so charged shall be the only security for creditors, and that the shareholders shall not be individually liable for the corporate debts and obligations. Every contract entered into by a corporation therefore includes: (1) An implied agreement that the company's capital shall be held and used as a trust fund equitably pledged as security for the corporate debts. (2) An implied representation that the company's capital has been paid in or subscribed as indicated by the com-

pany's charter, and that the fund contributed or subscribed has been preserved for the purposes for which it was provided." "Capital stock is the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock is to be clearly distinguished from the amount of property possessed by the corporation. Occasionally it happens that under the terms of statutes relating to taxation which have been drawn without regard to the technical meaning of words, the courts will construe the capital stock to mean all the actual property of the corporation. But this is for the purpose of carrying out the intent of the statute, and is not the real meaning of the terms. At common law the capital stock does not vary, but remains fixed, although the actual property of the corporation may fluctuate widely in value and may be diminished by losses or increased by gains." 1 Cook, *Stock, Stockholders & Corp. Law*, § 9. See also *Memphis & C. R. Co. v. Gainer*, 97 U. S. 697, 24 L. ed. 1091; *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.* 11 Humph. 1, 53 Am. Dec. 742; *Union Bank v. State*, 9 Yerg. 490; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853; *Memphis v. Ensley*, 6 Baxt. 553, 32 Am. Rep. 532; *Nashville Gaslight Co. v. Nashville*, 8 Lea, 406. We therefore conclude that the term "capital stock paid in" means the amount subscribed and paid by the stockholders, and that amount is clearly shown by the proof to have been \$107,600.

The next question presented is whether the word "indebtedness," in the clause of the charter imposing personal liability on the directors' assenting to an indebtedness in excess of the capital stock paid, includes bonded indebtedness. The chancellor so held. The contention of the directors' counsel is that the term means the floating indebtedness, and does not embrace the bonded debt. Counsel, in order to support this contention, go into a history of previous legislation on this subject, but we have been unable to derive much light from that source. The only material difference we note between the former acts and the statute in question is that in the latter the words "paid in" have been added. The former acts simply provided that the indebtedness should not exceed the capital stock. We think the addition of the words "paid in" strengthens, rather than diminishes, the force of the argument that bonded indebtedness is within the meaning of the statute. The construction contended for by counsel for the directors would lead to this anomaly: that directors having contracted indebtedness to the limit allowed by the charter may fund this liability in bonds, secure them by a recorded mortgage, and then, without risk to themselves, incur additional indebtedness, and repeat the process *toties quoties*. We have been furnished with no direct authority on the point now being adjudged. Counsel, however, cite *Stone v. Chisolm*, 118 U. S. 302, 28 L. ed. 991, where it appears that the indebtedness with which the directors were sought to be charged under a North Carolina statute was a registered bonded indebtedness; but the precise point raised here

was not presented or decided. We think this section of the charter of the car-wheel company is unambiguous, and the term "indebtedness" clearly includes the bonded debt.

It is insisted by defendants' counsel that the directors' liability does not constitute a fund for the benefit of creditors generally, but that it is a specific liability in favor of individual creditors whose debts were illegally contracted, and that other creditors, whose debts were legally contracted, cannot avail themselves of it. That proposition is true, but in conceding this we do not wish to be understood as agreeing that each creditor whose debt has been illegally contracted may maintain a separate suit against the directors for the assertion of his individual claim. We held in *Moulton v. Connell-Hall McLeester Co.* 93 Tenn. 377, that the liability of the directors is a fund created by the statute for the benefit of all the creditors whose debts were incurred in excess of the capital stock paid in with the assent of directors, and that the bill must be filed for the benefit of all creditors so situated. In this view the present bill is properly framed. *Hornor v. Henning*, 93 U. S. 231, 23 L. ed. 879; *Stone v. Chisolm*, 113 U. S. 302, 28 L. ed. 991; *Pollard v. Bailey*, 87 U. S. 20 Wall. 520, 22 L. ed. 376. In *Stone v. Chisolm*, 113 U. S. 302, 28 L. ed. 991, Justice Matthews, in stating the reason of the rule, said, *viz.*: "The conditions of the personal liability of the directors of the corporation, expressed in the statute, are that there shall be debts of the corporation in excess of the capital stock actually paid in, to which the directors sought to be charged shall have assented. . . . To ascertain the existence of the liability in a given case requires an account to be taken of the amount of the corporate indebtedness, and of the amount of the capital stock actually paid in—facts which the directors, upon whom the liability is imposed, have a right to have determined, once for all, in a proceeding which shall conclude all who have an adverse interest, and a right to participate in the benefit to result from enforcing the liability. . . . The evident intention of the provision is that the liability shall be for the common benefit of all entitled to enforce it according to their interest; an apportionment which, in case there cannot be satisfaction for all, can only be made in a single proceeding to which all interested can be made parties. . . . It is immaterial," continues the court, "that in the present case it does not appear that there are other creditors than the plaintiffs in error. There can be but one rule for construing the section, whether the creditors be one or many."

The next assignment is that the chancellor erred in decreeing that all the debts of the company contracted after April 30, 1885, were created with the assent of the directors. It may be conceded that this assignment presents a question of some difficulty, and probably the determining issue in the case. The language of the statute is *viz.*: "If the indebtedness of said company shall at any time exceed the capital stock paid in, the directors assenting thereto shall be individually liable to the creditors for said excess." It may be remarked that this clause is peculiar to charters of mining and manufacturing companies, and is a

discrimination, to some extent, against this class of domestic corporations. It has been uniformly held that such statutes, being in derogation of the common law, must be strictly construed. As stated by Mr. Cook in his work on Stock & Stockholders: "They [such statutes] are a wide departure from established rules, and, though founded on considerations of public policy and general convenience, are not to be extended beyond the plain intent of the words of the statute." *Hind v. Cole*, 88 Tenn. 402, 403, 7 L. R. A. 96; 2 Spelling, Priv. Corp. § 921; *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 62, 63. Says Mr. Thompson, in his *Commentaries on Private Corporations*, vol. 3, § 4271: "It is a principle of legal procedure that when a party sues to enforce a liability created by a statute in derogation of the common law, he must not only distinctly aver, but he must make strict proof of, a case within the terms of the statute. The principle operates, if possible, more strongly where, as in the cases under consideration, the statute creates a liability in the nature of a penalty. The principle is believed to be a rule of right rather than a rule of procedure, and hence applicable in the equitable, as well as in the legal, forum." Where the liability is imposed upon "the directors assenting thereto," the creditor . . . must both allege and prove that the directors against whom he proceeds did assent to the unlawful contract." 3 Thomp. Priv. Corp. § 4266. Again, the same author, at § 4264, says: "On the other hand, where the liability . . . is 'for the excess,' an interpretation has been fallen into which assimilates their liability to that of guarantors of final payment, which is believed to comport best with the real policy of all such statutes, by holding that the effect of the statute is to make the directors individually liable for such specific debts only as were contracted with their assent in excess of the paid-up capital, and which remained unpaid after the exhaustion of the corporate assets."

These principles have all been recognized and applied by this court in the case of *Allison v. Coal Creek & N. R. Coal Co.* 87 Tenn. 62. The liability of a director is contingent, and is made to depend upon four conditions, namely: First, assent by him to the creation of the particular debt upon which he is sued; second, that the debt has not been paid; third, that the assets of the corporation have been exhausted; fourth, that the particular debt is in excess of the capital stock. Judge Lurton, in delivering the opinion of this court in *Allison v. Coal Creek & N. R. Coal Co.* said: "Unless the very debt upon which it is sought to hold the director to individual liability was created by the assent of the director, it is not the case provided for by the charter." The cardinal inquiry, then, upon this branch of the case is whether there is proof in this record of assent by the directors to the creation of the particular debts for which the directors are sought to be held individually liable under this statute. It is insisted by counsel for the directors that the assent contemplated by the statute must be given by the directors, not as individuals, nor even as stockholders, but in their capacity as directors. We are constrained to believe, upon mature consideration, that this construction is

the proper one to be given this statute. This construction accords with the general rule that directors must act as an official body. Mr. Cook, in his work on Stock & Stockholders, states the rule thus: "Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting, and thereby bind the corporation. Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation. A single director has no power to contract for the corporation." 2 Cook, Stock & Stockholders, & Corp. Law, § 712. So we think, when it is sought to hold a director to individual liability under the provisions of this highly penal statute, it must be shown that his assent was given in his capacity as director, acting concurrently with a majority of the official board. We do not hold that the only evidence of this official assent must be found in the minutes of the board, but we do hold there must have been an official meeting when assent was given, whether it appears in the minutes or otherwise. In other words, we hold the official minutes do not constitute the only evidence of official assent, provided it is made otherwise to appear that at a meeting of the official body the directors sought to be charged assented to the creation of the particular debt. Tested by this rule, we find, upon an examination of the record, that only one of the debts with which the directors are sought to be individually charged was officially assented to, namely, that in favor of Peter Staub for lease of foundry.

It is next assigned as error that the chancellor refused any relief against the directors on account of the payment of dividends amounting to \$28,000. It is contended by counsel that said dividends were paid at a time and under circumstances that rendered the payment unlawful, and was a diversion of the assets of the corporation. The charter of this company provides, *viz.*: "If the directors declare and pay any dividend when the company is insolvent, or which declaration of a dividend would diminish the amount of the capital stock, they shall be jointly and severally liable to creditors for the amount of dividends thus declared. Any director may avoid liability by voting against the dividend or by filing his objections in writing as soon as he ascertains a dividend has been made." The dividends in question were paid, *viz.*: April 30, 1884, 4 per cent, \$4,280; April 30, 1886, 4 per cent, \$4,280; April 30, 1887, 4 per cent, \$4,280; April 30, 1888, 4 per cent, \$4,280; April 30, 1889, 5 per cent, \$5,350; April 30, 1890, 6 per cent, \$6,420. It is insisted that the first dividend, paid April 30, 1883, was paid out of the proceeds of the bonds which had been sold by the company at a discount of 22 per cent, and that the remaining dividends were paid at a time when the corporation was insolvent, and when its indebtedness exceeded the amount of its paid-up capital stock. The chancellor, upon the hearing, was of opinion that the directors were warranted in the payment of these dividends, and that the defendants were not liable to the creditors of the corporation. It is true, as argued by counsel, that when these dividends were declared the indebtedness of the

corporation did exceed the amount of capital stock paid in; but under the statute last cited this fact does not determine the liability of directors. The inhibition of the statute is against declaring dividends when the company is insolvent, or when such dividends will diminish the amount of the capital stock. If the assets are reasonably worth, or are honestly believed to be worth, largely more than the company's indebtedness, and upon this basis profits are estimated, the company is not insolvent, although its indebtedness may exceed its capital stock paid in. The record discloses that when these dividends were declared this company was engaged in a very extensive business, and was realizing large receipts from the sale of the products of its manufacture. Its assets were estimated by its directors to be largely in excess of the company's liabilities, and the proof shows that said assets, which consisted largely of mineral lands, were largely more valuable then than at a later period. The proof indicates that during the years covering the declaration of dividends the company was realizing a net profit on its business, and there was no reason why those profits should not have been distributed among its stockholders. The conduct of the directors is to be viewed in the light of the financial status of the company at that period, and is not to be determined by its ultimate insolvency, precipitated, doubtless, by the universal paralysis of business then prevailing throughout the country. When the large volume of business transacted by this company is considered, it is not perceived how its insolvency could have been superinduced by the small dividends declared. We are of opinion there was no error in the action of the chancellor upon this branch of the case.

The next matter for consideration arises upon the answer and cross bill of Peter Staub. As a creditor of the car-wheel company, Staub, on May 13, 1892, became a party to the original proceedings, and filed an answer, in which he admitted the material allegations of the bill. His answer was also filed as a cross bill, in which it was alleged that on December 31, 1890, he leased to the car-wheel company his foundry property on Hardee street, in the city of Knoxville, for a term of five years, at a rental of \$4,000 per annum, payable in monthly installments of \$333.33. It is then alleged that the company is indebted to him in the sum of \$1,500 on account of accrued rents, which he seeks to recover, and also asks a decree for the rents for the unexpired term as the same mature. It is further alleged that the directors of the company assented to the lease, and are individually liable to him, for the reason that at the time this lease was contracted the indebtedness of the company exceeded its paid-in capital stock. Complainant in the cross bill also joined in the prayer of the original bill for the appointment of a receiver. It further appears that on November 28, 1892, Staub filed a petition in said cause, stating that by reason of nonuser the foundry property was getting out of repair, and asking that proper repairs be made by the receiver. Petitioner further prayed that the leasehold be sold, alleging that the value of the lease was being deteriorated each day. It further appears that upon motion

of counsel for Staub the chancellor allowed as a preferred claim all rents accrued and accruing upon the leasehold property from May 10, 1892, date of appointment of temporary receiver, up to date of confirmation of sale of leasehold, which the receiver was ordered to pay out of any funds in his hands belonging to the company. In accordance with the decree of the chancellor, the unexpired term of the lease was sold by the clerk and master, and purchased by the Clark Foundry & Machine Company at the price of \$4,500. This amount not being sufficient to discharge balance of rent for the unexpired term, the chancellor decreed that the company should be liable for the difference between the amount realized from the sale of the leasehold and the sum contracted to be paid in the lease, and he accordingly pronounced a judgment against the company for this deficit, amounting to the sum of \$3,600. Two assignments of error are based upon the action of the chancellor in his disposition of the matters presented in this lease. The first is that he erred in decreeing that the car-wheel company was indebted to Peter Staub in the sum of \$3,600 on account of the unexpired term of the lease; that this unexpired term had been sold to the Clark Foundry & Machine Company, and the purchaser became obligated with the payment of the entire rental. We think the proposition embodied in this assignment, that the purchaser, after buying the unexpired term of the lease at chancery sale, should nevertheless be charged with the contract rental of the original lease for balance of term, carries on its face its own refutation. The second assignment is that the court erred in holding that the rents accruing from the Staub lease after the appointment of the receiver up to date of confirmation of sale of leasehold constituted a first charge upon the funds and property in the receiver's hands, and ordering same paid as an expense of the receivership. In support of this assignment counsel for appellant argue that complainant Staub became a party to the original bill in this cause by which the car-wheel company was enjoined from prosecuting its business or using its leasehold property, and had a permanent receiver appointed, and the leasehold sold; in a word, that the possession and holding of the leasehold estate from May 10, 1892, until it was sold, and sale confirmed, was all done at the instance and for the benefit of Staub, the lessor. It is contended, however, by counsel for Staub, that the receiver took possession of the property, and proceeded to rent some of it to tenants. The evidence wholly fails to show any renting of the property by the receiver, nor is there any proof that the receiver has ever charged or received any rent for such occupation. At most the record shows that one or two persons were permitted to occupy a part of the premises temporarily. As suggested by counsel, for aught that appears in this record, "this temporary use may have been for the protection and preservation of the property." It

31 L. R. A.

is insisted by counsel that such temporary occupation of the property by permission of the receiver would not be an adoption of the lease by the receiver, so as to bind the assets in his hands. Again, it is insisted that the receiver had no authority to adopt this lease, and, even if he had attempted to do so, it would not bind the complainant or the creditors. It is then suggested that complainant Staub in none of his pleadings had ever claimed that the receiver was liable for the rents, or that he had adopted the lease. "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property." *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 34 L. ed. 341. As observed in another case: "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court: and, by special authority, may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned. If the order of the court, under which the receiver acts, embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become assignee of the term, in any proper sense of the word. He holds that, as he would hold any other personal property involved,—for and as the land of the court, and not as assignee of the term." *Gaither v. Stockbridge*, 67 Md. 222; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 86, 36 L. ed. 633. "In order to bind a receiver, or one standing in a like relation to a leasehold estate, for rents, he must elect to accept the lease, and he thereby becomes vested with the title to the leasehold interest." *Re Otis*, 101 N. Y. 585. We infer, from briefs of counsel filed in this cause, that the chancellor allowed these rents to Staub as a preferred claim upon the idea that they were properly chargeable to the receiver as an operating expense. We find nothing in the record to warrant such an assumption; nor is there any basis for the other contention,—that there was in fact an adoption of this lease by the receiver. In our opinion, the action of the chancellor in allowing as a prior charge upon the funds in the hands of the receiver rents that accrued from the appointment of the receiver until the confirmation of the sale of the leasehold was clearly erroneous.

The result is that complainants are entitled to a decree against Staub on his refunding bond for the rents so improperly allowed him.

The decree of the chancellor in the particulars herein indicated will be modified, but in all other respects affirmed.

J. J. ANDERSON *et al.*, *Appts.*,

v.

George E. MILLER and Wife.

(.....Tenn.....)

1. **The right of the owner of property destroyed by fire to recover damages** from another by whose fault it was burned is, as against the defendant, unaffected by the fact that he may have already received full payment for his loss by insurance, and that the insurer is entitled to be subrogated to the claim.
2. **The unauthorized storage of cotton by a tenant in a building** hired for the storage of vehicles makes him liable for injury resulting to the building by fire which is due to the more dangerous nature of the cotton.
3. **The measure of damages for partial destruction of a building** is the reasonable cost of restoring it so that it will be as valuable as it was before, considering its age and depreciation; and it is not the cost of a new building the same as that destroyed.
4. **The proximate cause of damages to a building by fire** when cotton is stored therein without right is the storage of cotton therein, if except for that the fire could have been extinguished with little or no damage.

(January 17, 1896.)

APPEAL by defendants from a judgment of the Circuit Court for Davidson County in favor of plaintiffs in an action brought to recover loss caused by fire alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Robert L. Morris, for appellant Anderson, and **Messrs. Steger, Washington, & Jackson**, for appellant Grantland;

Upon payment by the insurers of a loss by fire communicated from the locomotive engine of a railroad the assured became a trustee for the insurers, and they might bring an action in his name against the railroad company which he could not release.

Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719.

The insurance company having paid the loss, the debt is not thereby extinguished, but the company is subrogated to all rights of the mortgagee against the mortgagor, and may compel the assignment of the debt and mortgage to it.

Concord Union Mut. F. Ins. Co. v. Woodbury, 45 Me. 452; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 501, 10 L. ed. 1047; *State Mut. F. Ins. Co. v. Updegraff*, 21 Pa. 518; *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Honore v. Lamar F. Ins. Co.* 51 Ill. 410.

The question of "proximate cause" is one

for the decision of the court where there is no room for doubt.

Pike v. Grand Trunk R. Co. 39 Fed. Rep. 255; *Hathaway v. East Tennessee, V. & G. R. Co.* 29 Fed. Rep. 489.

No one is held responsible for all the consequences of his acts or defaults, but for those only which the law considers the natural consequences.

5 Am. & Eng. Enc. Law, p. 5; 1 Sutherland, Damages, § 56.

The wrong done and the injury sustained must bear to each other the relation of cause and effect.

Warwick v. Hutchinson, 45 N. J. L. 61; 2 Greenl. Ev. §§ 524-526; Sedgw. Damages, 31; Sutherland, Damages, 2d ed. § 34; *McGrew v. Stone*, 55 Pa. 436; *Fairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *People v. Albany*, 5 Lans. 524; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070.

No case can be found where a mere accident or event not resulting naturally from the act done by the defendant has been held sufficient to constitute a valid claim for damages.

Vedder v. Hildreth, 2 Wis. 427.

One is not liable if it be found that the result was not under the circumstances to have been reasonably expected by an ordinarily prudent man.

Atkinson v. Goodrich Transp. Co. 60 Wis. 141, 50 Am. Rep. 352; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Scheffer v. Washington City, V. M. & G. S. R. Co. supra*; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Schmidt v. Mitchell*, 84 Ill. 195, 25 Am. Rep. 446; *Eames v. Texas & N. O. R. Co.* 63 Tex. 660; *Campbell v. Stillwater*, 32 Minn. 308, 50 Am. Rep. 567; *Louisville & N. O. R. Co. v. Guthrie*, 10 Lea, 432; Sutherland, Damages, § 34; *Bennett v. Lockroot*, 20 Wend. 223, 32 Am. Dec. 532; *Craigne v. Petrie*, 6 Hill, 523, 41 Am. Dec. 765; *McGrew v. Stone*, 53 Pa. 436.

Where two causes concur to produce an effect, and it cannot be determined which contributed most largely or whether without the concurrence of both it would have happened at all, and a particular party is responsible only for the consequence of one of the causes, a recovery cannot be had.

Marble v. Worcester, 4 Gray, 395; *Lerie v. Jensen*, 12 East, 648.

The rule of damages is the value of the property lost, and not the cost of replacement. May, Ins. § 423; *Steward v. Phoenix Ins. Co.* 5 Hun, 261.

Messrs. Nolen & Slemons and Henderson & Eggleston for appellees.

Wilkes, J., delivered the opinion of the court:

This is an action for damages growing out of a fire upon premises belonging to plaintiffs, Miller and wife, but occupied by Anderson,

NOTE.—The above case is one of the few which have directly decided that the existence of insurance or the payment of a loss by insurers constitutes no defense to an action by the owner of property for tort or negligence causing its destruction or loss. The other cases are believed to sustain the present decision without conflict, while the 31 L. R. A.

principle of the decision is necessarily recognized in that large number of cases which establish the right of subrogation in favor of the insurer against the person causing the loss. For some of these, see note to Insurance Co. of N. A. v. Easton (Tex.) 3 L. R. A. 424.

and by Grantland as lessee or tenant under Anderson. The cause was tried before the court and jury, and judgment rendered for plaintiffs for \$1,700, and defendants have appealed, and assigned errors.

It appears that Anderson and Mrs. Miller owned adjoining store or business houses in Nashville, the buildings being only a few inches apart; the roofs coming down together, and being drained by the same gutter. In August, 1891, Anderson, being pressed for room in his building, rented Mrs. Miller's building, or a part of it, from her agent for the purpose of storing his buggies and carriages on the first floor. It is a matter of some controversy whether he was to have the use of the basement and second story, or only the first; and this question was submitted to the jury under a proper charge. However this may be, he subrented to Grantland the basement and second story for the storage of cotton, and it was occupied by him for this purpose from November, 1891, to February 24, 1892, so far as the record discloses, without the plaintiffs' knowledge. At that date a fire originated in Anderson's house or factory, completely destroying it, as well as the roof and part of the second story floor and the rear windows and frames of Mrs. Miller's house. Mrs. Miller's building was fully insured, and she collected from the insurance company \$2,420 in full of her loss. She used \$1,980.50 of this amount to repair her building, making it as valuable as before the fire. She then sued Anderson and Grantland, averring that Anderson only rented the first story of her building for storing buggies, etc., and he and Grantland had wrongfully taken possession of the second story, and permitted cotton to be stored therein, by reason of which fact fire was conveyed into the second story from the Anderson building, and burned the floor and roof, and made it difficult and well nigh impossible to extinguish the fire, so that the floor and roof were destroyed. A separate count admits the rightful possession of the second story, but alleges that cotton, a highly inflammable substance, was stored therein contrary to express agreement. Several pleas were filed, both general and special. Among the latter, it was set up that plaintiff had been already paid the full value of her house by the insurance company, and that the insurance company was subrogated to all of plaintiff's rights of action. These pleas were, on motion, stricken out as insufficient, and this is assigned as error. It is also assigned as error that the trial judge committed an error in his charge to the jury, which will be fully considered hereafter. It is also assigned as error that the court charged that the measure of damages was the reasonable cost of restoring property to its former condition. Other errors are assigned, which are not material, and need not be specially considered, except that the court charged the jury that the rights of Grantland were measured by those of Anderson, because it was through him he occupied the premises.

In regard to the proper parties to the action, we do not think the assignment well taken. If it be conceded that the insurance company, having paid the entire fire loss, is now entitled to be subrogated to the rights of the insured, 31 L. R. A.

as against the tortfeasor, or to recover back from him the amount he recovers, still it does not prevent a recovery in the name of the insured for the damages sustained. The question of who will be entitled to the proceeds of the recovery,—the insurer or the insured,—is a matter between them, and constitutes no defense to an action for the damages, caused by the wrong, which, in any event, must be brought in the name of the owner and insured, although it might be for the use of the insurer. 24 Am. & Eng. Law, pp. 308-330; *Perrott v. Shearer*, 17 Mich. 48, 55, 58; *Clark v. Wilson*, 103 Mass. 219-227, 4 Am. Rep. 532; *Hayward v. Culin*, 105 Mass. 218; *Weber v. Morris & E. R. Co.* 35 N. J. L. 409, 10 Am. Rep. 253; *Mason v. Sainsbury*, 3 Dougl. 61; *Yates v. Whyte*, 4 Bing. N. C. 272; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 453; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 501, 10 L. ed. 1047; *State Mut. F. Ins. Co. v. Updegraff*, 21 Pa. 518; *Kernochan v. New York Bowery F. Ins. Co.* 17 N. Y. 428; *Honore v. Lamar F. Ins. Co.* 51 Ill. 410; *Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618.

In *Perrott v. Shearer*, 17 Mich. 48, the defendant, a sheriff, wrongfully levied on goods, the property of the plaintiff, assignee. The assignee had insured said goods, and they were destroyed while in the possession of defendant sheriff. In an action to recover the value of the goods, the defendant pleaded that the plaintiff had been paid value of same by the insurance company. Cooley, Ch. J., delivered the opinion of the court, and said: "He [the defendant] is found to be a wrongdoer in seizing the goods, and he cannot relieve himself from responsibility to account for their full value, except by restoring them. He has no concern with any contract the plaintiff may have with any other party, in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he run when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is therefore entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is therefore justly entitled to no return. The case, we think, is within the principle of *Merrick v. Brainard*, 38 Barb. 574, which appears to us to have been correctly decided. The plaintiff recovers of the defendant for the wrong that has been done him in taking his goods; and he recovers of the insurance company a large sum for a small outlay, because such payment was the risk they assumed, and for which they were fairly compensated. It

is not a question of importance in this inquiry, whether the act of the defendant caused the loss or not. His equitable claim to a reduction of damages, if he could have any, would spring from the fact that the plaintiff recovers pay for his property twice; but the answer to this is that he recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities." *Perrott v. Shearer*, 17 Mich. 55, 56.

Clark v. Wilson, 103 Mass. 219, 4 Am. Rep. 532, was an action for wrongful conversion of a boat. Plaintiff had received from an insurance company the full value of the vessel, but sued the defendant for conversion. It was pleaded that plaintiff had received from an insurance company full value of the vessel, and that therefore the right of action, if any, was in the insurance company. The court said: "The result is that, allowing to the abandonment made by the plaintiffs, and the recovery and payment of a total loss, the full effect, for which the defendant contends, of an abandonment by an absolute owner, and payment of a total loss to him, they did not defeat the right to bring an action at law in the name of the plaintiffs for the tort previously committed against them. The question whether the damages recovered will belong to them or to the insurers is a question in which the defendant has no interest, and which is not now in issue." *Clark v. Wilson*, 103 Mass. 227, 4 Am. Rep. 532.

In *Weber v. Morris & E. R. Co.* 35 N. J. L. 409, 10 Am. Rep. 253 (action of insured against a railroad company for the benefit of an insurance company, the insurance company having paid the amount of loss), the court said: "Notwithstanding such payment, an action will lie by the insured against the railroad company. The insurance is to be treated as a mere indemnity, and the insured and insurer regarded as one person; therefore payment by the insurer before suit brought cannot affect the right of action. In *Mason v. Sainsbury*, reported in 3 Dougl. 61, suit was brought on the riot act to recover damages for the demolition of a house in the riots of 1780. The property having been insured in a fire office, which paid the loss, the action was in the name of the insured, for the benefit of the insurance office. Lord Mansfield held that payment by the insurer was not in case of the hundred, and not as co-obligors, and that the case must be considered as if not a farthing had been paid. 'He likened it to the case of abandonment in marine insurance, where the insurer is constantly put in the place of the insured.' Chief Justice Abbott, in citing the case of *Mason v. Sainsbury*, in *Clark v. Inhabitants of the Hundred of Blything*, 2 Barn. & C. 254, says he could not entertain any doubt of its propriety; and he held that where the owner of certain stacks of hay and corn, which were maliciously set on fire, received the amount of his loss from the insurance office, he might,—nevertheless, maintain his action against the hundred. In *Yates v. Whyte*, 4 Bing. N. C. 272, which was the case of a collision at sea, the plaintiff recovered his whole loss, notwithstanding his prior recovery of a portion of it 81 L. R. A.

from the underwriters, the court saying that the plaintiff would hold in trust for the underwriters such portion as they had paid him. These cases are referred to and their authority recognized, by Chief Justice Shaw, in *Hurt v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719, and in *Monmouth County Mut. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107, this rule is said to be settled." *Weber v. Morris & E. R. Co.* 35 N. J. L. 413, 10 Am. Rep. 253.

In *Hayward v. Cain*, 105 Mass. 213 (action by insured against the defendant for maliciously setting fire to plaintiff's building), the plaintiff received amount of damage from insurance company. The court said the transactions between the insurers and the owners of the property injured were matters in which the wrongdoer had no concern, "and which do not affect the measure of his liability."

In regard to the measure of damages the charge of the court was correct in directing the jury that it would be the reasonable cost of restoring the property to its former condition. This does not mean, as argued by counsel, that it was the cost of a new building, the same as that destroyed, and the jury could not have so understood it; but the proper construction was that the building, as restored, should be of equal value to that destroyed, taking age and depreciation into consideration,—in other words, to reinstate plaintiff as before the fire. The jury was told, in express terms, that no recovery could be had if Anderson rented the entire building, or had permission to store cotton therein, or that such storage was the ordinary and usual use of the building.

The only other question material to be considered is whether the act of the defendants in storing the cotton in the house was the proximate cause of the loss, and whether the charge of the court upon this point was misleading or not. It is insisted that the proximate cause was the fire which originated on Anderson's premises, and, no negligence of defendants being shown in connection therewith, defendants would not be liable. On the other hand, it is insisted that this fire would not have communicated to plaintiffs' house but for the cotton stored therein, and hence this storage was the proximate cause of plaintiffs' loss, and not the fire originating elsewhere. The definitions of "proximate cause" are easily given in general terms, but they are very difficult in practical application to the facts of each particular case. There is, however, a marked distinction between the proximate cause of an accident, and the proximate cause of the injury resulting from the accident. This is illustrated in the case of *Deming v. Merchants Cottonpress Storage Co.* 90 Tenn. 553, 13 L. R. A. 518, in which the court said: "It is true that the fire destroyed the cotton, and in that sense caused the loss, but it appears that, notwithstanding the occurrence of the fire, the cotton would not have been burned by it had not the breaking of the train while it was being removed happened so that, but for this fact, the cotton would have been saved. This [the breaking of the train] must therefore be held to be the proximate cause of the loss, and, if it was the result of negligence, the carrier must answer for it." In *East Tennessee, V. & G. R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A.

691, goods were consumed by fire which was not the result of defendant's negligence, but the goods would never have become exposed to the fire but for the negligent failure and refusal to deliver the goods on demand previous to the fire; so that, while the fire caused the loss, the failure to deliver caused the injury. In *Postal Tel. Cable Co. v. Zopff*, 93 Tenn. 374, the same distinction is illustrated, where the fall of a young girl was caused by the slippery condition of a walk way, but the injury proximately resulted from the telegraph company negligently leaving its pole where she fell upon it, and received an injury which would not have resulted but for the presence of the pole, even though she had fallen. In that case a hypothetical case is put, to further illustrate the distinction of a person falling upon an ice-covered pavement into an open cellar. In such case the ice is the cause of the fall, but the open cellar may cause an injury which, but for it, would not have occurred. This case collates many authorities recognizing and enforcing the same distinction. *Id.* 93 Tenn. 375. With this distinction in view, the question of liability of defendants is easily solved. The jury were properly instructed, in regard to Anderson's rights under his rental agreement, that if he rented the premises with the understanding that he might store cotton in them, or such storage was a reasonably safe use of the premises,—attended with no more danger than the purposes to which he intended to put them,—then the defendants would not be liable, but if the storing of cotton was a more dangerous use than the storing of vehicles, for which he rented the premises, or if he occupied the premises without authority for any purpose, then he would be liable for the injury which resulted. The jury evidently found this contention unfavorable to Mr. Anderson, and the record justifies and warrants such finding.

The only question remaining is, Did this unauthorized storage of cotton on the premises proximately cause the injury? The court instructed the jury that "if they found the fire was not communicated to plaintiffs' house by the cotton, but that the inflammable nature thereof prevented the firemen from being able to extinguish the fire, and that it could have been extinguished, but for the presence of this cotton, with little or no damage to the property, then the plaintiffs are entitled to recover such damages as immediately and proximately resulted therefrom." In connection with this he further said: "If you find that the cotton was the proximate cause of the burning of the plaintiffs' house, in being the means without which the fire would never have been communicated to plaintiffs' house, then plaintiffs can recover. On the other hand, if you find that the cotton did not, in the first instance, communicate the fire to plaintiffs' building, and that it was not the proximate cause of the burning of the house, and if you further find that it did not operate as the efficient cause

which prevented the firemen from extinguishing the fire in time to save the building, but simply intensified the flame and smoke of the burning building, or if you find that substantially the same damage would have resulted to plaintiffs' property, even though there had been no cotton stored therein, then plaintiffs cannot recover for any damage to the building on account of said fire. So if the fire accidentally originated in the adjacent building, and this accidental fire was the proximate cause of the injury to plaintiffs' building, then plaintiffs cannot recover therefor. By 'proximate cause,' as used in the foregoing instructions to you, and as elsewhere used in this charge, is meant the efficient, controlling event or act that produced the injury,—the act or event which, without any intervening cause, brought about the injury complained of." This charge is altogether fair and favorable to the defendants. We think the court might even have said that if defendants had put their premises to an unauthorized use, by storing inflammable material therein, then they would have been liable for a fire, no matter when or how originating, if it communicated to the building by reason of the presence of such material, and would not have communicated with or injured the building but for the presence of the inflammable, unauthorized material stored. Here the wrong consisted and the injury resulted from the storage (unauthorized) of inflammable material where it was liable to be reached by a fire, no matter when or how originating, in adjoining premises, and which would have been harmless to this building but for the unauthorized presence of this inflammable material. The principle would have been the same if benzine, naphtha, gunpowder, or other easily inflammable or combustible material had been stored, without permission, where it could be reached by a fire which would not have communicated with other, less inflammable material, or could have been more easily controlled or prevented.

The court charged the jury that the rights of Mr. Grantland were to be measured by those of Anderson, because it was through him that he occupied the premises. This is correct, and the jury no doubt understood that his liability, as well as his right, was commensurate with that of Anderson, so far as plaintiffs were concerned. Although Mr. Grantland may have rented in good faith, believing that Anderson had the right to sublet to him, still the fact remains that he, as well as Anderson, was a trespasser and wrongdoer; and Anderson could no more authorize Grantland to put the premises to an unwarranted use than he could put them to such use himself, and both stand upon the same ground of liability to the plaintiffs. *Smith v. East End Street R. Co.* 87 Tenn. 636; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 523, 4 L. R. A. 622.

We find no reversible error in the record, and the judgment of the court below is affirmed, with costs.

MAINE SUPREME JUDICIAL COURT.

George O. DANFORTH

v.

Etta M. DANFORTH.

(88 Me. 120.)

A divorce from a wife for "utter desertion continued for three consecutive years" may be granted under Rev. Stat. chap. 80, § 2, where she deserts her husband and remains away from him for the full period continuously, and unreasonably refuses to return, although once during that time he visited her and for two or three nights occupied the same bed with her.

(June 5, 1895.)

REPORT by the Superior Court of Kennebec County for the opinion of the Supreme Judicial Court of a question arising in a divorce suit upon the alleged ground of desertion as to whether the period of desertion had been uninterrupted. *Ruling in plaintiff's favor.*

The case sufficiently appears in the opinion.

Mr. W. T. Haines, for libellant:

Desertion means a breaking off of cohabitation, and one, two, or even three instances of intercourse should not work to renew cohabitation in marital relations, when all other conditions show it to remain completely broken off with intention of perpetual desertion.

Stewart v. Stewart, 78 Me. 549, 57 Am. Rep. 822.

To establish desertion, three things are necessary, first, cessation from cohabitation (to live together as man and wife) continuing the necessary time; second, the intention in the mind of the deserter not to resume cohabitation; third, the absence of the other party's consent to the separation, or conduct justifying the same.

Southwick v. Southwick, 97 Mass. 327, 98 Am. Dec. 95; *Reid v. Reid*, 21 N. J. Eq. 331; *Steele v. Steele*, 1 MacArth. 505.

Although the parties are apparently together for a time, this is not a renewal of cohabitation if the intention of desertion continues.

Kennedy v. Kennedy, 87 Ill. 250; *Meldowney v. Meldowney*, 27 N. J. Eq. 328; *Gaillard v. Gaillard*, 23 Miss. 152; *Rie v. Rie*, 34 Ark. 37.

Messrs. W. H. Newell and W. N. Judkins for libellee.

NOTE.—The general subject of divorces for desertion was considered in a note to *Herold v. Herold* (N. J.) 9 L. R. A. 696. See also, as to what constitutes desertion, *Williams v. Williams* (N. Y.) 14 L. R. A. 220.

For refusal of marital intercourse as desertion, see *Fritts v. Fritts* (Ill.) 14 L. R. A. 685, and note. 31 L. R. A.

Walton, J., delivered the opinion of the court:

The question is this: If a wife deserts her husband, and remains away from him for three consecutive years, and during all that time continuously and unreasonably refuses to return, will the fact that, within the three years, her husband once visited her and occupied the same bed with her for two or three nights, necessarily interrupt the desertion, and bar his right to a divorce for that cause?

We think not. Desertion, such as will be a valid cause for a divorce, is not easily defined. *Stewart v. Stewart*, 78 Me. 548, 57 Am. Rep. 822, and cases there cited. And it may be equally difficult to define what will constitute an interruption or condonation of desertion. The authorities are conflicting and confusing.

In *Kennedy v. Kennedy*, 87 Ill. 250, where a wife, without justification, refused to go to a new home which her husband had prepared for her, and remained away for the statutory length of time necessary to create a valid ground for divorce, the court held that the fact that, on one occasion, he cohabited with her at her brother's house, did not interrupt the desertion or bar his right to a divorce.

And we have reached the same conclusion. "Utter desertion, continued for three consecutive years," is one of the causes for which a divorce may be granted. Rev. Stat. chap. 80, § 2. And we think that if a wife deserts her husband, and remains away from him for the full period of three consecutive years, and, during all that time, continuously and unreasonably refuses to return, his right to a divorce is complete, and cannot be defeated by proof that on one occasion, within the three years, he visited his wife, and, for two or three nights, occupied the same bed with her.

Such a visit is not illegal or improper. On the contrary, it has often been held to be the duty of the husband to visit his absent wife, and to endeavor by all proper means to effect a reconciliation. If he succeeds, and his wife returns to her home, and to her duties as his wife, undoubtedly her prior desertion will be interrupted or regarded as condoned, and cannot be added to a subsequent desertion for the purpose of completing the three years necessary to entitle her husband to a divorce. But if, in spite of his efforts, his wife persistently and unreasonably refuses to return, and continuously remains away from him for three consecutive years, we think her husband's right to a divorce is complete; that the mere fact that on one occasion he visited her, and for two or three nights occupied the same bed with her, does not interrupt the continuity of her desertion.

Case remanded, for further hearing in the court below.

ARKANSAS SUPREME COURT.

RICE, STIX, & COMPANY *et al.*, *Appls.*,
v.
WOOD & HENDERSON.

(.....Ark.....)

1. Sureties on an indemnity bond to a sheriff to cause him to levy an attachment may

be held liable as principals to the owners of the property attached if the attachment is wrongful.

2. It is not fraud for one creditor to try to keep another ignorant of a trade he is seeking to make with the debtor for no other purpose than his own protection.

3. Refusal of an instruction as to how far intent constitutes fraud is not reversible error if

NOTE.—Participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors.

I. Necessity of participation; general doctrine.

II. Who are bona fide purchasers within the statute.

III. What constitutes participation.

a. Generally.

b. Securing a preference.

c. Knowledge of fraud, insolvency, etc.

d. Assumption of other debts as part of purchase price.

e. Amount of property taken.

f. Allowance of fair price.

g. Security greater in value than debt.

h. Security for overstated debt.

i. Security for present and future advances.

j. Inclusion of simulated debts.

k. Reservation of benefits.

l. Taking conveyance fraudulent on its face.

m. Retention of possession.

n. Failure to record.

o. Other circumstances and conditions tending to show participation.

IV. Participation by agent.

V. Participation as between trustees and beneficiaries.

VI. Participation by one of several beneficiaries.

VII. Effect of other accompanying purposes besides that to defraud.

VIII. Effect of relationship or intimacy of the parties.

IX. Conveyances taken from a fraudulent grantee.

X. Presumptions and burden of proof.

XI. Participation under bankruptcy and insolvency laws.

I. Necessity of participation; general doctrine.

The statute of 13 Eliz. chap. 5, made perpetual by 29 Eliz. chap. 5, which is the last of a series of statutes on the subject, though repeatedly held and stated to be merely declaratory of the common law, seems to be regarded as the foundation of all the modern law of fraudulent conveyances. It declares all conveyances or other disposition of property, real or personal, made with the intention of defrauding creditors, to be null and void as against them, with the proviso that nothing therein contained shall extend to defeat any estate or interest made on good consideration and bona fide to any person having at the time no notice of such fraud. It is still in force in England and has been re-enacted in Ireland and has been adopted by a number of the American states including Maine, New Hampshire, Massachusetts, Delaware, Pennsylvania, Maryland, and Iowa, while the statutes of the other states are modeled after it and are in the main simply a re-enactment of it.

Under these statutes the rule may be said to be practically universal, that a transfer by a debtor to a creditor in payment of his claim, made with intent upon the part of the vendor to hinder, delay, or defraud his other creditors, participated in by the purchaser, is invalid as against such creditors.

This rule was adopted by *Twyne's Case*, 3 Coke, 31 L. R. A.

80b, 1 Smith, Lead. Cas. 1, decided in 1801, which is a leading case with relation to fraudulent conveyances, and which seems to have always been regarded as the fountain and source of modern law on the subject, in which it was held that a gift made by a debtor in satisfaction of a debt exceeding in value the property given was void where the creditor knew of a judgment and execution against the debtor and took the property with a view to defeat their collection.

And substantially the same rule was laid down and acted upon in *Pulliam v. Newberry*, 41 Ala. 168 (1867); *Martin v. Estes* (Mo.) 34 S. W. 53 (1896); *Henderson v. Henderson*, 55 Mo. 534 (1870); *Meyberg v. Jacobs*, 40 Mo. App. 128 (1890); *Devries v. Phillips*, 63 N. C. 53 (1868); *Gillespie v. Allen*, 37 W. Va. 675 (1893).

And it will be seen that it is supported, either directly or indirectly, by numerous cases cited below in this as well as in other subdivisions.

A transfer of property to a creditor, intended to cut off the redress of other creditors, may be fraudulent by reason of the delay and hindrance to which it subjects them, though it was made to pay a debt. *Hough v. Dickinson*, 58 Mich. 89 (1895).

And a transfer by a debtor to a creditor, made to hinder, delay, and defraud the other creditors of the debtor, of which intent the creditor was aware and participated in by accepting the transfer to enable him to consummate his fraudulent purpose, renders the transaction fraudulent and void without reference to the question of the amount of the consideration. *Commercial Bank v. Bolton*, 87 Hun. 647 (1895).

And though the debtor finally intended to pay all his indebtedness. *Roberts v. Radcliff*, 35 Kan. 502 (1896).

So, a purchase by a bona fide creditor, the real object of which was not the payment of his debt but simply to give a colorable appearance of a sale when in fact nothing was intended, is fraudulent as against creditors of the vendor. *Hartshorn v. Eames*, 31 Me. 98 (1849).

And a conveyance made by an insolvent husband to his wife with intent on the part of the husband, participated in by his wife, to hinder, delay, or defeat a creditor in the collection of his debt, is invalid as against creditors, though the consideration may have been a valid pre-existing debt due to her. *Peeler v. Peeler*, 109 N. C. 623 (1891).

And a purchaser who takes a conveyance of his debtor's property with knowledge that he is about to abscond from his creditors, with the view of aiding him to convert his property into funds so that he may the more readily effect his purpose, participates in the fraud of the debtor so as to invalidate the conveyance as against creditors. *Garr v. Hill*, 9 N. J. Eq. 210 (1852).

So, a conveyance by a debtor after a verdict against him and previous to the entry of the judgment thereon, to a creditor to pay and satisfy a debt due him where the debtor had ample means, independent of the real estate, to pay and satisfy the debt owing by him, which is received and accepted by the creditor with full knowledge of that fact and with intent to defraud the creditor who obtained the verdict, is fraudulent and void and will

a proper disposition of the case can be arrived at from the acts of the parties without regard to the intent.

4. Fraud cannot be imputed to an honest creditor because in taking his debtor's stock of goods to settle his claim he advised him to keep the money he had in bank and his accounts.

be set aside. *Waterbury v. Sturtevant*, 18 Wend. 353 (1837).

And judgments obtained by a creditor against a debtor for the purpose of aiding him in hindering, delaying, and defrauding his creditors, and in covering up his property, under which his property is sold and placed in the name of his wife, are fraudulent and void and will be set aside independently of the question of the bona fides of the claims upon which the judgments are rendered. *Smith v. Schwed*, 9 Fed. Rep. 483 (1881).

So, the rule that a mortgage or trust deed made by a debtor to or for the benefit of a creditor with intent upon the part of the mortgagor to defraud his other creditors, participated in by the mortgagee or beneficiary, is void as against such creditors though founded upon a good consideration or given for a valid debt, is equally well settled and universal.

This is the rule substantially stated and acted upon in *Wilson v. Horr*, 15 Iowa, 489 (1884); *Fish v. McDonnell*, 42 Minn. 519 (1890); *Alberger v. White*, 117 Mo. 847 (1893); *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155 (1882); *Landauer v. Mack*, 43 Neb. 430 (1895); *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L. R. A. 398 (1898); *Holt v. Creamer*, 34 N. J. Eq. 181 (1881); *Smith v. Hardy*, 36 Wis. 417 (1874); *Stinson v. Hawkins*, 4 McCrary, 500 (1882); *Rindskopf v. Vaughan*, 40 Fed. Rep. 304 (1889); *Farmers' Bank v. Douglass*, 11 Smedes & M. 469 (1848); and it will also be found to be supported by cases below.

Thus, a valid consideration for a mortgage will not validate it where the mortgagee entertained a fraudulent purpose in taking it. *Bussard v. Bullett* (Iowa) 64 N. W. 658 (1895).

And proof that a mortgage executed by an insolvent debtor was given to secure a debt actually owing by the mortgagor does not as a matter of law disprove the existence of a fraudulent intent on the part of the parties. *Billings v. Russell*, 101 N. Y. 226 (1886).

So, a mortgage made by a partner upon partnership assets, the evident purpose of which was to use the firm assets to pay for the homestead of the partner, which purpose was known to the creditors claiming under the mortgage, and which they assisted in getting up, is fraudulent and void as to other creditors. *Johnston v. Standard Shoe Co.* 5 Tex. Civ. App. 896.

And a mortgage made by a debtor to a creditor to secure a valid debt, which was but one of a series of acts by which the mortgagor intended to delay certain other creditors, is invalid where the mortgagee consciously lent his aid in furtherance of the mortgagor's design. *Bryant v. Fink*, 75 Iowa, 516 (1888).

And a mortgage by a failing debtor not intended to secure any debt, but designed to secure the mortgaged property against attachment or execution in favor of other creditors, is void as to such creditors, and will be set aside at their instance. *Wilson v. Horr*, 15 Iowa, 489 (1884).

And a fraudulent combination between a mortgagor and a mortgagee of chattels after the execution of the mortgage in good faith to secure a bona fide indebtedness, but before possession taken thereunder, to defraud the creditors of the mortgagor and deprive them of the benefit of the surplus, renders the whole transaction, including the mortgage, void as against such creditors. *Hadley v. Adair* (Kan.) 42 Pac. 836 (1895).

81 L. R. A.

5. A bill of sale in satisfaction of debts cannot be turned into an assignment by the fact that the creditor agrees to pay other claims against the debtor, if the liability is absolute and not dependent on the disposition made of the property.

(January 4, 1896.)

So, the title of a person claiming under a writ of sequestration issued by the court of chancery, is superior to that of a mortgagee under a mortgage made in order to avoid the effect of the writ and with full knowledge on the part of the mortgagee of all the circumstances, though given for full value. *Ward v. Booth*, L. R. 14 Eq. 195, 41 L. J. Ch. 729, 27 L. T. N. S. 364, 20 Week. Rep. 880 (1872).

And one who had made advances in good faith upon a consignment of property in the belief that the consignors were solvent and did not contemplate bankruptcy is entitled to hold as against a mortgage previously made upon the same property with intent to defraud the creditors of the mortgagor, in which intent the mortgagee shared. *Blanchard v. McKey*, 125 Mass. 124 (1878).

And a mortgage given by a father to his daughter pending a compromise with his creditors, which included a mortgage on his homestead with intent on his part to defraud and hinder such creditors, will be postponed to the mortgage given pursuant to the compromise where it was taken by her with knowledge of his object, though it is claimed to have been given to secure to her moneys advanced, and also for services rendered in his family. *Miller v. Sauerbier*, 30 N. J. Eq. 71 (1878).

And where it is apparent upon the face of a deed of assignment or mortgage made by an insolvent debtor, that it was made for the purpose of hindering, delaying, or defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the fraudulent intent of the grantor should not be left to the determination of the jury. *Bigelow v. Stringer*, 40 Mo. 185 (1867).

On the other hand, the rule is equally well settled that a sale by a debtor to his creditor in payment of his claim is not invalidated by the fact that it was made with an intent upon the part of the vendor to delay, hinder, or defraud his creditors where such intent was not known to or participated in by the purchaser. This was the ground of decision in *H. B. Claffin Co. v. Rodenberg*, 101 Ala. 213 (1893); *Warren v. Jones*, 68 Ala. 449 (1890); *Christian v. Greenwood*, 23 Ark. 264, 79 Am. Dec. 104 (1861); *Smith v. Jensen*, 13 Colo. 213 (1889); *Schroeder v. Walsh*, 120 Ill. 403 (1887); *Hanchett v. Kintark*, 118 Ill. 121 (1886); *Kuhlenbeck v. Hotz*, 53 Ill. App. 675 (1894); *Stainbrook v. Duncan*, 45 Ill. App. 344 (1892); *Wilson v. Fawcner*, 38 Ill. App. 438 (1890); *Burtis v. Humboldt County Bank*, 77 Iowa, 103 (1889); *Citizens' Bank v. Rhutasel*, 68 Iowa, 537 (1896); *Schram v. Taylor*, 51 Kan. 547 (1893); *Beurmann v. Van Buren*, 44 Mich. 498 (1890); *Schroeder v. Bobbitt*, 108 Mo. 289 (1882); *Knox v. Hunt*, 18 Mo. 174 (1853); *Little v. Eddy*, 14 Mo. 160 (1851); *Peters-Miller Shoe Co. v. Casebeer*, 58 Mo. App. 640 (1893); *Frank v. Curtis*, 58 Mo. App. 349 (1894); *Rothell v. Grimes*, 22 Neb. 526 (1887); *Bank of Commerce v. Schlotfeldt*, 40 Neb. 212 (1894); *Archer v. O'Brien*, 7 Hun. 146 (1876); *Evans v. Kilgore*, 29 W. N. C. 279 (1891); *Anderson v. Pilgram*, 41 S. C. 423 (1891); *Haas v. Kraus*, 86 Tex. 687 (1894); *Kinnear v. White*, 2 Kerr (N. B.) 235.

Satisfactory evidence of collusion in the fraudulent intent by the grantee is necessary. *Smith v. Jensen*, *supra*.

He must not only have had notice of, but must also have participated in, such fraudulent intent. *Treusch v. Ottenburg*, 54 Fed. Rep. 867, 6 U. S. App. 403 (1893).

And a creditor who takes property from his

APPEAL by plaintiffs from a judgment of the Circuit Court for Garland County in favor of defendants in an action brought to recover damages for defendants' alleged wrongful interference by attachment with property belonging to plaintiffs. *Reversed.*

Statement by **Harrod**, Special Judge:
On the 15th day of December, 1890, Jones & Fulton, a firm of merchants in Hot Springs, Ark., executed the following instrument:
Know all men by these presents, that for and in consideration of the sum of \$8,000.00,

debtor at its fair market value in payment of a valid, subsisting mortgage held by him, acting in good faith, is entitled to recover the value thereof from another creditor who causes the property to be seized and sold under attachment as that of the debtor. *Furth v. Snell*, 6 Wash. 542 (1893).

And a bona fide purchaser for a valuable consideration without notice under a deed of trust, not void upon its face, cannot be affected by any intended fraud of the grantor in the trust deed. *Ewing v. Cargill*, 13 Smedes & M. 79 (1849).

So, a conveyance of real estate by a husband to his wife in payment of a valid debt held by her, against him, will not be set aside so as to subject the real estate to the payment of a debt of the husband, unless it clearly appears that the wife knew of the alleged fraudulent intent of the husband in conveying the real estate to her, and took the conveyance in order to delay or defraud his creditors. *Lippert v. Edwards*, 39 Ind. 165 (1872).

And such a conveyance, though accompanied by many badges of fraud, will not be set aside as against creditors where there is nothing to charge the wife with notice of the alleged fraudulent intention of her husband. *Meyer v. Sulzbacher*, 76 Ala. 120 (1884).

And a conveyance of lands to a husband in satisfaction of a demand for damages against the grantor for alienation of a wife's affections is valid as against creditors of the grantor where no fraud appears on the part of the husband. *Carlisle v. Gaskill*, 4 Ind. 219 (1853).

And the intent of a husband to defraud his creditors in conveying chattels to his wife equal in value to moneys handed to him by her, consisting of the proceeds from the sale of her lands and timber, which he then orally promised to repay with interest at 8 per cent, will not vitiate her title unless she participated in or had knowledge of such intent. *State, Brown, v. Mitchell*, 102 N. C. 347 (1899).

So, a conveyance by a son to his mother is good as against his creditors where she was an honest and meritorious creditor having loaned moneys to him at various times out of funds which she received from the estate of her husband, and stood entirely clear of any design to aid him in any fraud. *Roe v. Moore*, 35 N. J. Eq. 526.

And a purchase by a daughter of an owner of lands at execution sale with moneys furnished by him with intent to defraud his creditors vests title in her good as against such creditors, where he was indebted to her to the extent of the amount furnished at the time, and she purchased the lands for a fair consideration, not buying for his use, and not being a party to his fraudulent intent. *Sharpe v. Williams*, 76 N. C. 87 (1877).

And a partner in embarrassed circumstances may appropriate his private property to the payment primarily of his private debts in preference to partnership debts by transferring such property to his private creditors, and such transfers will be valid where there is nothing to impeach the good faith of the grantees or to show that they aided in any concealment or fraudulent intent or purpose on the part of the grantor. *Auburn Exch. Bank v. Fitch*, 48 Barb. 354 (1867).

So, a purpose to defraud creditors on the part of a pledgor of property, not participated in by the pledgee, does not affect the pledge. *Rose v. Coble*, Phill. L. 517 (1868).

And a garnishee, whose deed or mortgage was

executed with an actual intention on the part of the grantor to hinder, delay, or defraud creditors, may retain a bona fide debt due to himself out of the funds in his hands with respect to which he is garnished, unless he accepted the trust with knowledge of the grantor's fraudulent intention. *Price v. Masterson*, 85 Ala. 483 (1890).

And a conveyance of property, made by a debtor to pay a debt justly due by him, will not be held fraudulent although he made false representations as to his condition and intentions, where the grantees in such deed were not parties to the fraud. *Chouteau v. Sherman*, 11 Mo. 385 (1848).

So, also, a mortgage, trust deed, or other security given by a debtor to a creditor to secure the payment of his claim is not invalidated by an intent upon the part of the debtor to defraud his other creditors, where the creditor receiving it or the beneficiaries therein did not know of or participate in such fraudulent intent.

This rule was adopted in *Howell v. Carden*, 99 Ala. 100 (1892); *Coleman v. Smith*, 55 Ala. 368 (1876); *Governor v. Campbell*, 17 Ala. 566 (1850); *Christian v. Greenwood*, 23 Ark. 258, 79 Am. Dec. 104 (1861); *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458 (1856); *Herkeleath v. Stookey*, 63 Ill. 486 (1872); *Meixsell v. Williamson*, 35 Ill. 529 (1864); *Brown v. Riley*, 22 Ill. 45 (1859); *Straight v. Roberts*, 126 Ind. 383 (1890); *McFadden v. Ross*, 126 Ind. 341 (1890); *Citizens' Bank v. Rhutassel*, 67 Iowa, 816 (1885); *Kohn Bros. v. Clement*, 58 Iowa, 589 (1882); *Hadley v. Adsett (Kan.)*, 42 Pac. 696 (1895); *First Nat. Bank v. Nail*, 52 Kan. 211 (1898); *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 632 (1899); *McLarren v. Thompson*, 40 Me. 284 (1856); *Eureka Iron & S. Works, v. Bresnahan*, 66 Mich. 489 (1877); *Andrews v. Fillmore*, 46 Mich. 315 (1881); *Adams v. Niemann*, Id. 135 (1876); *Hausmann v. Hope*, 20 Mo. App. 193 (1896); *Johnston v. Dunn (N. J.)*, 29 Atl. 361 (1894); *Carpenter v. Muren*, 42 Barb. 300 (1864); *Hall v. Arnold*, 15 Barb. 599 (1853); *Woodruff v. Bowles*, 104 N. C. 197 (1899); *Currie v. Bowman*, 25 Or. 364 (1894); *Magovern v. Richard*, 27 S. C. 272 (1886); *Mills v. Haines*, 8 Head, 332 (1859); *Ellis v. Valentine*, 65 Tex. 532 (1886); *Kraus v. Haas*, 6 Tex. Civ. App. 665 (1894); *Ogden State Bank v. Barker (Utah)* 40 Pac. 769 (1895); *Paul v. Baugh*, 85 Va. 955 (1899); *Johnson v. Hope*, 17 Ont. App. Rep. 10 (1890); *Ex parte Games*, L. R. 12 Ch. Div. 314, 40 L. T. N. S. 789, 27 Week. Rep. 744 (1879); *Hedman v. Anderson*, 6 Neb. 392 (1877).

A creditor may take a mortgage from his debtor to secure his debt in good faith without reference to the motives of the mortgagor in giving it. *Funk v. Staats*, 24 Ill. 632 (1860).

Affirmative evidence of fraud on the part of the mortgagee must be given in order to invalidate a mortgage given by a debtor to a creditor for a valuable consideration. *Straight v. Roberts*, 126 Ind. 383 (1890); *Chandler v. Colcord*, 1 Okla. 290 (1893).

Thus, to avoid a mortgage given by a husband to his wife to secure payment of moneys received by him from her as a loan, which she obtained from her father's estate or other outside sources, for fraud, it is not enough to show that the mortgagor intended to hinder, delay, or defraud his creditors, it must also appear that the mortgagee received the mortgage with like intent, and the burden of proof is with the one alleging the fraud. *Benson v. Maxwell*, 21 W. N. C. 446 (1888).

And a mortgage made by a husband to his wife, covering all his property, given to secure a bona fide debt or made with intent to defraud the

to be paid as follows: \$4,892.86 credited on the debt we owe Rice, Stix, & Co., of St. Louis, Mo.; \$1,804.78 credited on the debt which we owe the Clark Shoe Company, of St. Louis, Mo.; \$278.58 credited on the debt we owe Pratt, Simmons, & Co., of St. Louis,

Mo.; \$147.00 to be paid by the purchasers to J. R. Jones, Sr., being the amount of our debt to him for borrowed money; to N. L. Cathran, of Norman, Oklahoma territory, said purchasers are to pay \$104.00 for borrowed money due him; \$65.00 to Maurice

mortgagor's creditors, is good in the hands of the mortgagee, where she was not present at the time the mortgage was given but was in Europe and knew nothing of the transaction. *McIntyre v. Legon*, 38 S. C. 457 (1892).

So, the acceptance by the beneficiaries in a trust deed of its benefit without participation in or knowledge of any purpose upon the part of the grantor to defraud other creditors renders it effective without regard to the grantor's intent. *White v. Sterzing (Tex.)* 82 S. W. 909 (1895).

And a mortgage made by a party to a contract who has assigned it to secure the fulfillment thereof is not voluntary and without consideration, and is not void as against the mortgagee in the absence of proof of a fraudulent intent on his part, though the mortgagor designed thereby to defeat and delay his creditors. *Currier v. Taylor*, 19 N. H. 189 (1848).

And a mortgage for a sufficient consideration, given to rearrange and secure certain debts, giving time for the payment, is not fraudulent and void as against creditors in the absence of proof of any combination with the mortgagees, most of whom were not present and had nothing to do with procuring the execution of the mortgage. *Monaghan Bay Co. v. Dickson*, 39 S. C. 146 (1896).

And a mortgage given by a member of an insolvent firm who had bought out his copartner, to his father to protect him as security on notes given to his copartner for the copartner's interest, and a subsequent conveyance of the land to the father in satisfaction of the mortgage debt and a previous encumbrance, are not fraudulent and invalid as to creditors where the debts assumed equaled the value of the land and the father had no notice of the firm's insolvency when he signed as security. *Willis v. Heath (Tex.)* 18 S. W. 801 (1891).

So, in *Chissom v. Lamcool*, 9 Ind. 590 (1857), which was an action to set aside a mortgage as fraudulent as against creditors, in which an instruction was given not requiring any participation in the fraud of the mortgagor on the part of the mortgagee to vitiate the conveyance, the court refused to set aside a verdict in favor of the mortgagee upon the ground that if there was error in the instruction it was in favor of the mortgagor.

And in *McCreary v. Skinner*, 75 Iowa, 411 (1888), it was held that an instruction that before the jury can find fraud to exist in the execution of a chattel mortgage by a husband to his wife they must find that she joined with him with the intent to carry out his purpose to defraud his creditors, and actual participation therein with the pretense of securing a claim owing to her, is misleading in the use of the word "pretense."

The rule adopted in Alabama, however, is that the question of the existence of a fraudulent intent upon the part of the parties will not affect a sale by an embarrassed or insolvent debtor to a creditor in absolute payment of a bona fide existing debt, where there is no material difference between the value of the property and the amount of the debt, and no use or benefit is reserved to the debtor. *Knowles v. Street*, 87 Ala. 360 (1888); *Pollock v. Meyer*, 96 Ala. 172 (1892); *First Nat. Bank v. Smith*, 93 Ala. 97 (1890); *Hodges v. Coleman*, 76 Ala. 108 (1884); *Bamberger, B. & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374 (1895).

And that it is immaterial whether the grantor alone, or the grantor and grantee both, in a conveyance by an insolvent debtor for the payment of

an antecedent debt, devised and intended to get the advantage of other creditors, if in fact the effect of the transaction was solely to pay a debt honestly due and the property was received at a fair and adequate price, and no interest or benefit was reserved to the grantor. *Pollock v. Meyer, supra*.

And that a sale of goods by a husband to his wife in absolute payment of a debt, for a fair and adequate consideration in which no interest is reserved to the grantor, will be sustained against the creditors of the husband notwithstanding the fraudulent intent of one or both of the parties. *Meyer v. Sulzbacher*, 76 Ala. 120 (1894).

So, in *Werner v. Zierfuss*, 163 Pa. 380 (1904), it was held that a conveyance or payment in any form, taken by a creditor from his debtor to secure an actual debt, is valid against other creditors though he knew that the effect would be to postpone them and that the debtor intended it to have that effect, and he took it to aid the intent as well as to protect himself.

And in *Jewett v. Noteware*, 30 Hun, 192 (1883), it was held that the act of a bona fide creditor in taking security for the exact amount of his debt cannot be fraudulent as to other creditors no matter what the intent may have been.

The existence of a fraudulent intent participated in by both parties to a transfer is a question of fact for the decision of the jury. *Leasure v. Coburn*, 57 Ind. 274 (1877).

And the jury may take into consideration all of the acts of a mortgagee performed after the making of the mortgage as bearing on the question whether he participated in any fraudulent intent on the part of the mortgagor. *Showman v. Lee*, 86 Mich. 556 (1891).

II. Who are bona fide purchasers within the statute.

The courts of Mississippi seem to have adopted the rule that the mere settlement of an antecedent debt without the payment of any new consideration is not sufficient to render the creditor an innocent purchaser within the protection of the statute of frauds. *Perkins v. Swank*, 43 Miss. 349 (1871); *Pope v. Pope*, 40 Miss. 516 (1866).

And that a conveyance of lands or chattels as security for an antecedent debt does not operate as a purchase for value unless the purchaser advanced some new consideration, or relinquished some pre-existing security, or did some act on the faith of the purchase which cannot be retracted. *Hinds v. Pugh*, 48 Miss. 298 (1873).

And it was held that a trust deed by an insolvent merchant upon his stock of goods to secure a bank for past-due indebtedness with intent to place the property beyond the reach of creditors is void, even if the officers of the bank do not participate in the fraud, as it is not a purchase for value, and especially so where the president of the bank then holding for collection a check drawn by the insolvent advises against the employment of its regular attorney on the ground that he is the attorney of other creditors, and confederates with the insolvent to put the deposit into his hands in order to place it beyond the reach of creditors. *Briester v. Moore (Miss.)* 16 So. 596 (1895).

The courts of the same state, however, hold that an absolute extinguishment of an antecedent debt in consideration of a simultaneous transfer of property constitutes the vendee a purchaser for value within the protection of the statute of

Ran, to be paid by the purchasers, being the amount we owe him for clerk hire; \$300.00 to be paid by the purchasers on the debt we owe Levi Newberg & Co., of Louisville, Ky.; \$400.00 to be paid by the purchasers to Voorhees, Miller, & Rupel, of Cincinnati, Ohio,

on the debt we owe them; \$325.00 to be paid by the purchasers to M. Wolf & Sons, of Cincinnati, Ohio, on the debt we owe them; \$182.83 to be paid by the purchasers to Rothschild Brothers, of St. Louis, Mo., on the debt we owe them: Now, in considera-

frauds to the same extent as if he had paid it in money. *Soule v. Shotwell*, 32 Miss. 236 (1876).

And that one who takes a security or specific property in satisfaction and discharge of a pre-existing debt, which is thereby extinguished, is a bona fide purchaser, protected by the statute of frauds, and not affected by previous equities. *Love v. Taylor*, 26 Miss. 567 (1853).

And in *Surget v. Boyd*, 57 Miss. 485 (1879), it was held that security for a pre-existing debt, without a new consideration, does not, like a purchase for value, cut off secret equities and frauds, but, unless they are shown to exist, the recipient is equally entitled to protection.

And it was held that a creditor who accepts a pledge for a pre-existing debt is not a purchaser for value within the protection of the statute of frauds, and that the validity of the transaction as against other creditors of the pledgor is determinable, not alone by the good faith of the pledgee, but also by the lawful or unlawful intent of the debtor in making the pledge, though it would be otherwise if the creditor took the property as a purchaser, entirely relinquishing his debt. *Harris v. Lombard*, 60 Miss. 29 (1882).

But the rule that a conveyance or mortgage to pay or secure a pre-existing debt, made for a valuable consideration, is within the statute of frauds, and is not vitiated by a fraudulent intent upon the part of the vendor or mortgagor not participated in by the purchaser or mortgagee, would seem to be supported, in effect, by the cases cited *supra*, I., and is directly laid down and acted upon in *Woodruff v. Bowles*, 104 N. C. 197 (1889), and *Battle v. Mayo*, 102 N. C. 413 (1889). *Potter v. Stevens*, 40 Mo. 229 (1867).

And in *McWilliams v. Rodgers*, 56 Ala. 87 (1876), it was held that a debtor in failing circumstances may make a mortgage to secure the payment of pre-existing debts provided it is received in good faith without intent to aid the mortgagor in hindering, delaying, or defrauding his creditors.

And such a mortgage is good as against other creditors of the mortgagor where the mortgagee had no knowledge of any fraud upon the part of the mortgagor and acted in the utmost good faith. *McFadden v. Boes*, 126 Ind. 341 (1890).

And a mortgage is not rendered fraudulent as to creditors by the fact that it was given to secure an antecedent debt, and the mortgagee knew that the mortgagor was financially embarrassed. *Cromelin v. McCauley*, 67 Ala. 542 (1890).

So, mortgages, as well as transfers of absolute title, were intended to be protected by the provisions of the Texas assignment act, § 9, providing that if the purchaser of property bought the same in good faith he shall be held to have acquired, as against an assignee and creditors, a good and valid title to such property. *Simmons Hardware Co. v. Kaufman*, 77 Tex. 131 (1890).

And a mortgagee or an accepting beneficiary under a trust deed is placed upon the same plane with a purchaser, and is included within the meaning of the word "purchaser" as used in the statute of frauds, and a bona fide creditor who has thus obtained security for his debt will be protected to the same extent as a purchaser in good faith. *Kraus v. Haas*, 6 Tex. Civ. App. 665 (1894).

There is no obligation on the part of a creditor whose claim a debtor is willing to secure to examine into any of the circumstances for the purpose of ascertaining whether the debtor had any 31 L. R. A.

ulterior object in view. *Archer v. O'Brien*, 7 Hun. 146 (1876).

And when a mortgage is given to secure a debt presently contracted or contracted on the faith and promise that it should be given, the mortgagee is a bona fide purchaser for a valuable consideration, and as such entitled to protection against equities of which he had no notice. *Coleman v. Smith*, 55 Ala. 368 (1876).

And in *Levy v. Williams*, 79 Ala. 171 (1885), it was held that a purchase made partly in payment of an antecedent debt and partly for money paid is subject to the same rule as purchases on a new consideration, and the payment of the past debt is a circumstance to be considered in determining the good faith of the transaction.

In *Stinson v. Hawkins*, 13 Fed. Rep. 833 (1882), the United States district court of the eastern district of Missouri, however, held that a mortgage given to hinder or delay creditors, both the mortgagor and mortgagee knowing the fraudulent purpose, cannot be upheld as against creditors, the same rule applying to a mortgage, especially for an antecedent debt of long standing, as that which applies to sales of property.

So, it was held that a creditor who takes a chattel mortgage and an assignment of accounts covering property worth from \$15,000 to \$17,000 to secure an indebtedness of from \$1,200 to \$2,000 and an advance of cash of \$800, knowing of the insolvency of the debtor, is not a bona fide purchaser within the statute of frauds, in *Herman v. McKinney*, 47 Fed. Rep. 758 (1891).

And in *Manhattan Co. v. Everton*, 6 Paige, 457 (1837), it was held that where a creditor of a fraudulent grantee of real estate takes from him a mortgage on such real estate as a further security for a pre-existing debt, he is not protected against the lien of judgment creditors of the fraudulent grantor whose judgments were recovered subsequently to the fraudulent conveyance and prior to the mortgage, though he took without notice of the fraud.

So, creditors in whose favor judgments are confessed are not purchasers for value who cannot be affected by the fraudulent intent of the debtor unless they participated therein. *Galle v. Tode*, 74 Hun, 542 (1893).

III. What constitutes participation.

a. Generally.

The general rules laid down *supra*, I., give rise to the question, What constitutes such a participation in the fraud of a debtor as will invalidate a conveyance or security given to his creditor to pay or secure his claim?

The solution of the question would seem to depend upon the question of the good or bad faith of the purchaser or mortgagee.

Thus, a creditor who purchases property from his debtor, who is insolvent and attempting to dispose of his property to defraud other creditors to his knowledge, must act with the utmost good faith. *Lewis v. Hughes*, 49 Kan. 23 (1892).

And a security given by a person in insolvent circumstances is not impeachable, unless the person claiming the benefit of the transaction had notice or knowledge of the insolvency and did not act in good faith. *Johnson v. Hope*, 17 Ont. App. Rep. 10 (1890).

And a chattel mortgage is not void because made with a fraudulent intent on the part of the mort-

tion of said sum of \$8,000.00 to be credited to and paid as aforesaid, we hereby sell and transfer and deliver to Rice, Stix, & Co., Clark Shoe Company, and Pratt, Simmons, & Co. all our stock of goods, wares, and merchandise contained in our storehouse in the city of Hot Springs, Ark., Nos. 613 and 615 Central avenue, together with all the store

fixtures and fixtures therein, and hereby assign to them our lease on said storehouse.

Witness our hands, this 15th day of December, 1890.

Jones & Fulton.
J. E. Jones, Jr.
Jeff Fulton.

gagor; it must also appear that the mortgagee was not acting in good faith from an honest purpose to secure his own debts, but was aiding the debtor to defeat his other creditors by covering up the property in some improper way to the debtor's use and benefit. *Hausman v. Hope*, 20 Mo. App. 193 (1888).

It is only when a mortgage is given and received with the intent to hinder and defraud creditors that it is void, and not when it is taken by the mortgagee for the honest purpose of securing a valid claim whatever may have been the intent of the mortgagor. *Currie v. Bowman*, 25 Or. 364 (1894).

And a creditor may take the goods of his debtor at a fair price in payment of his debt where he does so for the sole purpose of collecting it without reference to the intent of the debtor in thus disposing of his goods. *Stainbrook v. Duncan*, 45 Ill. App. 344 (1892).

And a purchaser who acts for the purpose of satisfying his own claim against the vendor is entitled to protection where he takes without notice of fraud or of the fraudulent title of the vendor, or without notice of facts sufficient to put him upon inquiry. *Hanchett v. Kimbark*, 118 Ill. 121 (1896).

And the fact that the primary purpose of a debtor in conveying or mortgaging property to a creditor is to prevent some other creditor from subjecting it to the payment of a debt due him, does not render the transaction fraudulent, where the creditor's purpose is solely to get payment or security for the sum due him. *Haas v. Kraus*, 86 Tex. 687 (1894).

So, an execution creditor, securing the collection of his debt with no other purpose than to make himself safe, cannot be affected by an undisclosed fraudulent purpose on the part of the debtor. *Evans v. Kilgore*, 29 W. N. C. 279 (1891).

And a creditor of an insolvent firm is not answerable as garnishee to its creditors for taking its goods in payment of his claim, where he was acting without knowledge of any fraud and for the sole purpose of securing payment of his claim, taking no more goods than was necessary. *Hellman v. Dick*, 55 Mo. App. 168 (1893).

And a deed, the only purpose of which was to secure and protect the grantor's brother, to whom he was largely indebted, is not fraudulent as to creditors. *Giddings v. Sears*, 115 Mass. 505 (1874).

To impeach the payment or securing of an actual debt by a failing debtor, there should be evidence tending to show, either some other advantage or benefit to the debtor beyond the discharge of the obligation, or some other benefit to the creditors beyond mere payment of his debt, or some injury to the other creditor beyond postponement of his debts. *Werner v. Zierfuss*, 162 Pa. 360 (1894).

A mortgage given by a debtor to a creditor to secure his claim will not be set aside as to creditors in the absence of evidence that the mortgagee had a purpose to aid the fraudulent plans of the mortgagor in addition to his purpose to protect himself. *Kohn Bros. v. Clement*, 58 Iowa, 589 (1882).

And to render a mortgage void as to creditors, it would be necessary to show that it was made and contrived with the actual intent to hinder, delay, and defraud creditors, as, for instance, to cover up and conceal the property of the debtor, or to raise funds which were to be kept from the reach

of process for collection of debts, and that the mortgagee participated in this intent. *Hurley v. Taylor*, 78 Mo. 238 (1883).

And a purchase by a creditor from his debtor for a fair price, of no more than is necessary for his protection, is not invalidated by the vendor's fraud unless the purchaser participated in it by assisting the vendor to put the property out of the reach of creditors and appropriate it to himself with a knowledge of such fraudulent design and with intent to further its accomplishment. *Christian v. Greenwood*, 23 Ark. 264, 79 Am. Dec. 104 (1861).

And a compromise by a debtor with certain creditors, made with the intent on his part to defeat the collection of another claim against him which he did not think he was morally bound to pay, is good as to the creditors with whom he compromised, where they did not participate in his fraudulent intent, or having knowledge or notice of such intent, did not avail themselves of such knowledge for the purpose of obtaining a personal advantage to themselves at the expense of the debtor's other creditors. *Anderson v. Pilgram*, 41 S. C. 423 (1891).

But a creditor of an insolvent debtor must stop at securing his debt, and if he goes farther and assists the fraudulent debtor in carrying out his fraudulent purpose, his preference so obtained will be avoided in favor of other creditors. *Alberger v. White*, 117 Mo. 347 (1893); *Foster v. Grigsby*, 1 Bush, 86 (1896); *Meyberg v. Jacobs*, 40 Mo. App. 128 (1890).

And a mortgage made with a fraudulent intent upon the part of the mortgagor to cheat, hinder, or delay his creditors, and accepted by the mortgagee with knowledge of that design and with intent to promote its accomplishment, is void as against other creditors. *Rindskopf v. Vaughan*, 40 Fed. Rep. 394 (1889); *Smith v. Hardy*, 36 Wis. 417 (1874).

And the rule is the same though it is founded upon a perfect consideration. *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L. R. A. 336 (1888); *Holt v. Creamer*, 34 N. J. Eq. 181 (1881); *Schmidt v. Opie*, 33 N. J. Eq. 136 (1880); *David v. Birchard*, 53 Wis. 492 (1891).

And the fact that a valuable consideration has been given for a mortgage or transfer of property is not, as a proposition of law, inconsistent with the existence of an intent on the part of a debtor, or of such knowledge thereof on the part of the mortgagee or purchaser as will avoid the conveyance, whether the consideration consisted of an existing debt or arose in any other manner. *Billings v. Russell*, 101 N. Y. 226 (1896).

So, a mortgagee who takes a mortgage made by a mortgagor with intent to defraud his creditors, who besides securing his own debt undertakes to aid and assist the mortgagor in his fraudulent purpose to hinder and delay other creditors, can claim nothing under it as against such creditors. *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155 (1892).

The whole transaction is vitiated. *Meyberg v. Jacobs*, *supra*.

So, a mortgage given by a debtor to a creditor upon the advice of the mortgagee, intended to prevent other creditors from enforcing their claims out of the property, and compel them to wait until he could get around to pay them, is void as to such creditors. *Fish v. McDonnell*, 42 Minn. 519 (1890).

Possession of the property was delivered immediately to the agents of the vendees. Two days later, one James McGuire sued out an attachment against the property of Jones & Fulton; and when the writ of attachment came to the sheriff's hands, before levying it, he demanded an indemnity bond. Thereupon the appellees, Wood & Henderson, executed and delivered to the sheriff the following instrument:

Common Pleas Court of Garland County.
John M. McGuire & Co.

J.
Jones & Fulton.

We undertake to indemnify the sheriff of Garland county against all damages which he may sustain by reason of the levy of the attachment herein.

[Signed] James B. Wood.
Dec. 17, 1890. J. P. Henderson.

And a note and deed of trust given by a debtor to a creditor with intent to delay, hinder, and defraud other creditors, is void as to them where the creditor receiving it knew of such intent and aided or assisted him in carrying it out. *Alberger v. White*, 117 Mo. 347 (1898).

And where a debtor conveys away his property with intent to get it beyond the reach of a pressing creditor, to a purchaser, though for value, who has notice of such intention and aids the debtor in getting his property beyond the reach of the creditor, such purchaser participates in the debtor's fraud, and his conveyance will be held void at the instance of the creditor. *Gillespie v. Allen*, 37 W. Va. 675 (1893).

So, an intent upon the part of the parties to hinder, delay, or defraud creditors is sufficient to invalidate a mortgage. It is not necessary that there should also be a combination and confederation between the mortgagor and mortgagee. *State, Bindfeutel, v. Nauert*, 2 Mo. App. 295 (1876).

And the grantor and the grantee need not be actuated by like motives to cheat and defraud creditors. If the grantee purchases with such knowledge of facts as would put a prudent man on inquiry and lead him to infer a purpose to hinder, delay, or defraud creditors, the sale will be fraudulent though he purchases because he considers the property cheap or to save a debt due him. *De Walt v. Doran*, 21 D. C. 163 (1892).

And a creditor who takes a bill of sale from his debtor, not for the purpose of securing the amount due him and for which he was security, but for speculation, is a mere volunteer, and the purchase will be held invalid as to creditors where he knew that mortgages had been made by the debtor and that he had been pressed for the settlement of claims which he could not pay. *Redhead v. Pratt*, 72 Iowa, 99 (1897).

An intent to hinder and delay creditors which will invalidate a conveyance by a debtor to a creditor, however, must be one which will cause an unlawful as distinguished from a lawful hindrance. *Sonnen- theil v. Texas Guaranty & T. Co. (Tex.)* 30 S. W. 945 (1895).

And whether or not notice on the part of the beneficiary in a trust deed of a purpose on the part of a grantor to hinder, delay, or defeat other creditors, would defeat their claim, depends upon the character of the obstructions or obstacles by which such hindrance or delay was intended to be accomplished. When there exists a fraudulent intent proper, the creditor cannot aid in executing it by accepting a mortgage given for that purpose, but if the conveyance which the debtor purposes is no more than the law permits him to make, the intent does not constitute the fraudulent intent denounced by the statute, and notice to the creditor of such a motive is not notice of a fraudulent intent which will invalidate the transaction. *Ibid.*

And a deed made by a debtor to his father-in-law as trustee for the purpose of preferring a creditor is not invalidated by the fact that the trustee received it with a view of concealing a felony committed by the debtor in his transactions with his creditors and preventing a prosecution therefor, if it was not executed with the concurrence of the *cestui que trust* and a knowledge of the motives

which influenced the trustee, and was not afterwards assented to by them under some engagement to suppress the prosecution. *Marbury v. Brooks*, 20 U. S. 7 Wheat. 556, 5 L. ed. 522 (1822).

Nor is an assignment given by a debtor for the purpose of preferring one creditor over another invalidated by the fact that it was made and received in the hope and expectation and with a view of preventing prosecution for a felony connected with the debtor's transactions with his creditors, if the preferred creditors have done nothing to excite that hope and the assignment was made without their knowledge and concurrence and without a knowledge of the motives which influenced the assignor and which were not assented to by them under some engagement, express or implied, to suppress or forbear the prosecution. *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78, 6 L. ed. 423 (1826); *Marbury v. Brooks*, *supra*.

b. Securing a preference.

The intent of this subdivision is to treat the question of when and to what extent the securing of a preference by a creditor by taking a transfer from his debtor by way of payment or security will amount to a participation in the fraudulent intent of the debtor, and not to deal with the broad general question of preferences and the right to prefer.

The acceptance by a creditor of a transfer from his debtor for the purpose of preferring him involves no fraud on other creditors where the preferred creditor was actuated by the sole purpose of securing the indebtedness due him. *Schroeder v. Bobbitt*, 108 Mo. 289 (1892); *Brigham v. Hubbard*, 115 Ind. 474 (1888); *Stock-Growers' Bank v. Newton*, 18 Colo. 245 (1890).

And an intent by a mortgagee to obtain a preference will not invalidate the mortgage. *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 299 (1894); *West Coast Grocery Co. v. Stinson (Wash.)* 43 Pac. 35 (1895).

And under the rule adopted in Alabama the intent of both parties to the transaction to defraud other creditors will not invalidate it where it was had in good faith and a fair price was allowed and no reservation made in favor of the vendor. *Bamberger, B. & Co. v. Schoonfield*, 160 U. S. 149, 40 L. ed. 374 (1895).

And an absolute sale by an insolvent or failing debtor to his creditor in payment of an antecedent debt by way of preference and for a fair and adequate consideration, without reserving any interest, is an act which is itself legal, and is not vitiated by fraud. *Hodges v. Coleman*, 78 Ala. 103 (1884).

The danger of other creditors taking a debtor's property is a justifiable motive for a purchase by a creditor from his debtor at a fair price to secure his claim. *Pearson v. Rockhill*, 4 B. Mon. 296 (1846).

And the principal case goes still further, holding that an effort on the part of the creditor to keep other creditors from finding out his purpose does not invalidate the transfer.

So, a bill of sale by way of mortgaging all personal chattels as a security for money actually loaned is not fraudulent and void under the statute of Elizabeth, though its object is to defeat the expected execution of a judgment creditor. *Darvill v. Terry*, 6 Hurlst. & N. 807, 30 L. J. Exch. 335 (1861).

After receiving the indemnity bond, the sheriff levied the order of attachment upon part of the goods mentioned in the bill of sale, of the value of \$260.12. On the 20th day of February, 1891, Rice, Stix, & Co. and the other vendees mentioned in the bill

of sale brought suit in the Garland circuit court against Wood & Henderson, to recover the value of the goods levied upon and sold by the sheriff in the McGuire case. The complaint alleged that the plaintiffs were the owners of the goods, and that, when Mc-

And a mortgage deed executed by a debtor for the benefit of some of his creditors is not invalidated under that statute because made in expectation that a writ of sequestration would issue against the property. *Alton v. Harrison*, L. R. 4 Ch. 622, 38 L. J. Ch. 609, 21 L. T. N. S. 232, 17 Week. Rep. 1034 (1890).

So, a preference among creditors will not be held invalid for fraud on the part of the debtor alone. The preferred creditor must have participated in the fraud. *Forrester v. Moore*, 77 Mo. 651 (1883).

And the fact that a grantor was embarrassed and in failing circumstances would not invalidate a deed made by him to one creditor to the exclusion of others, provided the deed was made in good faith in payment of an honest debt. *Totten v. Brady*, 54 Md. 170 (1880).

A creditor may purchase his debtor's property in payment of his debt as safely as he can take it by legal process, although the effect of the transaction would be to place the property beyond the reach of creditors. *Kirtland v. Snow*, 20 Conn. 23 (1849).

And the fact that the preferred creditor is the debtor's wife does not make the transaction fraudulent, and is not evidence of fraud. *Becker, Stull, v. Yeager*, 1 Super. Ct. (Pa.) 107 (1896).

So, a preference given to some creditors over others by a transfer of property is not invalidated by the fact that the debtor had previously been engaged in a scheme to defraud his creditors, in the absence of evidence tending to show fraud upon the part of the preferred creditors in accepting the preference. *Hard v. Foster*, 98 Mo. 297 (1889).

And a debtor may prefer a creditor either by way of payment or security where it is disassociated with a common-law assignment, and where it is not intended or made for the purpose of delaying or defrauding creditors, and so understood and participated in by the creditor taking the security. *Eureka Iron & S. Works v. Bresnahan*, 66 Mich. 499 (1887).

So, a debtor may give preferences to one of his creditors by a fair and honest transfer of goods and chattels adequate to the payment of his debt where no more was transferred than is sufficient to pay the debt intended to be secured, and there is no collusion between the parties to cover the remaining property from the claims of other creditors. *Bruce v. Smith*, 3 Harr. & J. 499 (1806).

And a security given by a person in insolvent circumstances to secure an actual advance, made without notice or knowledge of the insolvency and in good faith, is not impeachable because the moneys advanced are, pursuant to the directions of the insolvent, paid over to one of his creditors, who thereby obtains a preference. *Johnston v. Hope*, 17 U. C. App. Cas. 10 (1889).

So, a creditor who purchases the personal property of his debtor without fraud is entitled to the advantage obtained as against a judgment confessed by the debtor to another creditor, where the purchase was made before the issue of execution, though the judgment debtor may have acted in bad faith towards his judgment creditors, the purchaser having no notice thereof. *Ball v. Barnett*, 36 Ind. 55.

And a creditor does not become liable to other creditors for taking a mortgage or conveyance of property from his debtor who is in failing circumstances to secure his claim, provided he acts in good faith and does not obtain more than is justly due him. *Kurtz v. Miller*, 26 Kan. 314 (1881).

And a mortgage given to the cashier of a bank

to secure the payment of notes with intent to prefer the holders of such notes, made with a fraudulent design or with the intent to hinder and delay creditors, is good where neither the trustee nor the owners of the notes participated in the fraud or had knowledge of it. *Ogden State Bank v. Barker* (Utah) 40 Pac. 799 (1895).

And a deed of trust executed for the purpose of preferring the creditors mentioned therein is good as against other creditors where the debts preferred were bona fide, and neither the trustee nor the beneficiaries in such deed had notice of fraud, perpetrated by means thereof, though the intent of the grantor was fraudulent. *Sonnenhell v. Texas Guaranty & T. Co.* (Tex.) 30 S. W. 945 (1896).

So, it is not fraudulent for a creditor to accept a conveyance of property in payment of his debt from an insolvent debtor which will disappoint other creditors. *Flewellen v. Crane*, 38 Ala. 627 (1877).

And a conveyance by a debtor to a creditor giving him a preference is not invalid though the grantee knew of the insolvency of the debtor. *Dana v. Stanford*, 10 Cal. 299 (1858); *Wheaton v. Neville*, 19 Cal. 41 (1861); *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552 (1891); *Frazer v. Thatcher*, 49 Tex. 26 (1878); *Bamberger, B. & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374 (1895).

And though the effect of the preference may be to delay his other creditors, where the transaction was in good faith and made with the intention to pay a preferred debt, and without any secret trust. *Crawford v. Neal*, *supra*.

Provided he does not come within the prohibition of the bankrupt law; and the fact that the debtor's object may have been to defeat his creditors will not interfere with the right, unless the creditor is chargeable with notice of that fact. *Frazer v. Thatcher*, *supra*.

Where property goes to pay an honest debt, that use of it is lawful though it may cut off the redress of all others, and though intended to do so. *Nichols v. Bancroft*, 74 Mich. 191 (1890).

A bona fide creditor may take a conveyance of the goods of his debtor in the discharge of his debt for a fair consideration and hold them till other creditors may lose their entire debts, without reference to what the motive of the seller may have been. *Wilson v. Fawcner*, 38 Ill. App. 438.

And the mere fact that a creditor by receiving a deed from his debtor has obtained a preference over other equally meritorious creditors, or that the transfer to him had the effect of hindering and delaying other creditors and was so intended by the grantor, will not vitiate the transfer where the transaction was in truth bona fide. *Iglehart v. Willis*, 58 Tex. 306 (1883); *Warren v. Jones*, 68 Ala. 449 (1890); *Frank v. Curtis*, 58 Mo. App. 349 (1894).

And a creditor may take a chattel mortgage to secure the payment of his debt, if the debt is a bona fide indebtedness, and if taken in good faith as security the mortgage will be valid although the effect may be to delay and entirely defeat other creditors in the collection of their claims against the mortgagor. *Hadley v. Adsit* (Kan.) 42 Pac. 636 (1895); *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 632 (1893).

So, a purchaser who in good faith takes the property of his debtor at a fair value in payment of an honest debt will be protected against creditors, though his claim may absorb the entire property of the debtor, where there is no evidence of bad

Guire sued out his attachment, the sheriff demanded an indemnity bond before serving it, and that the defendants executed the bond, and that thereafter the goods were taken; that they were of the value of \$260.12; and asked judgment for that sum. The defend-

ants, demurring to the complaint, and the demurrer being overruled, saved their exceptions, and afterwards answered, denying the allegations of the complaint, and setting up, further, that the McGuire attachment was sustained, and alleging as a further defense

faith. *Schram v. Taylor*, 51 Kan. 547 (1896); *Davis v. McCanthy*, 52 Kan. 116 (1898).

And a mortgage given for a valuable consideration, and not taken for the purpose of hindering, defeating, or delaying creditors, is not void under the statute of Elizabeth, though the mortgagor was insolvent and the mortgage embraced all the debtor's visible property and by agreement was not recorded for forty days. *Magovern v. Richard*, 27 S. C. 272 (1896).

The acquisition of a lien on a part or the whole of an insolvent's property to secure a bona fide debt is valid as against creditors though the debtor gave it with intent to secure to the favored creditor an advantage over other creditors, and thus hinder, delay, or defeat the collection of their debts. *Ellis v. Valentine*, 65 Tex. 532 (1896).

So, a debtor has a right to prefer one creditor to another in payment, and his private motives for giving the preference cannot affect the right if the preferred creditor has done nothing improper to procure it, but any unlawful consideration moving from the preferred creditor to induce the preference will avoid the deed which gives it. *Marbury v. Brooks*, 20 U. S. 7 Wheat. 556, 5 L. ed. 522 (1882).

And preferences given to certain creditors in executing a mortgage are not evidence of fraud though they may be considered by the jury with other facts and circumstances in the case in determining whether the mortgage is fraudulent. *Haben v. Harshaw*, 49 Wis. 379 (1890).

And where there is an actual debt, the jury cannot be permitted to infer a fraudulent intent from the mere fact of the payment or preference given to it. *Werner v. Zierfuss*, 162 Pa. 390 (1894).

So, fraud will not be imputed to an honest creditor who is preferred by a failing debtor as against another creditor who had been promised payment by the debtor out of the proceeds of the property assigned to the former to secure him. *McKeown v. Coogler*, 18 Fla. 866 (1892).

And a transfer of property by a debtor to his creditor for the purpose of preferring him over other creditors is valid though such preferred creditor knew at the time that the debtor did not intend to pay other creditors. *State, Glaser, v. Mason*, 24 Mo. App. 321 (1887).

So, an instruction in an action to set aside a sale for fraud, that if the vendor intended to hinder or delay his creditors in a collection of their demands, and if the vendee knew of such intention and participated in it, the transaction was fraudulent as to creditors, is not erroneous as taking away the right of the vendee who was a creditor to take a preference, though he knew his getting it would hinder and delay other creditors. *Hardwick v. Cox*, 50 Mo. App. 509 (1892).

And a deed of trust given by a corporation to secure certain of its creditors is valid though it gave a preference to and secured the debts of several of the directors who participated in the resolution of the board authorizing its execution. *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79 (1887).

But a director of a corporation whose duty it is to know its financial condition cannot avail himself of any dereliction of such duty to secure a personal advantage over other creditors of the corporation by taking an assignment of its property in payment of his claim. *Clay v. Towle*, 78 Me. 86 (1896).

So, a bank having a claim against an insolvent, 81 L. R. A.

firm which is consulted by another creditor with reference to collecting and securing his claim is not legally bound to disclose the existence of its claim to such firm, but may keep silent, and protect its own interests, provided it is guilty of no fraudulent conduct and does nothing more than is necessary to its own protection. *First Nat. Bank v. Nall*, 52 Kan. 211 (1896).

And an arrangement between a debtor and a creditor by which the debtor gives the creditor a confession of judgment which is not to be entered if the debtor succeeds in obtaining from his other creditors an extension, but may be entered on the confession and execution issued if such creditors refuse such extension, is valid and effectual as to other creditors where it was not used or intended to be used to influence the negotiations of other creditors, but simply designed to secure a preference to the preferred creditor. *Meeker v. Harris*, 19 Cal. 278, 79 Am. Dec. 215 (1861).

And the affirmation, by stipulation with the debtor, of a judgment for an honest lien debt against him, which results in a judicial sale of his property, notwithstanding the judgment is reversed on appeal, being in effect a transaction which amounts simply to the collection by a creditor of his debt by taking his debtor's property at a full and fair valuation and by force of a preference to which he was legally entitled, is not necessarily fraudulent but depends upon the good faith of the parties and the absence of a fraudulent intent, which are questions of fact. *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454 (1896).

So, if a debtor conveys to a creditor property at a fair valuation for the purpose of the payment of a debt due him, or sells to some other person for a fair price to raise money to pay debts, which by the terms of the sale the purchaser is bound to see, and does see, is at once appropriated for such purpose, the sale cannot be said to be one made to hinder, delay, or defraud creditors, though the complaining creditors are ones who did not receive any part of the proceeds. *Ellis v. Valentine*, 65 Tex. 532 (1896).

But though creditors may accept preferences in the way of receiving transfers of property in the payment of their debts, they cannot accept them in consideration of terms, express or implied, to further the plans of the debtor to hinder, delay, or defraud other creditors. *J. W. Butler Paper Co. v. Robbins*, 151 Ill. 588 (1894); *Alberger v. White*, 117 Mo. 347 (1893); *Foster v. Grigsby*, 1 Bush, 86 (1896).

So, the rule that a debtor has a right to prefer one creditor to another is subject to the qualification that it must be done openly and fairly, without any other object than the fact on its face embraces. *Hancock v. Horan*, 15 Tex. 507 (1855).

And the fact that a preference by an insolvent by way of a chattel mortgage upon his goods is given to a bona fide claim, is not alone sufficient to protect the mortgagee where he was at the time of accepting the security aware of and participated in the purpose of the mortgagor to fraudulently delay or defeat the claims of other creditors. *Landauer v. Mack*, 43 Neb. 430 (1895).

And a mortgage given pursuant to and to carry out a secret arrangement by a debtor who compounds with his creditors to pay one more than he does the others, is fraudulent and void as to such other creditors. *Feldman v. Gamble*, 26 N. J. Eq. 494 (1875).

And a stipulation in a trust deed, giving a prefer-

that the sale by which Rice, Stix, & Co. *et al.* claimed the goods was fraudulent.

Upon the trial of the case, it appeared from the evidence that early in December, 1900, Jones & Fulton wrote to their creditors, asking an extension of time in which to pay

their indebtedness. Among other creditors to whom they wrote were Rice, Stix, & Co., Clark Shoe Company, and Pratt, Simmons, & Co., all of St. Louis. When the letters reached St. Louis, these three firms consulted in regard to the best course to pursue in the

ence to such creditors as will on receiving one half of their debts release the other half, renders it fraudulent and void as to other creditors. *Palmer v. Giles*, 5 Jones, Eq. 75 (1860).

A promise by a debtor, made upon obtaining credit from a creditor, that he would protect him if anything ever occurred by which he was not able to pay his debts, and that if he met with losses he would secure him, when the debtor was doing an apparently prosperous business and when there was no imperative reason for the belief that he was likely to become insolvent, will not invalidate the preferences given to such creditor upon the debtor subsequently becoming insolvent. *Smith v. Craft*, 17 Fed. Rep. 705 (1883); *Smith v. Munroe*, 1 App. Div. 77 (1896).

And an agreement between the manager of a corporation and a creditor, made when the company was organized, in consideration of goods furnished by the creditor on credit, upon which it commenced business, and the promise of an additional loan, if needed, that if the corporation should become involved or be sued for any indebtedness, notes held by such creditor should become immediately due unless secured, followed by an assignment to such creditor preferring his claim, does not of itself operate as a fraud upon other creditors, though such agreement was kept secret. *Teitig v. Boesman Bros.* 12 Mont. 404 (1893).

In *Teitig v. Boesman Bros.* *supra*, *Blennerhassett v. Sherman*, 105 U. S. 118, 28 L. ed. 1085 (1882), *infra*, III. n. was distinguished upon the ground that the question involved in that case related to an actual conveyance by way of mortgage of real estate of great value having been made by a debtor then insolvent to the knowledge of the mortgagee, which mortgage by prearrangement had been withheld from record.

But a trust deed given pursuant to a mortgage under which a lender of money was to be preferred in such deed, to be given by the borrower, both as to the money lent and as to previous indebtedness, is entirely void as against creditors, though the previous loans were made in good faith, where the lender knew at the time that the borrower was insolvent and that the trust deed was made with intent to defraud. *Ewing v. Teague* (Tex.) 20 S. W. 401.

And an arrangement between a creditor and a debtor, the debtor being insolvent to the knowledge of the creditor, by which the creditor agreed to advance such sums of money as the grantor might need in the prosecution of a business enterprise within a designated time, the debtor promising that the proceeds of sales in the meantime should be paid to the creditor, and that if he should become embarrassed he would pay him in preference to other creditors, is fraudulent and void as to such creditors, where the creditor might have known that the proposed scheme of business involved heavy purchases on credit, when credit was not merited. *Krippendorf v. Hyde*, 28 Fed. Rep. 788 (1896).

As to the effect of accepting a preference under the bankruptcy and insolvency laws, see *infra*, XI. *Participation under bankruptcy and insolvency laws.*

c. Knowledge of fraud, insolvency, etc.

The mere knowledge of a creditor, to whom a transfer of goods is made by a debtor in payment of his claim, that the debtor thereby intends to

hinder, delay, or defraud his creditors, does not render the transaction void as against creditors where the preferred creditor acts in good faith and takes the property for the sole purpose of saving a bona fide debt, as simple knowledge does not amount to participation in the intended fraud.

This is the rule laid down in *Sexton v. Anderson*, 95 Mo. 375 (1888), and *Banfield v. Whipple*, 14 Allen, 13 (1867), and it was upon this ground that the principal case was decided.

And that a creditor may purchase goods of his debtor for the purpose of satisfying his claim, though he knows or ought to have known the object of the debtor in making the sale to be to defeat other creditors, where he is actuated only by a desire in good faith to secure payment of an honest debt, is held in *First Nat. Bank v. Smith*, 93 Ala. 97 (1890); *Hornthall v. Schonfeld*, 79 Ala. 109 (1885); *Wood v. Keith*, 60 Ark. 425 (1895); *Christian v. Greenwood*, 23 Ark. 258, 79 Am. Dec. 104 (1861); *Gray v. St. John*, 35 Ill. 222 (1884); *Windmiller v. Chapman*, 38 Ill. App. 276 (1890); *Chapman v. Windmiller*, 29 Ill. App. 393 (1893); *Worland v. Kimberlin*, 6 B. Mon. 608, 44 Am. Dec. 785 (1846); *Holmes v. Braidwood*, 82 Mo. 610 (1884); *Albert v. Besel*, 88 Mo. 150 (1886); *Morgan v. Wood*, 38 Mo. App. 255 (1890); *Kendall v. Baltis*, 26 Mo. App. 411 (1897); *Knower v. Central Nat. Bank*, 124 N. Y. 552 (1891); *Dudley v. Danforth*, 61 N. Y. 626 (1874); *Sabin v. Columbia River Lumber & F. Co.* 25 Or. 15 (1893); *Uhler v. Maulfair*, 23 Pa. 481 (1854); *Reynolds v. Weinman* (Tex.) 25 S. W. 33 (1894); *Owens v. Clark*, 78 Tex. 547 (1890); *Smith v. Whitfield*, 67 Tex. 124 (1896); *Edwards v. Dickson*, 66 Tex. 618 (1896); *Lewy v. Fischl*, 65 Tex. 311 (1896); *Traders' Nat. Bank v. Day*, 7 Tex. Civ. App. 569 (1894); *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 360 (1893); *Shelley v. Boothe*, 73 Mo. 74, 39 Am. Rep. 481 (1890); *State, Glaser, v. Mason*, 24 Mo. App. 321 (1897).

In *Uhler v. Maulfair*, *supra*, *Ashmead v. Hean*, 13 Pa. 584 (1850), holding to the contrary, was overruled as not being the law of the land.

And the same rule applies though the creditor knew that the conveyance would deprive the debtor of the means of paying other creditors. *First Nat. Bank v. Smith*, *Chapman v. Windmiller*, *Sabin v. Columbia River Lumber & F. Co.*, *Smith v. Whitfield*, and *Lewy v. Fischl*, *supra*; *First Nat. Bank v. Lowrey Bros.* 36 Neb. 290 (1893); *Seaman v. Nolen*, 68 Ala. 463 (1890).

And though the grantee knew that the effect would be to hinder and delay other creditors of the vendor. *Ross v. Sedgwick*, 69 Cal. 247 (1896).

It must also appear that the creditor in some way participated in the fraud, as that there was a purpose, beyond the mere effort to collect his debt, to aid the debtor in defeating, delaying, or defrauding other creditors, or to protect the debtor as well as himself. *Holmes v. Braidwood*, 82 Mo. 610 (1884).

A creditor who obtains property or security from his debtor, who is insolvent, in payment of an honest debt, where the debtor acted with the design of delaying or defrauding other creditors, will not lose his preference by reason of notice of the wrongful design of the debtor, though the payment of his debt may absorb the entire property of the debtor, where his only purpose was to obtain satisfaction or security for his own debt. *Hasle v. Connor*, 58 Kan. 713 (1894).

Thus, where goods are taken in satisfaction of bona fide debts, actual participation by the creditor in the fraudulent intent of the debtor is neces-

matter. The agents of the last two named firms were in Hot Springs at the time, and Rice, Stix, & Co. sent their agent to Hot Springs. When he arrived there, on the 13th of December, he went to the store of Jones & Fulton, and shortly afterwards met the

representatives of the Clark Shoe Company and Pratt, Simmons, & Co. These parties entered into an extensive investigation of the financial standing of Jones & Fulton, as they say, to determine whether the extension should be granted. After looking into the

sary to make his acceptance of the goods fraudulent. Simple knowledge is not enough, as he has a right to look after his own interests and need not consult those of other creditors. *State v. Mason*, 112 Mo. 374 (1892).

And a debtor may secure a debt by a voluntary sale to his creditor, though the creditor knew that his object in making the sale was to deprive himself of the means of paying other debts, as the purchaser would be presumed to have acted, not with a purpose to defraud, but to secure himself. *Christian v. Greenwood*, 23 Ark. 254, 79 Am. Dec. 104 (1881).

And a sale and delivery of goods by a debtor to a creditor in satisfaction of an honest debt cannot be evaded by other creditors unless made and received with intent in fact to defraud them, and the fact that one of the preferred creditors was the debtor's wife, does not affect the question. *Jewell v. Knight*, 123 U. S. 423, 31 L. ed. 190 (1887).

So, the knowledge of a bank at the time of the execution of a deed of trust to it securing a debt, that the property covered by the deed was fraudulently procured by the grantor, together with its knowledge of the intention of the grantor to defraud its other creditors in making the deed, does not invalidate it where the debts secured were honest. *Stokes v. Burns* (Mo.), 33 S. W. 460 (1895).

And a son who takes a conveyance from his father, made with intent, first to prefer such son as a creditor, and second, to place the residue beyond the reach of his other creditors, of which intent the son had full notice, is protected to the extent of his father's indebtedness to him, but not in the additional payment made by him at the time of the transfer. *Seller v. Walz*, 17 Ky. L. Rep. 301 (1895).

And where a sale is made in fraud of the creditors of the vendor, and so intended by the purchaser also, it is necessary to prove that a mortgagee deriving his title from such purchaser had knowledge of and participated in the fraud in order to invalidate the sale. It is not sufficient that the mortgagee had reasonable cause to know of such fraudulent intent. *Carroll v. Hayward*, 124 Mass. 121 (1878).

Notice of a fraudulent transfer of property will not prevent a bona fide creditor from purchasing the goods so transferred in payment of an honest debt, or from taking them in execution. *Stark v. Ward*, 3 Pa. 323.

So, the same rule applies to mortgages and other securities taken by a debtor from a creditor as that applying to absolute transfers in payment of debts. *Byrd v. Perry* (Tex.), 28 S. W. 749 (1894).

And a mortgage or other security given by a debtor to a creditor to whom a bona fide debt is due, which is taken for the purpose of securing it, and not for the purpose of aiding the debtor to hinder, delay, or defraud other creditors, is valid when the debtor has the right to prefer a creditor, though the mortgagee had knowledge or notice, actual or constructive, of the mortgagor's fraudulent intent. *Chase v. Walters*, 28 Iowa, 480 (1870); *Olmstead v. Mattison*, 45 Mich. 617 (1881); *Moline Wagon Co. v. Rummell*, 14 Fed. Rep. 155 (1882); *Alberger v. White*, 117 Mo. 347 (1893); *Deering v. Collins*, 38 Mo. App. 73 (1889); *Sabin v. Columbia River Lumber F. Co.* 25 Or. 15 (1893); *Rook Island Plow Co. v. Hill* (Tex.), 32 S. W. 242 (1895); *Byrd v. Perry*, *supra*; *Rider v. Hunt*, 6 Tex. Civ. App. 238 (1894); *Hulakamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971 (1886); *Russell v. Letton*, 56 Mo. App. 541 (1894).

31 L. R. A.

And the rule is also the same although he knows that the effect will be to delay, hinder, or defeat other creditors. *Alberger v. White*, *supra*; *First Nat. Bank v. Lowrey Bros.* 36 Neb. 290 (1893).

He must also have participated in the fraudulent design of the debtor, and intended to aid and abet the fraud. *Deering v. Collins*, 38 Mo. App. 73 (1889).

If a mortgagor's intention in making a mortgage was fraudulent, and the mortgagee knew it, the conclusion that he participated in it does not necessarily result therefrom or from the fact that it was not necessary to secure the mortgagee's debt. *Worland v. Kimberlin*, 6 B. Mon. 606, 44 Am. Dec. 785 (1856).

And a mortgage which is valid on its face, and is accepted by the mortgagee without any secret trust, or understanding, or connivance, or participation in the fraudulent intent of the mortgagor, but for the mere purpose of securing payment of the debt, is not fraudulent and void though the mortgagee may have thought that the mortgagor company was in failing circumstances and that its president sought by the mortgages to hold off its creditors until its financial difficulty could be tidied over. *Currie v. Bowman*, 25 Or. 334 (1894).

And a purchaser at a foreclosure sale under a mortgage made by a debtor to a creditor with the intent upon the part of the debtor to defraud his creditors, takes good title, though he knew of such fraudulent intent, where the creditor acted in good faith and took the securities solely for his own benefit without any knowledge of any fraud on the part of the debtor. *Bergen v. Producer's Marble Yard*, 72 Tex. 53 (1893).

So, *cestui que trust* for whose benefit a mortgage had been taken by a trustee to secure trust moneys, made upon lands which the trustee had fraudulently conveyed to his son, occupy the position of creditors, and not of purchasers, and it is immaterial that in accepting such preference they were aware that the vendee giving them a lien for a debt due from his vendor had taken his title in fraud of the creditors of such vendor; such a transaction is not a participation in the fraud. *First Nat. Bank v. Cummins*, 39 N. J. Eq. 577 (1885).

And a mortgage for \$1,000 executed by an insolvent to his son, of the consideration for which \$400 was a pretended debt to the son and \$600 a pretended debt to the mother, which the son subsequently, under an arrangement with his father, transferred to a holder of notes of the father to the amount of \$300, which notes were given by the son and \$400 paid in cash, entitles the holder to claim for the full amount of the security in priority to subsequent execution creditors of the mortgagor, though he had notice of the character of the mortgage. *Totten v. Douglas*, 18 Grant, Ch. (N. C.) 341 (1871).

But if a creditor taking a conveyance acted with a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest, it is fraudulent and void. *Shelley v. Boothe*, 73 Mo. 74, 39 Am. Rep. 481.

And if he takes a chattel mortgage with a design to assist the debtor in cheating or defrauding other creditors, he will not be allowed to profit thereby. *Russell v. Letton*, 56 Mo. App. 541 (1894).

That a mortgagee knew that one of the purposes of the mortgagor in giving the mortgage was to hinder and delay his creditors, is strong evidence of a participation by him in the fraudulent pur-

condition of the affairs of Jones & Fulton, they determined to refuse the extension asked for, and began immediately trying to secure a settlement of their debts. The making of an assignment and the giving of a mortgage were both discussed. Jones & Fulton wanted

to make that disposition of their property that would realize most for their creditors, and the other parties wanted that done which would most certainly result in their protection. The representatives of these St. Louis houses acted in perfect concert for their own

pose, though it does not of itself constitute such participation. *Carr v. Briggs*, 156 Mass. 78 (1892).

It is held in a late Pennsylvania case, however, that if a creditor takes a conveyance or payment in any form to secure an actual debt, the transaction will be valid against other creditors, although he knew that the effect would be to postpone others and that the debtor intended it to have that effect, and although he took it to aid that intent as well as to protect himself, the criterion being, not the effect, but the fraudulent intent. *Werner v. Zierfuss*, 162 Pa. 380 (1894).

But the contrary rule was adopted in *Moore v. Williamson*, 44 N. J. Eq. 496, 1 L. R. A. 386 (1888), that where a mortgage is made with intent to defraud creditors, and the circumstances are such as to awaken the suspicion of the mortgagee and put him upon inquiry as to the intent with which the mortgage is made, he will be charged with a notice of such intent.

So, the knowledge of a creditor that his debtor had made other conveyances to other creditors at about the same time, with the intent to hinder other creditors, will not defeat a conveyance to him in good faith in payment of an honest debt. *Schroeder v. Mason*, 25 Mo. App. 190 (1887).

And a transfer by an insolvent debtor of all his property in actual payment or discharge of a pre-existing debt is not fraudulent and void as to creditors, though he has other creditors known to the transferee, where it is unaccompanied by actual fraud. *Johnson v. McGrew*, 11 Iowa, 151, 77 Am. Dec. 137 (1890).

And when land is given in good faith to satisfy a debt, the knowledge of the vendee that there were other creditors who would take it if he did not, or his taking it to prevent them from securing their claims and effecting the loss of his, is not enough to make the transaction fraudulent and void. *Covanhoven v. Hart*, 21 Pa. 495, 60 Am. Dec. 57 (1853).

In *Covanhoven v. Hart*, *supra*, the court overruled *Summers's Appeal*, 16 Pa. 169 (1851), and *Ashmead v. Hean*, 13 Pa. 587 (1850), holding the contrary doctrine, saying that reason and justice have vindicated their supremacy against these judicial invasions of it.

So, the rights of a creditor to take property from his debtor in payment of his claim are not affected by notice of proceedings by other creditors to collect their debts. It is only when under guise of collecting or securing his own debt he obtains a transfer of or charge upon the property of his debtor with intent to hinder or defraud creditors that the title so obtained is void as to him. *Storey v. Agnew*, 2 Ill. App. 363 (1878).

And a trust deed executed by an officer and director of a corporation upon property belonging to the corporation, the title to which was in his name to secure money borrowed expressly for the use of the corporation and applied to the payment of its liabilities, is not fraudulent as against creditors, although the corporation was in embarrassed circumstances and the beneficiary had notice of the equitable interest of the corporation, where from its acquiescence in the manner of dealing with the property it is presumed to have approved or ratified the transaction. *Donham v. Hahn*, 127 Mo. 430 (1895).

So, a transfer or mortgage made by a debtor to a creditor, accepted with the honest design to secure the payment of his claim and without intent to defraud other creditors, is valid as against them, 31 L. R. A.

though the creditor knew that the debtor was in failing circumstances. *Gage v. Chesebro*, 49 Wis. 496 (1890); *Cromelin v. McCauley*, 67 Ala. 542 (1890); *Rockford Boot & S. Mfg. Co. v. Mastin*, 75 Iowa, 112 (1898); *Olmstead v. Mattison*, 45 Mich. 617 (1881); *Sibly v. Hood*, 3 Mo. 290 (1884).

And though the creditor knows that the debtor is insolvent. *Bray v. Ely* (Ala.) 17 So. 180 (1895); *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704 (1876); *Dana v. Stanfords*, 10 Cal. 299 (1856); *Wheaton v. Neville*, 19 Cal. 41 (1861); *First Nat. Bank v. Jaffray*, 41 Kan. 694 (1890); *Giddings v. Sears*, 115 Mass. 505 (1874); *Sibly v. Hood*, *supra*; *Stevens Lumber Co. v. Kansas City Planing Mill Co.* 59 Mo. App. 373 (1894); *Schroeder v. Mason*, 25 Mo. App. 190 (1887); *Frazer v. Thatcher*, 49 Tex. 26 (1878); *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 360 (1893); *Erdall v. Atwood*, 79 Wis. 1 (1891); *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552 (1891); *Huiskamp v. Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971 (1886); *Sweetzer v. Higby*, 63 Mich. 13 (1896).

And a transfer or mortgage by a debtor to a creditor to pay or secure his claim is not subject to objection on the ground of fraud participated in by the purchaser or mortgagee, though he knew that the effect would be to prevent the collection by other creditors of their claims, or to hinder and delay them. *Bray v. Ely*, *supra*; *Curran v. Olmstead*, 101 Ala. 692 (1894); *Bates v. Vandiver*, 102 Ala. 249 (1894); *Seaman v. Nolen*, 68 Ala. 463 (1890); *Crawford v. Kirksey*, *supra*; *Gilkerson-Sloes Commission Co. v. Carnes*, 56 Ark. 414 (1892); *Wheaton v. Neville*, and *Dana v. Stanfords*, *supra*; *Martin v. Duncan*, 47 Ill. App. 84 (1892); *Locke v. Duncan*, 47 Ill. App. 110 (1892); *Levi v. Bray*, 12 Ind. App. 9 (1895); *Ford v. Williams*, 3 B. Mon. 550 (1843); *Giddings v. Sears*, *supra*; *Banfield v. Whipple*, 14 Allen, 13 (1867); *Olmstead v. Mattison*, 45 Mich. 617 (1881); *Sweetzer v. Higby*, *Stevens Lumber Co. v. Kansas City Planing Mill Co.*, and *Schroeder v. Mason*, *supra*; *First Nat. Bank v. Lowrey Bros.* 36 Neb. 290 (1893); *Hopkins v. Beebe*, 26 Pa. 85 (1856); *Covanhoven v. Hart*, 21 Pa. 495, 60 Am. Dec. 57 (1853); *Wood v. Castlebury* (Tex.) 84 S. W. 653 (1896); *Greenleive v. Blum*, 59 Tex. 124 (1883); *Young v. Dumas*, 59 Ala. 60 (1893).

A creditor has a perfect right to purchase property of his debtor in payment of his claim where it is an honest one and he buys no more than is sufficient to pay it, notwithstanding the insolvency of the debtor. *Owens v. Clark*, 78 Tex. 547 (1890).

And the fact that a creditor taking the property of his debtor in payment of his claim has delayed until his debtor is on the eve of bankruptcy does not show that he was not acting in good faith. *Young v. Clapp*, 40 Ill. App. 312 (1890).

Thus, knowledge by a mortgagee that a verdict had been rendered against his mortgagor, and that he would be unable to pay the sum named in the verdict, does not make it a fraud on his part to take security for a debt due him or invalidate the mortgage as against creditors. *Straight v. Roberts*, 126 Ind. 383 (1890).

And a conveyance by a debtor to his creditor to secure a bona fide debt will be upheld, although the grantee had full knowledge that the grantor had no other property or means to pay other creditors and was insolvent after the transfer, where the property taken is of no greater value than the amount of the debt, though the debt be one barred by the statute of limitations. *Hale v. Stewart*, 7 Hun, 591 (1876).

And a conveyance of cotton by a debtor to his

protection. While negotiations were pending between these parties, a representative of another firm, to whom Jones & Fulton were indebted, was in Hot Springs, and Armstrong, who represented the Clark Shoe Company, told Jones & Fulton that, if they

wanted to, they could go over and look at his goods, to keep him from finding out what was going on. Mr. Fulton testified that Brown and Armstrong, who represented Rice, Stix, & Co. and Clark Shoe Company, when they were trying to get them to make the bill

creditor, made in part satisfaction of a debt due him for which credit was given the debtor upon the indebtedness to the same amount as the value of the cotton conveyed, is not invalidated by reason of the creditor's knowledge that he was obtaining an advantage over other creditors and delaying and hindering them in the collection of their debts. *Smith v. Whitfield*, 87 Tex. 124 (1886).

And a mortgage made in good faith by an insolvent debtor, covering his property, to secure a bona fide debt executed in contemplation of an assignment which is made the next day, is valid and enforceable, and not a part of the assignment, though the mortgagee had knowledge that the assignment was contemplated. *Gilbert v. McCorkel*, 110 Ind. 215 (1886).

So, a chattel mortgage given by a husband to his wife to secure a bona fide debt is valid as against his creditors, although she knew at the time that he was indebted to others, and that suits were pending to enforce the collection of such claim. *Dice v. Irvin*, 110 Ind. 561 (1886).

And a conveyance for a valuable consideration by a husband to his wife, made with intent to defraud creditors, vests title in her as against such creditors where she had no notice of such intent, though she may have known of the existence of indebtedness and its amount. *Brigham v. Hubbard*, 115 Ind. 474 (1888).

And such a conveyance when she knew he was largely in debt but did not know that he had been sued thereon, will be treated as a security for the amount of his bona fide indebtedness to her, and creditors will be permitted to enforce their claims against the property subject thereto. *Stamy v. Laning*, 58 Iowa, 602 (1882).

And a purchase by a creditor from his debtor of the debtor's interest in his wife's estate for the purpose of securing the payment of an indebtedness due the creditor which was agreed to be deducted from the purchase price, will not be regarded as fraudulent and void as to creditors because the creditor had been told by the debtor that he expected that his interest would be attacked by creditors and that something would have to be done, in the absence of evidence of a positive intent on the part of the creditor to collude with the debtor to hinder and delay creditors as distinguished from his purpose to save his debt. *Bear's Estate*, 60 Pa. 430 (1869).

So, a purchase by a creditor of a firm and one of its members, with the assent of all of the partners in good faith and at a fair price, of goods from the firm to the amount of a joint and separate indebtedness then due, is not *per se* fraudulent as against the general creditors of the firm, though the purchasers had knowledge that such firm was insolvent in the popular sense of the term. *Sigler v. Knox County Bank*, 8 Ohio St. 516 (1858).

And a mortgage given by a debtor to his surety when, the debtor was in insolvent circumstances, to the knowledge of the mortgagee, in consideration of which the mortgagee raised money and advanced it with a large additional amount to the mortgagor, who thereupon paid the debt for which the mortgagee was surety and other notes on which relatives were indorsers out of the money thus raised, is valid whether the mortgagee knew of the insolvent's intention to apply the moneys to pay off certain creditors in preference to others or not. *Campbell v. Roache*, 18 Ont. App. Rep. 646 (1891).

And a memorandum made by a solicitor a fortnight before his death, in whose hands a client had placed money for investment and who had died insolvent without investing the money, declaring himself trustee of certain leaseholds then in mortgage to himself, and of a bill which he had indorsed to the client to secure the repayment of the sum placed in his hands, is good and entitles the client to the benefit of the security as against other creditors, even if the solicitor executed the memorandum with knowledge of his insolvency, as he retained no benefit to himself. *Middleton v. Pollock*, L. R. 2 Ch. Div. 104, 45 L. J. Ch. 298 (1875).

So, the fact that a person in failing circumstances engages with others in a business which requires money and credit, and executes a bill of trust for the performance of his engagements, does not indicate *mala fides* upon the part of those he thus engages with, though they are aware of his embarrassed condition. *Dubose v. Young*, 14 Ala. 139 (1848).

And proof that partners were in debt is not sufficient to raise a presumption of fraud and avoid mortgages made by them in the absence of anything to show that they were made with intent to defraud creditors of the firm and that the mortgagees had knowledge of such intention. *Green v. Tanner*, 8 Met. 411 (1844).

But, parties who take security from insolvents or from parties who are indebted to others must act in good faith and so as not to unnecessarily hinder, delay, or deceive other creditors. *Showman v. Lee*, 86 Mich. 556 (1891).

And the fact that a creditor knew of his debtor's insolvency when taking a transfer from him may be evidence of a fraudulent intent. *Erdall v. Atwood*, 79 Wis. 1 (1891).

And a creditor who takes a mortgage from an insolvent debtor with knowledge of his condition, and subsequently takes a transfer of the mortgaged property but a few days before an attachment was levied on it, may be considered as having aided the mortgagor in his fraudulent design to defraud the attachment creditor. *Shultz v. Morgan*, 27 La. Ann. 616 (1875).

As to the effect of notice or knowledge when more property is conveyed than is necessary to pay the debt, see *infra*, e.

d. Assumption of other debts as part of purchase price.

The question whether a transfer or security given by a debtor to a creditor to secure or pay his claim, in consideration for which he also pays or assumes the payment of claims of other creditors, will be regarded as a fraud upon creditors, participated in by the purchaser or mortgagee, seems to depend upon the bona fides and fairness of the transaction.

Thus, a stipulation by a purchasing creditor from a failing debtor at a fair and reasonable price, not materially less than the value of the property, to pay debts due to certain other creditors as a part of the agreed price, does not render the transaction fraudulent and void. *Chipman v. Stern*, 89 Ala. 207 (1890); *Ford v. Williams*, 8 B. Mon. 560 (1851).

And a sale by a debtor of his entire stock of goods to a creditor at a fair and reasonable valuation in payment of his claims is not rendered fraudulent as to creditors by the fact that an additional sum over and above the debt was paid under an express stipulation that it should be applied in payment of

of sale, told them (Jones & Fulton) that they would always be their friends, and assist them in any way they could, but that this promise had nothing to do with their making the trade. He also testified that the parties said for them to keep the money they had in

bank, about \$850, and their accounts. Col. E. W. Rector, who represented some of the attaching creditors (among others, Voorhees, Miller, & Rupel, who were to be paid \$400 by the terms of the bill of sale), states that he went to see Brown, who was in charge of

the debt due another creditor. *Rankin v. Vandiver*, 78 Ala. 562 (1885).

And in *Johnson v. McGrew*, 11 Iowa. 151, 77 Am. Dec. 137 (1880), it was held that a sale by a debtor of all his property to a creditor for a fixed sum, which such creditor pays in part by discharging the indebtedness which he holds, and in part by undertaking to pay other debts of the grantor and paying them the balance in money, is valid in the absence of actual fraud, and does not constitute a general assignment.

The knowledge of a purchaser that the vendor's intent and the necessary effect of the transaction would be to place the property beyond the reach of others creditors will not invalidate a sale made in consideration and satisfaction of a debt due him from such vendor and his assumption of the payment of several other debts. *Lewy v. Fischl*, 65 Tex. 311 (1886).

So, a transfer by a debtor to a creditor of not more of the debtor's goods than was sufficient to pay the creditor's claim, besides which the creditor undertakes to pay the debts due certain other creditors, is not invalid as a transfer to defraud creditors, though it may result in delaying or even defeating them. *Noyes v. Sanger Bros.* 8 Tex. Civ. App. 388 (1894).

And a purchase by a vendee from an indebted vendor for a full and fair price, a considerable portion of which goes to discharge the vendor's debts for which the vendee is surety, furnishes cogent evidence that the intent of the vendee was to secure himself rather than to defraud the creditors of the vendor. *Brown v. Foree*, 7 B. Mon. 357 (1847).

And a sale of property at a fair price, made for the purpose of raising money to pay debts, by the terms of which the purchaser is bound to and does appropriate the purchase price to such purpose, cannot be said to have been made to hinder, delay, or defraud a creditor, though he received no part of the proceeds. *Ellis v. Valentine*, 65 Tex. 532 (1886).

So, a verdict that a creditor was a bona fide purchaser will not be disturbed where the evidence shows his purchase through an agent of the stock of goods of his debtor at their full value in satisfaction of his claim and the payment of certain other debts which he assumed, though there were still other debts of which he had notice. *Keith Bros. v. Keffelfinger*, 12 Neb. 497 (1892).

And a purchase by a creditor in good faith from his debtor for the purpose of securing his claim is valid after satisfying prior liens, though the goods were in the possession of an officer replevying them under a chattel mortgage. *Morris v. Tillson*, 81 Ill. 607 (1876).

So, a sale of property by a debtor to a creditor, a part of the consideration for which is the payment and cancellation of a claim of one of the vendor's creditors, is good if made in good faith and for an adequate consideration, but is void as to creditors if not so made, but for the purpose of enabling the debtor to pay one creditor in full and to hinder, delay, or defraud his other creditors, or for the purpose of putting him in a position to force a settlement with them. *State, Heye, v. Frank*, 22 Mo. App. 53 (1886).

And where a transfer is made by one anticipating a judgment in a suit pending against him, to his son with intent to prevent the collection of the judgment, the son agreeing to pay his father's debts to certain bona fide creditors and executing

mortgages to them therefor while the action was still pending and after verdict but before judgment, executing other mortgages to his brother, the property will be relieved of the latter mortgages on a bill filed by a judgment creditor, but the mortgages to creditors will be held good where they did not participate in the fraudulent intent. *Beam v. Bennett*, 51 Mich. 148 (1883).

So, including in a mortgage debts claimed to be due to others, the mortgagee giving his parol undertaking to pay such debts, does not of itself make the mortgage fraudulent, but when considered in connection with other circumstances may be evidence of a fraudulent intent. *Carpenter v. Muren*, 42 Barb. 300 (1864).

And an agreement that a debtor shall execute a chattel mortgage upon his entire stock of goods, reserving the right to withdraw a certain amount of such goods to be turned over to another creditor in payment of a claim considered to be just, and a chattel mortgage executed and delivered pursuant to such agreement, are not fraudulent as against other creditors. *First Nat. Bank v. North*, 2 S. D. 480 (1892).

And taking a note and mortgage by a creditor from his debtor, intended to secure two creditors besides himself, does not invalidate the transaction as to creditors where the mortgagor refused to give such security unless the mortgagee would assume and agree to pay such creditors. *Lycoming Rubber Co. v. King*, 50 Iowa, 343 (1894).

And a mortgage given to trustees in good faith and without intent to defraud, to secure the indebtedness of the mortgagor to a third person named therein, by which the trustees were authorized to take possession of a hotel, leased by the mortgagor from a person to whom he was indebted, and to conduct the same and out of the proceeds pay the expenses of management, and from the balance pay off the indebtedness of the mortgagor to such lessor, and after the payment of a reasonable compensation to the trustees to return the remainder to the mortgagor, is not fraudulent either in fact or in law. *Ottman v. Cooper*, 81 Hun, 530 (1894).

A purchase of goods from an insolvent by a purchaser to whom such insolvency was known, however, is fraudulent and void as to creditors, unless the purchaser paid a fair price for them with a valid debt due him by the vendor and other valid debts, etc. *Tennent, S. & E. Shoe Co. v. Partridge*, 82 Tex. 329 (1891).

And the surrender of a note by a creditor to a debtor, the debtor at once giving it as security to other creditors, after which the creditor buys the stock of goods of the debtor, satisfying his own debt and paying debts of others, furnishes a question for the jury as to the existence of a fraudulent intent. *Ibid.*

In *Tennent, S. & E. Shoe Co. v. Partridge*, *supra*, *Seligson v. Brown*, 61 Tex. 182, in which the purchaser was not a creditor, was distinguished upon the ground that in that case the question arose upon a charge refused or asked, while in this one it arose upon an issue of fact, fraudulent intent or not.

So, a purchase by a creditor of his debtor of property in satisfaction of his debt and of the debts of other favored creditors, taking a large surplus over to the exclusion of a particular creditor, whose suit was then pending, is evidence of fraud. *Peck v. Land*, 2 Ga. L. 46 Am. Dec. 365 (1847).

And a sale by a debtor to a creditor under an

the store, and told him that he wanted to get the \$400, and see the bill of sale. He says that Brown told him that he wanted to see Col. Murphy before paying the money, and that on the next day Murphy and Brown came to his office, and said they were ready

to pay the money, but wanted him to recognize the bill of sale, and that he declined to do so. Judge Leatherman, who represented M. Wolf & Sons, who were to be paid \$325 by the terms of the bill of sale, testified that he went to Brown, and asked him when he

agreement that the creditor should sell the property and pay himself out of the proceeds, and then pay certain other creditors and return the balance to the debtor, entered into for the purpose of preventing creditors of such debtor from attacking and seizing the property, is fraudulent and void. *Menton v. Adams*, 49 Cal. 620 (1875).

So, a transfer by a debtor in embarrassed circumstances of all his property not exempt from execution to one who was well acquainted with all the facts and who paid therefor nothing but the mortgages and judgment liens thereon and the debt of one creditor in addition to a debt due himself, taken in connection with other evidence tending to establish unfairness of the whole transaction, was held to be fraudulent and void as to creditors of the vendor in *Ferguson v. Hillman*, 55 Wis. 181 (1882).

And a conveyance by a copartnership in failing circumstances with a view to insolvency, authorizing the grantees to pay such claims of other persons not mentioned in the conveyance as the vendees may deem prudent, conditioned that such conveyance should be void in case of failure of the grantees to pay certain notes, is in violation of the act against fraudulent conveyances, and void. *Harvey v. Mix*, 24 Conn. 406 (1856).

And a transfer of goods paid for partly in a debt due the purchaser, partly in the assumption by him of other debts due by the vendor, and partly in a note made by the purchaser, payable to the order of the vendor, will be set aside where it was fraudulent as to the part of the consideration received in the form of the purchaser's note, though the transaction was fair and unimpeachable in so far as by it honest debts of the vendor were paid. *Lambeth v. McClinton*, 65 Tex. 108 (1885).

So, in *Re Chaplin*, L. R. 26 Ch. Div. 319, 53 L. J. Ch. N. S. 732, 51 L. J. 345 (1884), a conveyance in which the grantee undertook the payment of the grantor's debts and agreed to employ the grantor to manage the business, which was thereafter carried on in the grantor's name as before, with nothing to show a change, was held, in connection with the fact that the debt thereby paid was overstated, to be void as against a trustee in bankruptcy as in fraud of the bankruptcy act and of the assignor's creditors under the statute of Elizabeth.

Some of the cases, however, have proceeded on the theory that a transfer providing for the payment of other debts besides those of the transferee is to be regarded as a sale proper, and not a transfer in payment of a debt, within the rule charging a purchaser with participation in the fraudulent intent of the vendor from mere notice, though he did nothing in aid of it except to make the transfer.

Thus, a sale of all the property of a firm in embarrassed circumstances, which amounts in all to over \$16,000, in consideration for which the vendee agrees to cancel his indebtedness to him, amounting to \$9,850, and to pay \$3,300 to another person, and to pay other items entitled to a preference, shows an intention to make an out and out sale as distinguished from a transfer in payment of a debt, the intent of which is to be determined by that of the purchaser as well as the vendor. *Hine v. Bowe*, 46 Hun, 196 (1887).

And in *Bollman v. Lucas*, 22 Neb. 796 (1888), a creditor who purchased the stock of goods of his debtor taking out of the consideration his own claim, and also paying the claims of several other

debtors amounting in all to the consideration money in the bill of sale, was treated as a purchaser, and not as a creditor taking payment of his debt in property.

And in *Allen v. Stingel*, 95 Mich. 195 (1893), it was held that a purchase by a mortgagee in consideration of his assumption of prior mortgages and taxes where the land was worth \$200 more than the amount of all the mortgages and taxes, is invalid as against creditors, where the intent of the mortgagor, of which the mortgagee had notice, was to defraud his unsecured creditors.

e. Amount of property taken.

The doctrine seems to be universal that a creditor may secure the payment of his claim from a failing debtor by taking a transfer of property where he acts in good faith and obtains no more property than will suffice to satisfy his claim.

This was held or stated in *H. B. Clafin Co. v. Rodenberg*, 101 Ala. 213 (1893); *Smith v. Boyer*, 29 Neb. 76 (1890); *Elwood v. May Bros.*, 24 Neb. 373 (1888); *Rothell v. Grimes*, 22 Neb. 526 (1887); *Sanger Bros. v. Colbert*, 84 Tex. 668 (1892); *Hellman v. Bick*, 55 Mo. App. 168 (1893); *Christian v. Greenwood*, 23 Ark. 264, 79 Am. Dec. 104 (1861); *Bruce v. Smith*, 3 Harr. & J. 499 (1805); *Owens v. Clark*, 78 Tex. 547 (1890); *Noyes v. Sanger*, 8 Tex. Civ. App. 388 (1894).

And in *Peters-Miller Shoe Co. v. Casebeer*, 53 Mo. App. 640 (1893), it was held that a conveyance by a debtor to his creditor in payment of his claim is valid where there is nothing to show that more property was bought than was reasonably necessary to pay the debt, or that the purchaser was a party to or cognizant of any scheme or fraud on the part of his grantor.

Where property received by a creditor in payment of his claim is no more than is reasonably required to satisfy his debt, taking into consideration the expense incident to a conversion of the property into money, the invalidity of the transfer must result from proof of a fraudulent intent in fact on the part of both the debtor and the preferred creditor. *Blankenship v. Willis*, 1 Tex. Civ. App. 657 (1892).

And a conveyance by a debtor to a creditor to secure a bona fide debt will be upheld though the creditor knew that the debtor had no other means with which to pay other creditors, where the property taken is no greater in value than the amount of the debt. *Hale v. Stewart*, 7 Hun, 591 (1876).

So, the receipt of goods by a creditor from his debtor in payment of his debts is not fraudulent as against the debtor's other creditors, though it may result in hindering them, where the goods taken are of a value reasonably proportionate to the debt extinguished and the debtor reserves to himself no benefit in the goods transferred. *La Belle Wagon Works v. Tidball*, 69 Tex. 161.

And the creditor has a right to take the property from an insolvent debtor if it be openly done. *Greenleve v. Blum*, 59 Tex. 124 (1883); *Smith v. Whitfield*, 67 Tex. 124 (1896).

And a creditor who in good faith receives a transfer of his debtor's property for the purpose of satisfying his claim, receiving no more than is sufficient for that purpose, will be protected, although his debtor may be insolvent and may have intended to defraud his other creditors and such facts are known to the creditor at the time of his purchase. *Hamilton-Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380 (1893); *Smith v. Whitfield*,

was going to pay the \$325; and Brown told him that he would do so when he returned to St. Louis, and, upon being asked when he expected to return, said: "When I dispose of this stock here." There was a difference in the testimony as to the amount of

goods Jones & Fulton had in stock at the time of the sale. The inventory taken by the purchasers showed \$10,129. Jones & Fulton testified that the stock amounted to \$13,000 or \$14,000. The defendants attacked the inventory taken by the purchasers, claim-

supra: Traders' Nat. Bank v. Day, 7 Tex. Civ. App. 569 (1894); Edwards v. Dickson, 66 Tex. 613 (1893); Reynolds v. Weinman (Tex.) 25 S. W. 33 (1894); Owens v. Clark, 78 Tex. 547 (1890).

So, a mortgage or bill of sale given by a failing debtor to secure an honest debt is not fraudulent though the parties knew that the claims of other creditors would be thereby defeated, provided the fair value of the property purchased as security did not greatly exceed the amount of the debt, interest, and probable expense of foreclosure. First Nat. Bank v. Lowrey Bros. 36 Neb. 290 (1893).

And where a creditor who holds a mortgage as security for his debt takes from his debtor other property with the agreement to apply the proceeds to his claim, if the value of the additional property added to that of the mortgaged property is materially in excess of what was necessary to satisfy his claim, the sale of the additional property must be deemed fraudulent and the purchaser will be held to have participated in the fraud, but if no more was taken than was reasonably necessary to pay the debt the law will protect the purchaser. State v. Durant, 53 Mo. App. 493 (1895).

And a conveyance by a person indebted in a considerable amount, both on his private account and as partner, to his copartner, of all his real estate to secure an indebtedness to him, and of a quantity of personal property for cash, after which he removes to another state with the money and all his remaining property, his copartner knowing of his indebtedness and of his intention to leave the state without paying his debts and that no property would be left in the state, but having the intent to secure a settlement with him and to furnish him with money to set up business in the other state, is not fraudulent as against partnership creditors, as the copartner remains personally liable for the partnership debt and the property could still be attached by partnership creditors, and is not void as against private creditors where he was not insolvent, as it was not made by him while in failing circumstances and was not void under the statute against fraudulent conveyances where the copartner had no knowledge of any fraudulent intent. Hamilton v. Staples, 34 Conn. 316 (1867).

But the law will not suffer a creditor, although he has a just demand, to use it as a screen to protect the debtor's estate from his other creditors where the estate greatly exceeds in value the amount of the debt. Kuykendall v. McDonald, 15 Mo. 416, 57 Am. Dec. 212 (1852); Edrington v. Rogers, 15 Tex. 188 (1855); Smith v. Boyer, 29 Neb. 76 (1890); Collingsworth v. Bell (Kan.) 43 Pac. 252 (1896).

In Smith v. Boyer, *supra*, Grimes v. Farrington Bros. 19 Neb. 449 (1886), *infra*, III. m, was distinguished upon the ground that in that case it did not appear that the property would sell for more than the amount of the debt.

And a purchase of property in payment of a debt is not valid as to creditors unless the goods taken bear a just proportion to the amount of the debt sought to be paid thereby. Schram v. Taylor, 51 Kan. 547 (1893); Smith v. Whitfield, 67 Tex. 124 (1896).

A creditor cannot purchase the goods of his debtor at a price in excess of his debt, when he knows that the excess so paid will be placed beyond the reach of the debtor's other creditors. Such a purchaser is a participant in the fraud of the debtor whether he intended to aid him or not. Hart v. Sandy, 39 W. Va. 644 (1894); McVeagh v. Baxter, 82 Mo. 518 (1884).

Some of the cases have been decided upon the 31 L. R. A.

theory that the creditor is limited to taking the exact amount of his indebtedness.

Thus, it was held that a creditor who takes from his debtor in payment of his debt more of his property than what appears to be reasonably worth the amount of the debt, commits a fraud upon other creditors which invalidates the transaction. Klein v. Hoffheimer, 132 U. S. 367, 33 L. ed. 373 (1890); Sanger Bros. v. Colbert, 84 Tex. 668 (1892); Edwards v. Dickson, 66 Tex. 613 (1893).

So, a transfer by a debtor to a creditor of property of value considerably in excess of the amount of the debt, the creditor not obligating himself to pay the excess to other creditors but executing his negotiable note therefor payable on a long credit to the vendor, is fraudulent in law, as the necessary consequence is to hinder and delay other creditors as to the surplus, and the purchaser cannot be permitted to say that his intent was fair and that the vendor agreed to appropriate the note to the payment of his other creditors. Elser v. Graber, 69 Tex. 222 (1897).

And where an involved debtor conveys property to his daughter to satisfy an indebtedness due her which greatly exceeds that indebtedness in value, and would tend to hinder, delay, and defeat the claims of other creditors, the whole transaction is fraudulent as far as such creditors are concerned. Reeves v. Shey, 39 Tex. 634 (1873).

And the assignment of a life insurance policy and the execution of a bill of sale absolute on its face but intended to secure a debt out of all proportion to the value of the property conveyed, made by a grantor utterly insolvent to a grantee of limited means, will be deemed fraudulent in the absence of explanatory evidence. Earnshaw v. Stewart 64 Md. 513 (1896).

So, in Oppenheimer v. Half, 68 Tex. 400 (1897), it was contended that a purchase of property by a creditor of a debtor for which the creditor satisfied his claim and paid the debtor \$1,000 in cash in addition, was not fraudulent and void as to other creditors, where the value of the property did not exceed the amount of the debt, and the \$1,000 in cash was given as an inducement or bonus to obtain the preference over other creditors; but the contention was not sustained purely upon the ground that the value of the property conveyed did exceed the amount of the indebtedness.

But the belief of a wife, who took a chattel mortgage from her husband who was financially embarrassed to secure a bona fide debt due her of \$4,268.51, for which he executed a bill of sale to her for the property to secure such debt and another debt of \$1,075 due to third persons for which she was surety, that the property thus conveyed was worth \$10,000, while in fact it was worth only about one half that amount, will not invalidate either the mortgage or the bill of sale where she acted in good faith, believing that the property was only a fair security for the debts and not intended to defraud any one or to hinder or delay creditors, further than might result from the honestly securing of her own debt. Miller v. Krueger, 36 Kan. 344 (1897).

Such a transfer, however, has been held to be a badge of fraud. Peck v. Land, 21 Ga. 1, 46 Am. Dec. 368 (1847); Howerton v. Holt, 23 Tex. 53 (1859); Baylor v. Brown, 8 Tex. Civ. App. 177 (1893).

Which is admissible in evidence as tending in connection with other facts to establish fraud. Howerton v. Holt, *supra*.

And it is thought that the doctrine may be re-

ing that in certain particulars it was fraudulent, and not a true statement of the actual assets. It seems to be conceded by all parties that all the debts mentioned in the bill of sale were bona fide. It was shown upon the trial that the attachment in the McGuire case

was sustained, and that the goods attached sold for \$115, several months after they were seized under the attachment.

The court gave eighteen instructions at the request of the plaintiffs, and refused the following asked by them: "(18) In this

garded as established by the weight of authority that such a transfer is nothing but a badge of fraud, and that whether or not the transaction will be regarded as fraudulent in fact will depend upon the accompanying facts and circumstances.

Thus, a purchase by a creditor from his falling debtor in payment of his claim is good as against other creditors, even though the purchase exceeds the demand, in the absence of anything else to show a fraudulent intent. *Young v. Stallings*, 5 B. Mon. 307 (1845); *Hobbs v. Davis*, 50 Ga. 214 (1873).

A sale by a debtor to a creditor for the payment of his claim is to be considered as a whole, and if there is a balance due the debtor for which the purchaser gives his notes, it will not be set aside for that reason alone to that extent in favor of creditors. *Beurmann v. Van Buren*, 44 Mich. 496 (1880).

And a purchase by a creditor from his debtor for the purpose of the payment of his debt cannot be impeached though he may have paid the difference between the amount of the note due him and the price agreed upon for the property in money, where his motive was to obtain payment only. *Reehling v. Byers*, 94 Pa. 316 (1880).

So, a slight excess in value of goods taken by a creditor from a debtor in payment of his claim over the amount of the indebtedness, will not vitiate the transaction where the creditor acted in good faith. *La Belle Wagon Works v. Tidball*, 69 Tex. 161 (1887); *Peters Saddlery & H. Co. v. Schoelkopf*, 71 Tex. 418 (1888).

Thus, a purchase of goods by a creditor from his debtor in payment of the creditor's debt will be treated as a preference of one debtor over another, although the amount of the purchase far exceeded the debt, where the balance of the purchase price was appropriated to the discharge of other of the debtor's obligations. *Tennent Stribling Shoe Co. v. Rudy*, 53 Mo. App. 196 (1893).

And a purchase by a creditor of his debtor in payment of his claim of a negro woman and two children at \$900 which was \$240 more than the creditor's demand, made by the debtor with intent to defraud other creditors, will be held good where they were family slaves and it does not appear that the purchaser had knowledge of such fraudulent intent. *Young v. Stallings*, 5 B. Mon. 307 (1845).

And a conveyance from a husband to his wife to secure an honest debt is valid to the amount of such debt although the amount conveyed largely exceeds the amount thereof, where the wife honestly believed her husband indebted to her for other money sufficient to make the indebtedness equal to the value of the land, though the husband had no right as against his creditors to account to her therefor; but she will hold the excess in trust for the use of his creditors. *Columbia Sav. Bank v. Winn* (Mo.) 38 S. W. 457 (1895).

And a conveyance by an insolvent debtor of land in part satisfaction of prior indebtedness is not rendered invalid by a subsequent independent transaction on the same day, whereby the debtor sells merchandise to settle the rest of the debt to the same vendee, although the vendee then pays a small sum to the debtor to balance the account. *Buford v. Shannon*, 95 Ala. 205 (1891).

The rule would seem to be that a purchase by a creditor from his debtor in payment of his claim is not invalidated because the property exceeded the amount of the debt, when this was reasonably necessary to effect the lawful purpose of satisfying

the debt, but the necessity must arise from the nature, situation, or condition of the property, and not from the debtor's demand for cash. *Levy v. Williams*, 79 Ala. 171 (1885).

Thus, a creditor may purchase lands of his debtor in satisfaction of his debt, and if necessary or convenient to effect the object he may advance cash to the debtor for a balance of the value without being pledged to see to the application of the cash to the payment of other debts. *Gist v. Barrow*, 42 Ark. 521 (1884).

And in *Christian v. Greenwood*, 23 Ark. 258, 79 Am. Dec. 104 (1861), it was held that a creditor purchasing of his debtor in payment of his debt must not buy more than is necessary for his own protection unless good reason appears why the property should be sold together and not separated so as to make the quantity equal to the amount of the debt.

But where a debtor's property is easily separable, if the creditor receives the same in excess of his indebtedness and pays the difference in money and has knowledge of the design of the debtor to transfer all of his property with intent to defraud his other creditors, the purchase is fraudulent *in toto* and cannot be separated as against creditors. *McDonald v. Gaunt*, 30 Kan. 693 (1883).

And the receipt by a creditor of property of his debtor in payment of a debt in excess of the amount of the indebtedness, paying the difference in money where the property is easily separable, is sufficient to establish the creditor's privity to a fraudulent intent of the debtor, and will invalidate the purchase. *Ibid.*

So, a conveyance taken by a creditor from his debtor of an amount of property more than sufficient to secure his debt for the purpose of enabling him to delay other creditors is fraudulent and void as against such creditors. *McNichols v. Richter*, 13 Mo. App. 515 (1883); *Davis v. McCarthy*, 40 Kan. 18 (1883).

And a transfer by a debtor of property which at a fair valuation is ample to satisfy all that he owes by way of sale and payment of a single creditor who is a near relative casts the burden of proof as to the entire bona fides of the transfer upon the purchaser. *Demarest v. Terhune*, 18 N. J. Eq. 532 (1867).

And a purchase by a creditor from a debtor in payment of his debt of more property than was necessary for such payment is fraudulent and void where there was a specific intent to hinder and delay other creditors, though the debtor subsequently used the money paid him by the purchaser in excess of his debt in the payment of debts due to other creditors, as the question of the validity of the transaction is governed by the facts existing when it was consummated. *Willis v. Yates* (Tex.) 12 S. W. 232 (1889).

So, a transfer by an insolvent debtor of all his property in payment of a debt, receiving a note for a balance with an understanding that he should get back part of the property for working out the stock sold, and that the money was to be made out of the stock before the notes should be paid, is fraudulent and void as to creditors. *Bentz v. Rockey*, 69 Pa. 71 (1871).

And a conveyance by an insolvent grantor justly indebted to his grantee in a comparatively smaller amount, of all or nearly all his property in satisfaction of the debt for a nominal consideration, falsely recited and claimed by the grantee to have

case no evidence has been adduced upon which you would be legally justified in finding a verdict for the defendants. You are therefore instructed to find a verdict for the plaintiffs, assessing their damages at the value of the goods seized under the attach-

ment of *J. M. McGuire & Co. v. Jones & Fulton* at the time of their seizure. (19) You are instructed that a fraud that would vitiate a sale of goods must be in the sale itself, and not in some mere device for putting other creditors off their guard, and pre-

been in hand paid equal in value to the property conveyed, but largely in excess of the debt actually due, is fraudulent and void when accepted by the grantee as to other creditors. *Knight v. Capito*, 23 W. Va. 639 (1884).

And a conveyance of one eighth of a ship for less than one half of its value, absolute in form and intended to be treated as absolute as to third parties but which was not so in fact between the parties but intended as security only, is fraudulent as against existing creditors, and when set up by the purchaser, as an absolute sale he will be charged absolutely and not on condition of payment to him of the consideration for the conveyance. *Thompson v. Pennell*, 67 Me. 159 (1877).

So, a violent presumption of a secret trust is raised by a conveyance by an insolvent debtor to a creditor of all his property in payment of a debt which is less than one fourth of the true value of the property, and about one fourth of the price which a purchaser offered and stood ready to give, which will invalidate the conveyance in the absence of anything to rebut it. *Shelton v. Church*, 38 Conn. 418 (1871).

And the execution by a debtor of a deed, upon the eve of his departure from the state and shortly after the receipt of intelligence materially affecting his credit, of property worth more than double the amount of the debt to be secured, to a creditor, the bill of lading for a part of the property having been antedated by the grantee for the purpose of overreaching another creditor who had previously obtained a bill of lading and who permitted the grantee to take, use, and sell the property contrary to the tenor of the deed, or connived at his doing so, sufficiently shows collusion between the debtor and the creditor to injure and defraud the rest, to prevent the creditor from being entitled to any prior lien by virtue of his deed. *Wright v. Hencock*, 3 Munf. 521 (1812).

And evidence that a sale by a debtor who had obtained goods by false pretenses and with intent not to pay for them, to a third party through an agent of the purchaser who had knowledge of the insolvent condition of the vendor, in consideration of the satisfaction of an indebtedness of the vendor amounting to \$3,000, the purchaser giving a check for the balance of the purchase price of \$10,000, after which he immediately sells the same to another for \$500 less, when the goods are sold at auction and he is paid from the proceeds of the auction sales, no inventory having been taken at either sale, warrants a finding that the first purchaser had notice or knowledge of the fraudulent intent of the original vendor. *Grossman v. Walters*, 33 N. Y. S. R. 921 (1890).

And in *Zeigler v. Carter Bros.*, 94 Ala. 291 (1891), a conveyance of property worth \$850 in consideration of an antecedent debt of \$850, was set aside as fraudulent and void as against creditors, where, soon after the conveyance, the grantee leased a part of the property to the grantor, who had no apparent means, and who at once erected a livery stable thereon worth \$400 or \$500 which was held in his wife's name but superintended and managed by the husband.

And in *Hamlin v. Wright*, 26 Wis. 50 (1870), a conveyance of land in settlement of partnership accounts, the land being worth several times the amount of the pretended balance, was held, in connection with the continued use and retention of profits by the grantor and other circumstances, to 31 L. R. A.

be sufficient to invalidate the conveyance as against creditors.

So, a conveyance by a debtor of his entire stock of goods, fixtures, etc., and credit given upon his debt therefor and the execution upon the same day of another conveyance to the same creditor of all his notes, accounts, and outstandings for the purpose of further securing such indebtedness, must be considered together as parts of the whole transaction; and where the value of the property transferred thereby greatly exceeds the debt to be paid or secured, it is a badge of fraud in fact, the effect of which is to be left to the jury. *Baylor v. Brown* (Tex.) 21 S. W. 73 (1893).

Whether or not more goods were intentionally received by a creditor in payment of his claim than were reasonably required to satisfy his debt, and whether the transaction was open and fair, solely for the purpose on the part of the purchaser of collecting a just debt, or whether there was also a fraudulent purpose to which the purchaser was privy, are questions for the jury. *Blankenship v. Willis*, 1 Tex. Civ. App. 657 (1892).

And a direction of a verdict upholding a transfer by which a preference was given to one creditor over another is erroneous where there is a conflict in the evidence as to whether more property was transferred than was reasonably necessary to pay the preferred debt. *Pierce v. Lowder*, 54 Mo. App. 25 (1893).

And in *Wood v. Keith*, 60 Ark. 425 (1895), the fact was recognized that necessity might compel a purchase of more than a sufficiency to pay the debt.

Where a creditor takes more property than is necessary to satisfy his claim, paying for the balance, however,—at least in a case in which the property can be severed,—he loses his position of a transferee in payment of a debt, and is placed in that of purchaser for an independent consideration in which mere notice or knowledge of the fraudulent intent of his vendor will charge him with participation therein though he does nothing in aid of it.

Thus, a creditor who takes goods from a failing debtor in payment of his indebtedness cannot go beyond obtaining satisfaction for his own debt. If he pays part of the consideration in cash the transaction is governed by the same principles which apply to purchasers on an entirely new consideration. *Harris v. Russell*, 93 Ala. 59 (1890).

And where a creditor takes payment of his indebtedness from a failing debtor in property, without paying any cash consideration therefor, pursuant to a combination and conspiracy between him and others not creditors by which other property is also taken for which a cash consideration is paid by the others, the creditor is affected by the principles which apply to the others, and the whole transaction is governed by the rules applicable to sales by a debtor. *Ibid.*

The right acquired by a creditor who takes property of his debtor in satisfaction of his claim of a value greater than the claim, paying the balance, must be tested and controlled by his attitude as a purchaser only, and if the transaction cannot be sustained as a purchase, it must fall both as a purchase and a settlement of the debt, there being but one entire transaction. *Sanger Bros. v. Colbert*, 84 Tex. 608 (1892).

So, a creditor, who, knowing that other creditors will be hindered and delayed, receives more of his-

venting them from investigating the doings of the debtor, though plaintiffs' agents may have advised Jones & Fulton to throw the agent of Voorhees, Miller, & Rupel off his guard intentionally, by ordering from him a bill of goods that was not a fraud that en-

tered into the bill of sale or affected it; and this is particularly so if the advice was not acted on. (20) Fraud must consist in acts done with a fraudulent intent, not in mere intent which is not carried out; and the secret motives of a debtor, however fraudu-

debtor's property than is reasonably necessary for the payment of his claim, paying a moneyed consideration for the excess, becomes a purchaser from the failing debtor and helps him to place his property beyond the reach of other creditors by giving him an equivalent therefor which they cannot subject to their claims, thus invalidating the transaction. *Black v. Vaughan*, 70 Tex. 47 (1888); *Smit v. Jacob Straus Saddlery Co.* 2 Mo. App. Rep. 880 (1886).

And a sale by a debtor of \$47,000 worth of property to his creditor for the purpose of satisfying a debt of only \$17,000, leaving a balance of about \$30,000 after applying the indebtedness, is a sale of property and not a conveyance in payment of a debt within the rule that the knowledge of the creditor of the fraudulent intention of his debtor does not prevent him from receiving payment of an honest debt. *Hanchett v. Goetz*, 25 Ill. App. 445 (1887).

So, a purchase by a creditor to whom \$5,700 was due, of the debtor's entire stock, knowing that he was insolvent, of which he paid \$1,000 in cash, leaving \$500 of his own debt unsatisfied, is a purchase for an advanced consideration, and not a mere securing of his own demand, and will be set aside as fraudulent as against the creditors. *Leinkauff v. Frenkle*, 80 Ala. 136 (1885).

And a mortgagee who purchases the mortgaged premises, agreeing to assume prior debts and to pay unpaid taxes on the land, which is worth \$200 more than the amount of all the mortgages and taxes, does not take as a creditor taking conveyances to secure his debt, but as a purchaser, and his action must be controlled by rules applicable to purchasers of insolvent debtors. *Allen v. Stingel*, 95 Mich. 195 (1893).

Where a creditor purchases enough property from his debtor to pay his claim and more besides, paying a consideration for the remainder, the sale will not be upheld as against creditors unless it was made under such circumstances as would validate it if made to any other person. *Allen v. Carpenter*, 66 Tex. 138 (1886).

In *Allen v. Carpenter*, *supra*, *Greenleve v. Blum*, 59 Tex. 124 (1883), *infra*, k, was distinguished upon the ground that in that case it appeared that the creditors had every reason to know that their debtors were selling to them and getting the advantage of the surplus over and above their debts for themselves in order to defraud their other creditors.

And a purchase made by a creditor with knowledge of the vendor's fraudulent purpose to hinder, delay, or defraud his other creditors of more than enough to pay the debt due, is a participation by the purchaser in the fraud of the vendor, thus assisting in the accomplishment of such purpose. *Roerber v. Bowe*, 26 Hun, 554 (1882); *McVeagh v. Baxter*, 82 Mo. 518 (1884); *Hart v. Sandy*, 30 W. Va. 644 (1884).

In *Roerber v. Bowe*, *supra*, *Dudley v. Danforth*, 61 N. Y. 626 (1874), *supra*, III. c, was distinguished upon the ground that the purchase and sale were made in good faith for the purpose of paying an honest debt, but the court afterwards criticised that decision, saying that its doctrine seems to be in conflict with the statute itself on the subject of fraudulent transfers, and should be restricted to cases precisely similar and not extending beyond them.

And a sale by an insolvent corporation, made by the members of its executive committee to two of its trustees who had knowledge of its insolvency 31 L. R. A.

and received the property in payment of a debt much less in amount than the value of the property, is fraudulent and void as a matter of law. *Third Nat. Bank v. Elliott*, 42 Hun, 121 (1886).

So, a purchase by a creditor of a debtor of his entire stock of merchandise with knowledge of his insolvency and indebtedness, to other persons in consideration of the satisfaction of the debt due the creditor and \$1,000 paid to the debtor in cash, is fraudulent and void as to other creditors. *Oppenheimer v. Halff*, 68 Tex. 409 (1887).

And a purchase by a creditor of all his debtor's property to satisfy his claim against him when the property amounts to more than the claim, giving his note for \$1,820 for the difference payable one year after date, when the debtor was insolvent and known to be so by the vendee, is fraudulent and void as against creditors. *Seger's Sons v. Thomas Bros.* 107 Mo. 635 (1891).

And that goods were purchased by a creditor from his debtor, amounting to \$233.87 more than his debt, which sum was paid in cash, knowing that the vendor was going down hill and was indebted to others and unable to pay, is sufficient to uphold a verdict setting aside the transfer upon the ground of fraud. *Meyberg v. Jacobs*, 40 Mo. App. 128 (1890).

So, a transfer of property worth at least \$330 by a debtor to a creditor in payment of debts aggregating \$185.80, is fraudulent and void as to other creditors where the creditor has knowledge of the debtor's insolvency and that the transfer was intended to defraud other creditors. *Stuart v. Smith* (Tex.) 21 S. W. 1026 (1893).

And a sale by an insolvent merchant who was under indictment, to one of his creditors of his entire stock of goods worth about \$800, in satisfaction of a debt due such creditor of about \$600, and for \$200 in cash, the cash payment having been taken to enable him to flee the country, which purpose and the existence of other debts were known to the vendee, is fraudulent and void as to other creditors. *Williams v. Moore Bros.* 6 Tex. Civ. App. 340 (1894).

And a creditor who takes the entire stock of goods of his debtor, amounting to more than \$700, to pay a debt of \$203, knowing that the debtor was hard pressed, the debtor's utter want of credit and pecuniary embarrassment being a matter of general notoriety in the community in which they lived, is sufficient to charge the purchaser with notice of the fraudulent purpose of the seller, if not to show that he was a participant in such fraudulent design. *Edmundson v. Silliman*, 50 Tex. 106.

And a purchase of three tracts of land at an aggregate price of \$1,000, of which \$800 was paid in cash and the balance in satisfaction of the creditor's antecedent debt, is fraudulent and void as against creditors, although the debtor refused to sell a single parcel separately, where the sale was made by the debtor with the known intent of converting his land into money, not for the payment of his debts, but to procure family supplies and enable him to carry on his business, the creditors having knowledge of his embarrassed condition and notice of facts sufficient to charge them with knowledge of the fraudulent intent. *Levy v. Williams*, 79 Ala. 171 (1885).

A purchasing creditor in securing the payment of his debt from a debtor must not unnecessarily hinder or delay other creditors or impair their

lent, do not vitiate the disposition of his property, provided such property is applied to the payment of debts at a rate which the law deems reasonable; and, when property is applied to the payment of debts at a rate equal to what it would bring at a fair public

sale to the highest bidder, that rate is reasonable. (21) If the plaintiff took the goods at such a price as they would have brought at a fair public sale to the highest bidder, the transaction would not be invalidated because they advised Jones & Fulton to put

rights by placing it in the power of the debtor to effectually screen part of the proceeds when he has knowledge of facts sufficient to create a reasonable belief of such intention. *Ibid.*

And it is not necessary that a creditor who takes a transfer of his debtor's property in payment of his debt, of value considerably greater than the amount of the debt, should have been influenced by a fraudulent intent in order to avoid the transfer, or that he should have intended to assist the debtor in defrauding his creditors, or that he should have had actual knowledge that such was the debtor's intention; it is sufficient to affect him with notice, if by ordinary prudence he might have known it. *Humphries v. Freeman*, 22 Tex. 45 (1858).

Thus, a purchase by a creditor from his debtor of property for which he pays a large sum in cash in addition to his claim is invalid where the sale was made with the intent upon the part of the vendor to hinder, delay, or defraud his creditors, and the vendee participated in the fraud or had knowledge thereof, or information of such facts as would have put an ordinarily prudent man on inquiry. *Sellers v. Bailey*, 29 Mo. App. 174 (1888).

And a creditor who purchases property of his debtor in excess of the amount of his claim, who knew of the embarrassment of his debtor and that execution had been levied on his property, and that a part of the property had been purchased in the name of a third person, and who had a private understanding with the debtor that he should have the privilege of paying within a reasonable time and reclaiming his property, is put upon inquiry as to the motive of the vendor. *Humphries v. Freeman*, 22 Tex. 45 (1858).

So, a purchase of the stock of goods in a store by an employee therein who knows that the proprietor is insolvent and had been refused further credit, in payment of a debt due him, who takes the stock of the debtor in another store in order to induce the debtor's consent, giving his notes for the balance, is fraudulent and void as to creditors. *Montgomery v. Bayless*, 96 Ala. 342 (1892).

And a transfer of merchandise by a debtor to a creditor clearly exceeding in value the sum due, the creditor knowing this fact and that the debtor was insolvent and had other creditors, and paying the debtor a sum of money to induce him to make the conveyance, whereby other creditors are prevented from enforcing their claims against a part of the property not necessary to pay such creditor's claim, are fraudulent and void as to other creditors. *Oppenheimer v. Halff*, 68 Tex. 409 (1887).

Such a transaction is invalid whether the excess is appropriated by the creditor to his own use or paid to the debtor in money or negotiable paper. *Blankenship v. Willis*, 1 Tex. Civ. App. 657 (1892).

And a conveyance by an insolvent husband to his wife of property worth several times the amount claimed to have been advanced by her will be set aside where her testimony was contradictory as to why the conveyance was made, and she knew that the money advanced by her was merely a part of the price paid to the original vendor, and that the conveyance was to a large extent voluntary, though she claimed to be ignorant of the value of the land. *Reese v. Shell*, 95 Ga. 749 (1895).

A creditor who takes property of his debtor of a value greater than the amount of his debt, satisfying his claim and paying the balance, is a purchaser for a valuable consideration, however, and before the transaction can be avoided as to him, it must

appear that he had notice of the fraudulent intent of his immediate grantor, and the burden of proof to establish such notice rests with the party attacking the transaction. *Sanger Bros. v. Colbert*, 84 Tex. 668 (1892).

And a sale by a debtor to his creditor of a larger amount of goods than was necessary to pay his debt will be upheld as against creditors where the vendee did not know and was not in possession of facts which would arouse the suspicion of an ordinarily prudent man and put him upon inquiry as to the fraudulent intent of the vendor. *Allen v. Carpenter*, 66 Tex. 138 (1893).

The question as to whether a purchase by a creditor from his debtor in payment of his claim of more property than is necessary to pay his claim when the property is not divisible and such purchase is rendered necessary by its situation, will be regarded as an independent purchase or a transfer in payment of a debt requiring something more than mere knowledge of the debtor's intent to defraud to charge the creditor with participation therein, seems to remain undecided.

There is a dictum in *McDonald v. Gaunt*, 30 Kan. 603 (1883), however, in which the rule that a purchase by a creditor of a debtor in payment of his claim of property in excess of the amount thereof is invalid where the circumstances attending his purchase are such as would put an ordinarily prudent man upon inquiry which if prosecuted would disclose a fraudulent intent, was confined to cases in which the property is easily separable.

And in *Wood v. Keith*, 60 Ark. 425 (1895), it was held that the knowledge of a creditor who purchases property from an insolvent or failing debtor in satisfaction of his debt, of a fraudulent intent of the debtor as to other creditors, does not affect the validity of his purchase if he does not aid him in defrauding his other creditors, and paid a fair price and purchased only to the extent of satisfying his debt, unless necessity compelled a purchase of more than a mere sufficiency.

And in *Chamberlain v. Dorrance*, 69 Ala. 40 (1891), it was held that a sale of property by a debtor to a creditor to apply in payment of his claim, which largely exceeds the value of the property without reservation, is valid as against creditors, though the debtor was then insolvent to the knowledge of the creditor and the property sold was substantially all he had.

In the above case there is nothing to show whether the property was or was not severable, but the assumption that it was not so might be based upon the fact that if it were severable the decision would be squarely in conflict with numerous cases above cited holding mere knowledge upon the part of the creditor of the fraudulent intent of the debtor to be sufficient to charge him with participation therein.

1. Allowance of fair price.

A creditor, in purchasing property from his debtor who is insolvent and attempting to dispose of his property to defraud other creditors to his knowledge, must act with the utmost good faith, and must pay or allow an adequate price for the property purchased. *Lewis v. Hughes*, 49 Kan. 23 (1892).

And a creditor who with full knowledge of an attempt of his debtor to defraud his creditors takes advantage thereof and obtains the property of the

their money into their pockets, and not to pay it to their creditors, if you find that such advice was given. Fraud consists in acts, and bad advice touching other property cannot vitiate a sale." Plaintiffs excepted to the refusal of these instructions.

The court, at the instance of the defendants, gave eleven instructions to the jury, two of which are as follows: "(9) If you believe from the evidence in this case that the plaintiffs by their transactions with Jones & Fulton in the purchase of the goods, acquired

debtor at less than its value, cannot be regarded as a purchaser in good faith. *Ibid.*

So, in *Hickman v. Trout*, 83 Va. 478 (1878), a conveyance for a grossly inadequate price without security was held, in connection with the continued possession by the grantor and an unusual length of credit and other circumstances, to warrant the conclusion that the grantor entertained a fraudulent design known to and participated in by the grantee.

But a creditor may accept a conveyance of property from his debtor at a fair and reasonable price in payment of his claims, though he knows that the debtor will be left without means with which to pay other creditors. *Seaman v. Nolen*, 68 Ala. 463 (1880); *Curran v. Olmstead*, 101 Ala. 602 (1894); *Bates v. Vandiver*, 102 Ala. 249 (1894); *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704 (1876); *Ford v. Williams*, 3 B. Mon. 550 (1843). And see *supra*, III., c., *Knowledge of fraud, insolvency, etc.*

A sale of goods by a debtor to a creditor in satisfaction of debts justly due, for a price not less than their real value, made with intent to defraud creditors on the part of the vendor, is not subject to objection on the ground that the fraud was participated in by the purchaser, though he knew the effect would be to prevent the collection of their claims. *Gilkerson-Sloss Commission Co. v. Carnes*, 56 Ark. 414 (1892).

And a sale by an insolvent debtor to a creditor in payment of an honest debt at a fair and adequate price without reserving any benefit to the vendor, is valid though made with a fraudulent intent of which the purchaser was cognizant. *Hornthall v. Schonfeld*, 79 Ala. 109 (1885); *Wood v. Keith*, 60 Ark. 425 (1895).

So, in *Christian v. Greenwood*, 23 Ark. 258, 79 Am. Dec. 104 (1861), it was held that a creditor who buys property of an insolvent debtor to secure his demand must allow a fair price.

And in *Hodges v. Coleman*, 76 Ala. 103 (1884); *Wilson v. Fawcner*, 38 Ill. App. 438 (1890); *Ellis v. Valentine*, 65 Tex. 532 (1886); *Chipman v. Stern*, 89 Ala. 207 (1889); *Rankin v. Vandiver*, 78 Ala. 562 (1885); *Brown v. Foree*, 7 B. Mon. 357, 46 Am. Dec. 519 (1847); *Keith Bros. v. Hiffelfinger*, 12 Neb. 497 (1882); *Sigler v. Knox County Bank*, 8 Ohio St. 516 (1858); *Bamberger, B. & Co. v. Schofield*, 160 U. S. 149, 40 L. ed. 374 (1895),—the element of a fair price was also considered in the decision of the cause.

And the payment of a fair price seems to have been one of the grounds upon which many transfers in which the purchaser or mortgagee has assumed the payment of the claims of other creditors have been sustained. See *supra*, III., d.

g. Security greater in value than debt.

The mere fact that the security given is more than is necessary is not of itself any indication of fraud. *Colbern v. Robinson*, 80 Mo. 541 (1883).

The law does not limit the amount of the security which a creditor may take from his debtor as against other creditors. *West Coast Grocery Co. v. Stinson* (Wash.) 43 Pac. 35 (1865).

A creditor may take adequate security by way of a mortgage upon the personal property of his debtor to secure his debt. *Morse v. Steinrod*, 29 Neb. 108 (1890).

And a chattel mortgage given by a debtor to secure a creditor is not fraudulent or void because more property is covered by it than would be necessary simply to satisfy the creditor's claim. *Sloan v. Coburn*, 26 Neb. 607, 4 L. R. A. 470 (1889).

Or solely because the property mortgaged was of a value two or even three times greater than the debt. *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb. 800 (1893).

And a mortgage given upon \$4,300 worth of goods to secure an indebtedness of only \$1,800, is not rendered invalid as against creditors by reason of the margin between the debt and the security, as the statute provides that the creditor may enforce his right notwithstanding the mortgage. *First Nat. Bank v. North*, 2 S. D. 480 (1892).

The mere fact that a mortgage covers more property than will secure the debt is not alone a circumstance from which the jury might presume the mortgage to be fraudulent as to creditors. *Downs v. Kissam*, 51 U. S. 10 How. 102, 13 L. ed. 346 (1850).

The rule would seem to be that the disproportion between chattels mortgaged and the amount secured thereby affords no basis for a presumption of fraud, but is a mere matter of evidence to be accorded such weight as in the light of certain circumstances it is entitled to receive in the determination of a question of fact. *Grand Island Bkg. Co. v. Costello*, 45 Neb. 119 (1895); *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb. 793 (1895).

And on an inquiry as to whether a mortgage was given in good faith and solely for the security of a just debt, or for the purpose of benefiting the mortgagor at the expense of other creditors, it is competent to show that the mortgagee having notice that there were other creditors took a mortgage covering substantially all of the debtors property,—a great deal more than enough to afford him ample security,—or that by the arrangement, he unreasonably postponed the collection of his demand, allowing the mortgagor in the meantime to retain and use the property, or that the mortgaged property which was retained and used by the mortgagor was perishable, or of such a character as to be profitable in its use. *Howell v. Carden*, 99 Ala. 100 (1892), *dictum*.

But a conveyance of property greatly in excess of sufficient security would be a fraudulent disposition of property as to the mortgagor's creditors. *Morse v. Steinrod*, 29 Neb. 108 (1890).

And a mortgage upon property, the fair value of which is much more than the debt to be secured, can only be allowed to stand as against creditors when it is entirely bona fide, and the burden of proof in this respect rests with the mortgagee. *Holt v. Creamer*, 24 N. J. Eq. 181 (1881).

And a mortgage by a failing debtor of nearly his whole estate to one of his principal creditors, the property mortgaged being 50 per cent more in value than the debt secured, stipulating for two or more years delay in its foreclosure, is void as against creditors, where the mortgagee knew that there were other creditors who would be hindered, delayed, and probably defeated thereby. *Reynolds v. Welch*, 47 Ala. 200 (1872).

And a mortgage executed by an embarrassed or insolvent debtor as security for a debt less than the value of the mortgaged property which was made payable in nine annual instalments, followed by a second mortgage upon the following day on the same property to the mortgagor's wife, who was the mother of the first mortgagee, is fraudulent and void as against a creditor of whose debt the

all the property of Jones & Fulton except the amount which the evidence in the case shows that the said Jones & Fulton had in the bank and their accounts, and that said plaintiffs counseled or advised the said Jones & Fulton to keep the said money themselves, and not

to pay the same to their creditors, and that such advice or counseling entered into said transactions between said plaintiffs and the said Jones & Fulton as an inducement for said Jones & Fulton to make said transaction with said plaintiffs, and that said Jones &

first mortgagee had notice. *McDowell v. Steele*, 87 Ala. 493 (1888).

So, a mortgage by a debtor on his real estate and a chattel mortgage of his entire personal property, given to secure his largest creditor, to whom he owed \$1,800 not yet due, is a fraudulent disposition of property where the stock of goods was worth \$4,200 and the real estate was valued at \$1,500 and he was indebted to other creditors to the amount of \$5,000. *Brown v. Work*, 30 Neb. 800 (1890).

And security on property worth from \$15,000 to \$17,000 for an indebtedness of from \$1,200 to \$2,000 and an advance of \$800, the creditor knowing of the insolvency of the debtor, cannot be regarded as a bona fide purchase within the statutes of fraudulent conveyances. *Herman v. McKinney*, 47 Fed. Rep. 758 (1891).

And a conveyance of real estate, absolute on its face, made to secure a debt actually due at a nominally high price and of a value far beyond the amount of the debt, with intent to cover the property from creditors, is fraudulent and void and will not be allowed to stand as a security for what was actually paid. *Miller v. Tollison*, Harp. Eq. 145, 14 Am. Dec. 712 (1824).

And where a creditor holds a mortgage upon the property of his debtor which largely exceeds in value the amount of the debt, and he thereafter enters into a scheme to prevent the creditors from receiving the surplus over and above his claim, it would be a fraud from its inception which would invalidate the whole transaction from the first to the last including the chattel mortgage, and vitiate the title to the goods acquired thereunder. *Hadley v. Adsit* (Kan.), 42 Pac. 836 (1895).

So, a mortgage by a debtor to a creditor, given for such length of time as will raise the presumption that it was given for the purpose of delaying or hindering creditors, or which is so disproportionate to the debt secured as to operate as a cover to shield the property from seizure under process of law, was spoken of as being fraudulent as against creditors, in *Eureka Iron & S. Works v. Bresnahan*, 66 Mich. 489 (1887).

A creditor is not guilty of fraud where he obtains security for the amount actually due by chattel mortgage covering no more property than is necessary to secure his debt, however, though the debtor acts with intent to defraud creditors. *First Nat. Bank v. Naill*, 52 Kan. 211 (1893); *Byrd v. Perry*, 7 Tex. Civ. App. 378 (1894).

And though he knows that it is the purpose of the debtor in giving the mortgage to defraud other creditors. *Byrd v. Perry*, *supra*.

And a finding that a mortgage was not fraudulent will not be disturbed on appeal where it appeared that it was given to secure a note for a balance due on the dissolution of a partnership and the value of the property mortgaged was not in excess of the debt secured, and that it was understood that any surplus remaining after paying the debt should be applied first to the debt of the complaining creditor and should then go to the mortgagor's relatives, though the intent of the mortgagor was to get the property out of reach of his creditors until he should be able to make sales and pay their debts. *Parker v. Roberts*, 116 Mo. 657 (1893).

So, in *Willis v. Heath* (Tex.), 18 S. W. 801 (1891), the fact that the debt equaled the value of the prop-

erty was treated as an element of the validity of the conveyance.

h. Security for overstated debt.

The doctrine has been asserted that a mortgage taken for a greater amount than the debt due the mortgagee is a fraud upon the mortgagor's other creditors and is invalid as against them. *Showman v. Lee*, 86 Mich. 556 (1891).

But it is thought that the prevailing rule is that the giving of a mortgage for a larger sum than the actual indebtedness to the mortgagee does not render the mortgage void in law. *Hoey v. Pierron*, 57 Wis. 262 (1886); *Frost v. Warren*, 42 N. Y. 204 (1870); *Wood v. Scott*, 55 Iowa, 114 (1890); *Bush v. Bush*, 33 Kan. 536 (1885).

And that a mortgage stating the debt intended to be secured at an amount greatly beyond what is due is at most prima facie evidence of fraud which may be overcome by showing fairness of intention on the part of the mortgagee. *Stover v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86 (1845); *Heim v. Chapel* (Minn.) 64 N. W. 825 (1895).

And it avoids the mortgage only when given willfully in connivance with the mortgagee and with an actual design to impose upon and defraud general creditors. *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289 (1894).

And that the overstatement in a conveyance of its consideration, not intentionally, but on account of a mistake of fact or law, when in fact the value of the property conveyed does not exceed the amount of the actual indebtedness, will not render the transaction fraudulent and void where there is neither an actual intent to defraud nor a legal fraud resulting from a transfer of more property than is sufficient to pay the debt. *Freybe v. Tiernan*, 76 Tex. 286 (1890).

Thus, the taking of a note and mortgage by a creditor for a larger sum than the debtor owed does not show a participation in the fraudulent intent of the debtor which will invalidate the transaction, where it was the result of a want of accurate knowledge of the amount due. *Lycoming Rubber Co. v. King*, 90 Iowa, 343 (1894).

And an overstatement of a debt in a chattel mortgage given to secure that and other debts does not invalidate the mortgage as against other creditors where it was due to the fact that the parties did not know the exact amount at the time the mortgage was prepared, and had no ready means of ascertaining it. *H. T. Simon-Gregory Dry Goods Co. v. McMahan*, 61 Mo. App. 490 (1895).

So, a mortgage given by a failing debtor to a bona fide creditor for considerably more than is due will not be deemed to be fraudulent and void as to creditors where the mortgagee did not know that the mortgagor was insolvent or contemplated insolvency. *Carson v. Byers*, 87 Iowa, 606 (1885).

And a note and mortgage designed to take up an old note and mortgage given in good faith to secure a bona fide indebtedness made upon the understanding that all the credits which were upon the old one should be placed upon the new one, thus overstating the amount in the mortgage, is not fraudulent and void *in toto* where such overstatement was made in good faith and without any intent upon the part of the mortgagee to hinder, delay, or defraud the mortgagor's creditors. *Hughes v. Shull*, 33 Kan. 127 (1885).

A mortgage executed by a debtor in failing cir-

Fulton, acting upon such advice of said plaintiffs, did appropriate said money to themselves, and thus deprived their creditors of it, and that said Jones & Fulton were at the time insolvent, you should find for the defendants in this case." "(11) If the jury

circumstances, for a sum known to be in excess of what is actually due to the mortgagee, however, is presumptively fraudulent. *Kellogg v. Clyne*, 54 Fed. Rep. 606, 12 U. S. App. 174 (1893); *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 289 (1894); *Heim v. Chapel* (Minn.) 64 N. W. 825 (1895).

And the burden of proof rests with the mortgagee to show that the mortgage was executed in good faith and for an honest purpose, and to explain the discrepancy. *Lombard v. Dows*, 66 Iowa, 243 (1885); *Heim v. Chapel*, *supra*.

Taking a mortgage for an amount in excess of the debt which it is given to secure, or of the assumed liability, is a badge of fraud, and amounts to fraud in law where the purpose is to protect the debtor's interests from other creditors. *Patrick v. Riggs* (Mich.) 63 N. W. 532 (1895).

And the fact that a chattel mortgage largely exceeds the debt which it is given to secure may be considered on the question whether the creditor's intention was in good faith to secure himself or to hinder, delay, or defraud other creditors. *Olmstead v. Mattison*, 45 Mich. 617 (1881).

Thus, a mortgage by a debtor to a creditor for a grossly exaggerated demand, designed by the debtor to cover his property from the demands of honest creditors, the creditor participating in the design and knowing the debtor's purpose, is fraudulent and void as against creditors. *Stinson v. Hawkins*, 16 Fed. Rep. 850 (1893); *Cordes v. Straszer*, 8 Mo. App. 61 (1879).

And a mortgage made for a larger amount than that actually owing by a sum of about \$340, which excess was paid for the purpose of delaying and defrauding other creditors, is fraudulent and void. *Ferris v. McQueen*, 94 Mich. 367 (1892).

And a mortgage on a large amount of property for the payment of \$90,000 when but \$4,000 was due to the mortgagee, is fraudulent as against creditors. *Hubbard v. Turner*, 2 McLean, 519 (1841).

So, a deed of trust given by a debtor to his creditor to secure a debt with the intent to delay, hinder, and defraud his creditors, in which the creditor permitted the debtor to include not only the debt but an amount in excess thereof, agreeing to account to the debtor for such excess, shows a participation by the creditor in the debtor's fraudulent intent which will defeat the deed. *Alberger v. White*, 117 Mo. 347 (1898).

And a mortgage, in fixing the consideration for which the parties have magnified a comparatively small debt into a very large one with the fraudulent intent to cover and conceal from the mortgagor's creditors a part of his property, is altogether void, although as to another part of his property it was meant to be an actual security for an honest debt. *Holt v. Creamer*, 34 N. J. Eq. 181 (1881).

And a chattel mortgage in which the express consideration is greater than the real indebtedness, which is given and taken for the purpose of protecting the mortgagor's property from his creditors, may be held fraudulent and void as to such creditors though as between the parties the maker would be estopped from denying the indebtedness purporting to be secured thereby. *Taylor v. Wood* (N. J.) 4 Cent. Rep. 133 (1896).

And a bill of sale by a failing debtor to a creditor reciting a cash consideration of \$2,250 where the transfer was to pay the mortgagee for debts and liabilities assumed, in the aggregate about \$1,800, will be set aside as fraudulent and void in the absence of an explanation of the false recital

as to consideration. *Brasher v. Jamison*, 75 Tex. 139 (1899).

So, in *Adams v. Niemann*, 46 Mich. 135 (1876), it was held that a mortgage is not fraudulent when given to secure no more than the mortgagee's actual claim, and taken without fraudulent intent.

So, mere knowledge or notice of the debtor's circumstances and intent would appear to be sufficient to constitute the creditor a participator in the fraud.

Thus, a chattel mortgage for a greater amount than is due, taken from one known by the mortgagee to be in failing circumstances and pressed by his creditors, is conclusive evidence of fraud. *Butts v. Peacock*, 23 Wis. 359 (1868).

But see *Wood v. Scott*, 55 Iowa, 114 (1880), in which it was held that such a mortgage is a badge of fraud, but is not conclusively presumed to be fraudulent.

And see also *Bentz v. Rockey*, 69 Pa. 71 (1871), *infra*, III., e., *Amount of property taken*.

And knowledge upon the part of a mortgagee that his mortgagor was trying to magnify his liabilities, and that he wanted him to take a mortgage for a sum so large that if his creditors should record it as an honest security his lands would be effectively put beyond their reach, makes it his duty to inquire as to the mortgagor's object and purpose, a failure to perform which would invalidate the conveyance. *Holt v. Creamer*, 34 N. J. Eq. 181 (1881).

And that a creditor, who, knowing the insolvency of his debtor, takes from him a deed of trust to secure the entire amount of his debt, without disclosing the fact that he is indebted to the grantor on another transaction not noticed in his deed, furnishes a strong circumstance for the establishment of his participation in the fraud of a grantor; but if the mortgaged property was insufficient to pay or secure the debt by an amount exceeding the amount of the creditor's indebtedness to the grantor, or if there were other debts and liabilities not provided for exceeding the creditor's indebtedness, this would be sufficient to rebut the presumption of fraud. *Alabama L. Ins. & T. Co. v. Pettway*, 24 Ala. 544 (1854).

1. Security for present and future advances.

Assignments of personal property by a debtor in insolvent circumstances who has stopped payment to secure a particular creditor for existing claims and engagements, as well as for future advances and responsibilities, will be deemed valid if made bona fide, and there is no reason to doubt the honesty and fairness of the transaction. *Hendricks v. Robinson*, 2 Johns. Ch. 283 (1817).

A creditor may extend further credit to his debtor though he is largely indebted at the time, and may take security therefor by a mortgage on the debtor's stock in trade, in preference to other creditors, where he acts with the bona fide intention of securing himself. *Ferris v. McQueen*, 94 Mich. 367 (1892).

But when a creditor taking security knows that there are other creditors who may be delayed or hindered in the collection of their debts, or has knowledge of facts or circumstances calculated to put him on inquiry and thus charge him with notice, the arrangement he makes must not go beyond securing his own demand. *Howell v. Carden*, 89 Ala. 100 (1892).

And a creditor cannot enter into a fraudulent

between the parties to said conveyance that the said grantees therein, to wit, Rice, Stix, & Co., Pratt, Simmons, & Co., and the Clark Shoe Company, or their agent or agents, were to sell the goods therein conveyed for the purpose of raising money out of which

to pay their debts, and to pay the other debts mentioned in the conveyance, and, in pursuance of said agreement, possession of said goods was delivered to their agents, then the effect of said conveyance would be an assignment and void, notwithstanding the fact that

scheme to hold his debtor up as deserving of credit, and thus enable him to purchase goods of other creditors for the purpose of taking security on them, knowing that they are not paid for. *Ferris v. McQueen, supra.*

And here also it would appear that mere notice or knowledge of the debtor's circumstances and intent is sufficient to make the creditor a participant in his designs.

Thus, when a mortgagee takes a mortgage with knowledge of a fraudulent intent upon the part of the mortgagor, the transaction is not bona fide and is invalid as to creditors, although a full and valuable consideration was given. *Robinson v. Holt, 39 N. H. 557, 75 Am. Dec. 234 (1859).*

And a vendee or mortgagee need not do any act in furtherance of a fraudulent design of the vendor or mortgagor in order to render him a participant in the fraud, other than the taking of the fraudulent conveyance with knowledge or notice direct or constructive that the conveyance is a prohibited one and is made with a fraudulent intent. *Kansas Moline Plow Co. v. Sherman, 3 Okla. 204 (1895).*

So, a mortgage made by an insolvent debtor to secure \$4,500 of indebtedness and \$1,000 advanced by the mortgagee at the time and with knowledge of the insolvency of the debtor, is fraudulent and void as to other creditors. *Wallis v. Adoue, 76 Tex. 118 (1890).*

And a creditor who takes a chattel mortgage and an assignment of accounts from his debtor upon his stock of goods, consisting of his whole property worth from \$15,000 to \$17,000, exclusive of the book accounts, to secure an indebtedness of from \$1,200 to \$2,000 and an advance of cash of \$8,000, knowing that the debtor was insolvent and that his creditors were pushing him, is not a bona fide purchaser within the protection of the statute of frauds. *Herrmann v. McKinney, 47 Fed. Rep. 758 (1891).*

So, a deed of trust given by a debtor of all his property and the crops he would raise for the two following years, to one who knew of his embarrassed financial condition, to secure a note for \$4,000 when he only owed \$19 or \$20, and the grantee advanced \$400 and the property exclusive of the crops was worth over \$1,800, will be presumed to have been fraudulent with the participation of the mortgagee, and the burden of proof will rest upon him to explain the facts and overcome such presumption. *Henry v. Harrell, 57 Ark. 569 (1893).*

And a mortgage given by a debtor to his creditor for \$800 where the indebtedness to be secured was \$400 and interest, the creditor having agreed to advance \$100 more, which he never did, shows a participation by the mortgagee in the fraudulent intent of the mortgagor, where he knew that the mortgagor was in failing circumstances at the time he took the mortgage. *Bussard v. Bullitt (Iowa) 64 N. W. 658 (1895).*

And a transaction by which a creditor, with knowledge that his debtor must fail unless he received the relief asked for, lent him \$2,000 and took a transfer of mortgages for the payment of that sum, and also \$4,000 due on account of previous transactions, is not vitiated as to that part which is fair and legal by the incorporation of the two claims, but will stand as security for the \$4,000, but will be set aside as to creditors as to the \$2,000. *Brown v. Kenner, 3 Mart. (La.) 270 (1814).*

So, a mortgage for a larger amount than was

loaned thereon, given with a view of covering future loans, is not conclusive evidence of fraud, but is open to explanation as to the good or bad faith of the parties. *Allen v. Fuget, 42 Kan. 672 (1890).*

And mortgages given, not only to secure an existing indebtedness, but providing also for security for advances and for overdrafts which might thereafter be made, are not thereby rendered fraudulent and void as to creditors where the mortgagor was at the time in active business, although it may subsequently turn out that he was in fact unable to pay his debts. *Sabin v. Columbia River Lumber & F. Co. 25 Or. 15 (1893).*

And a mortgage obtained by a creditor from a failing debtor to secure his indebtedness will not be deemed to have been made for the purpose of hindering and delaying other creditors because given upon the promise of the creditor that he would furnish him other goods to the amount of \$700. *Rouse v. Frank, 14 Ga. 623 (1890).*

So, in *Butts v. Peacock, 28 Wis. 359 (1868)*, the question whether a chattel mortgage for a greater amount than was due, though designed to secure future advances, is void as against creditors where such design does not appear on its face, was raised but not decided.

j. Inclusion of simulated debts.

A conveyance collusively made between a debtor and a creditor, professedly to secure an indebtedness which did not exist, is void as to other creditors, though it covers and includes a real indebtedness less than that named in the conveyance. *Cordes v. Straszer, 8 Mo. App. 61 (1879).*

And unless a deed of trust made by a debtor to his creditor is a sham which was never intended to be enforced, other creditors can vacate it by showing that the secured debts are simulated. *Surget v. Boyd, 57 Miss. 485 (1879).*

Thus, a deed made for the purpose of indemnifying a security against a responsibility created as a pretense for making the deed and with the purpose to thereby secure to the debtor the use of the property, is fraudulent and void as against creditors. *Leadman v. Harris, 3 Dev. L. 144 (1881).*

And a deed executed by a debtor unable to pay his debts to a grantee who knew of his insolvency, on the pretense that he was indebted to the estate of the grantee's deceased husband, with the intent of reserving the property conveyed from the grantor's creditors, is fraudulent and void. *Walcott v. Almy, 6 McLean, 23 (1853).*

And a mortgage purporting to secure a debt a part of which is simulated by the mortgagor with intent to prevent a levy on the property of his creditors and accepted by the mortgagee with knowledge of such intent, is fraudulent and void as against such creditors. *Hall v. Heydon, 41 Ala. 252 (1867).*

So, proof that a part of the consideration for a transfer was made up of a false and pretended debt for board and washing which was wholly fictitious, and which the parties to the transaction falsely concocted to make up a full and fair consideration therefor, is sufficient to establish a fraudulent intent on the part of the grantee which will invalidate the conveyance. *Baldwin v. Short, 125 N. Y. 553 (1891).*

And the surrender by a father of a bond and mortgage against his son for cancellation for accounts claimed by the son against the father, the

it purported to be a bill of sale on its face."

The plaintiffs excepted to the giving of each of said instructions.

There were a verdict and a judgment for the defendants. The plaintiffs filed a motion for a new trial, took a bill of exceptions, and appealed to this court.

greater portion of which, if existing at all, were prior to the execution of the claim, is fraudulent as against the father's creditors. *First Nat. Bank v. Cummins*, 38 N. J. Eq. 191 (1884).

And the purchase of lands for which a deed is taken in the name of the grantee's infant daughter, who has no means to pay any part of the purchase money, after which the grantee gets his daughter to unite with him in a deed to a third person for a simulated consideration, who takes with full knowledge of all the circumstances and in aid of his design to defraud creditors, establishes a bold case of fraud. *Biddinger v. Willand*, 67 Md. 359 (1887).

And a conveyance by a husband directly to his wife in consideration of a valid debt due her is fraudulent and void as to existing creditors of the husband where the consideration was much less than the value of the property and in order to bring it up to the required amount they added to said valid debt other indebtedness of the husband to the wife, having no existence in fact, and where the wife participated in the attempt to sustain the conveyance it will not be permitted to stand as security for the valid portion of the consideration. *Webb v. Ingham*, 29 W. Va. 389 (1887).

So, in *Eureka Iron & S. Works v. Bresnahan*, 66 Mich. 489 (1887), a fictitious debt included in a mortgage intended as a mere cover was spoken of and treated as rendering the transaction fraudulent as against creditors.

But a transfer in payment of a valid and subsisting debt cannot be revoked on the charge of simulation where it was really intended to pass title to the property and the creditor acknowledged full payment. *Pochelu v. Catonnet*, 40 La. Ann. 327 (1888).

And including in a mortgage a debt to become due from the mortgagor at a future day does not render the mortgage fraudulent. *Carpenter v. Muren*, 42 Barb. 300 (1864).

And a mortgage given by a debtor to a creditor to secure a bona fide debt, which also provides for the satisfaction of a simulated debt claimed to be owing another person after the satisfaction of the first, is not void as to the original, genuine creditor where he did not participate in the fraud of the mortgagor. *Anderson v. Hooks*, 9 Ala. 704 (1846).

And a conveyance by insolvents to their mother is not rendered fraudulent as to the former's creditors because the consideration in the deed includes some money expended for property belonging to the mother where the bona fide indebtedness from the insolvents without such land is more than the value of the property conveyed. *Troy Fertilizer Co. v. Norman* (Ala.) 18 So. 201 (1895).

So, a bill of sale taken by a creditor from a failing debtor, of articles of personal property which were scattered, with the agreement that he was to collect the property and pay his expenses out of the proceeds besides paying his debt and dividing the surplus among the consenting creditors, entered into in good faith, is not a fraudulent conveyance which will be set aside on application of other creditors. *Ewing v. Runkle*, 20 Ill. 448 (1858).

Whether the consideration of the assignment be real or fictitious, and whether there have been an actual delivery and acceptance of the goods, are questions for the jury. *Kinnear v. White*, 2 Kerr (N. B.) 235.

31 L. R. A.

Messrs. George W. Murphy and Rose, Hemingway, & Rose, for appellants:

When property is turned over at a reasonable price in payment of a just debt, fraud cannot be predicated of the transaction no matter what the motives of the parties may be.

Covanhoven v. Hart, 21 Pa. 495, 60 Am. Dec.

See also, as to conveyances and mortgages including fictitious debts, *infra*, VI., *Participation by one of several beneficiaries*.

k. Reservation of benefits.

The mere reservation of benefits to the grantor in a transfer of property to pay or secure a debt does not show a fraudulent intent participated in by the grantee or mortgagee which will invalidate the transaction as against creditors.

Thus, a bill of sale of all the grantor's then existing and after-acquired property by way of mortgage to secure an existing debt and future advances is not void under the statute 13 Eliz. chap. 5, unless it is made as a mere cloak for retaining a benefit to the grantor. *Re Games*, L. R. 12 Ch. Div. 314, 40 L. T. N. S. 789, 27 Week. Rep. 744 (1879).

And an assignment by an insolvent debtor of a chose in action to certain of his creditors for the purpose of securing their demands, reserving the surplus to himself, is not invalid where there is no extrinsic evidence of an intent to defraud other creditors. *Leitch v. Hollister*, 4 N. Y. 211 (1850).

To render a mortgage void by reason of some benefit resulting to the mortgagor, such benefit must have been given for the purpose of hindering, delaying, or defrauding creditors. *Whitson v. Griggs*, 39 Kan. 211 (1888).

A creditor may receive property from his debtor for the purpose of securing his own demands, but if he goes beyond this and secures a benefit to the creditor, knowing him to be insolvent however, he violates both the letter and the spirit of the statute, and his conveyance will be set aside. *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704 (1876).

And a sale by a debtor to a creditor in payment of a debt is invalid where it provides for and secures a secret benefit to the debtor, the creditor knowing his circumstances or being chargeable with knowledge thereof. *Seamen v. Nolen*, 68 Ala. 463 (1880).

And the same rule applies where a benefit is secured to the debtor to the knowledge of the creditor beyond that which the law without such agreement would secure him. *McDowell v. Steele*, 87 Ala. 493 (1888).

Thus, a reservation in a mortgage given by a debtor to a creditor in contemplation of insolvency of power to sell the partner's assets, accounting for the proceeds, will create a presumption of fraud which will shift the burden of proof to the creditor to explain the transaction, where he was aware of the contemplated insolvency. *Tickner v. Wiswall*, 9 Ala. 305 (1846).

And a conveyance by an insolvent debtor to a creditor of all his property in payment of a debt which was less than one fourth of the true value of such property and about one fourth of the price which a purchaser offered and stood ready to give, raises a violent presumption of a secret trust which will invalidate the conveyance in the absence of anything to rebut the presumption. *Shelton v. Church*, 38 Conn. 416 (1871).

So, a secret trust wilfully and knowingly created by the grantor and beneficiary for the purpose of concealing from the creditors of the grantor a portion of the debtor's property, and ultimately depriving them of any benefit to be derived therefrom, under cover of a conveyance to secure a bona fide indebtedness, is a fraud upon creditors

57; *Christian v. Greenwood*, 23 Ark. 264, 79 Am. Dec. 104; *Gilkerson-Sloss Commission Co. v. Carnes*, 56 Ark. 417; *Gist v. Barrow*, 42 Ark. 525; *Bump, Fraud. Conv.* 3d ed. 189; *Wait, Fraud. Conv.* § 232; *Hudgins v. Morrow*, 47 Ark. 515; *Daniel v. Vaccaro*, 41 Ark. 325.

The inducements which may have led to the

assignment are not to be inquired into. The law deals with the act of the party, and not with the secret springs which prompted it.

Bump, Fraud. Conv. 3d ed. 357; *Wait, Fraud. Conv.* § 841; *Pike v. Bacon*, 21 Me. 286, 88 Am. Dec. 259.

The fraud justifying an attachment is a vio-

and should be set aside. *Roberts v. Barnes*, 127 Mo. 406 (1895).

And the reservation of a life estate in such a conveyance is a fraud upon creditors. *Berry v. Hass*, 1 Ohio C. D. 48 (1898).

And an assignment by a debtor with the intention of not merely paying or securing a debt but of receiving a security and benefit to himself free from the claims of creditors, made to a creditor to whom he owes a debt considerably less than the value of the articles assigned, with the private understanding that he shall have the privilege of paying the debt within a reasonable time and of claiming the property, is fraudulent and void as against creditors. *Humphries v. Freeman*, 22 Tex. 45 (1858).

And the receipt of goods from a debtor by the agent of a creditor in payment of the claim under a secret understanding that the excess over the debts due to the grantor of the proceeds of the goods should be held for the debtor or that there should be a secret trust for his benefit, invalidates the transfer as against other creditors, although such preferred creditor may not have participated in the intent; as the agent's act in negotiating the transfer must be deemed in law to be his. *Greenlee v. Blum*, 50 Tex. 124 (1883).

So, an agreement by a mortgagor, made with intent to defraud creditors, with a purchaser at a sale under the mortgage, not to restate it but to hold the land in trust for the mortgagor and permit him to redeem it whenever his relations with his creditors would allow him to do so, is fraudulent and void as to creditors. *Musselman v. Kent*, 33 Ind. 452 (1870).

And a trust deed executed by a debtor on his property to secure a creditor, the creditor transferring one half of the property to a trustee for the benefit of the debtor's wife and children, which one half was secured by the trust deed, is tantamount to a reservation by the debtor himself of so much of his property for the use of his wife and children, and is fraudulent and void as against other creditors, though the debtor refused to secure any part of the creditor's debt unless the creditor would make such transfer to his wife and children. *Kissam v. Edmonston*, 1 Ired. Eq. 180 (1840).

But a creditor making a valid purchase from his debtor has the right to give or sell the goods purchased to the debtor's wife. *Bamberger, B. & Co. v. Schoofield*, 160 U. S. 149, 40 L. ed. 374 (1895).

And the mere fact that a debtor knows when he confesses judgment to a bona fide creditor that the creditor intends to settle the larger portion of the debt on the debtor's family, will not make the confession fraudulent as against other creditors. *Cureton v. Doby*, 10 Rich. Eq. 411, 73 Am. Dec. 96 (1858).

And a sale by a debtor to his creditor at a fair price in satisfaction of a debt will not be held fraudulent though made under the belief that the property would be set over to the use of the debtor's family. *Young v. Stallings*, 5 B. Mon. 307 (1845).

And such a conveyance, made pursuant to a voluntary proposition by the creditor that he would convey the land to the debtor's wife, who was his daughter, as a gift or advancement, is not fraudulent as to other creditors of the grantor. *Smith v. Riggs*, 56 Iowa, 488 (1881).

In *Smith v. Riggs*, *supra*, *Kissam v. Edmonston*, 13 L. R. A.

supra, was distinguished on the ground that in that case the debtor insisted against the protest of the grantor that one half of the amount due should be secured to his wife and children.

So, such a conveyance is valid though the creditor knew that it would delay or defeat his other creditors, and though immediately afterwards the creditor conveyed the property by deed of gift to his debtor's wife, who was his daughter. *Young v. Dumas*, 39 Ala. 60 (1863).

And a conveyance by an insolvent to his father-in-law, who knew of his insolvency, of mortgaged property in satisfaction of the mortgages thereon, and the immediate reconveyance thereof by the father-in-law to the vendor's wife as a gift out of sympathy for her, is not fraudulent as against creditors. *Rusie v. Jameson*, 62 Iowa, 52 (1883).

And a deed made by an insolvent brother to his sister in satisfaction of an honest debt, without any agreement for reconveyance, and which was not induced by her promise to reconvey, is valid as against creditors of the brother, though the sister reconveyed to a trustee in trust for the wife and children of such brother a few days afterwards, and the brother expected that his wife and children would receive some donation from his sister. *McPherson v. McPherson*, 21 S. C. 281 (1883).

And a sale by a debtor in good faith of property to a creditor in payment of the latter's claim, is not fraudulent though there was an understanding between the agents of the parties that the property would be reconveyed when the vendee was fully paid. *Cary-Halidy Lumber Co. v. Cain*, 70 Miss. 628 (1898).

But a conveyance of real estate, absolute in terms but made for the purpose of securing a debt, with an understanding between the parties that the land is to be reconveyed upon the payment of the debt and interest, is fraudulent and void, not only against existing creditors of the grantor, but against those who become his creditors after its execution. *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551 (1857).

That a trust or reservation in favor of the debtor may render a conveyance by him to his creditor in payment of his claim invalid as against other creditors, is also recognized in *Howell v. Carden*, 99 Ala. 100 (1892), and *Edwards v. Dickson*, 66 Tex. 613 (1896).

And the absence of any such trust or reservation is recognized as an element of the validity of such a transfer, in *H. B. Claflin Co. v. Rodenberg*, 101 Ala. 213 (1893); *Heyer Bros. v. Bromberg Bros.* 74 Ala. 634 (1893); *Reynolds v. Wehnman* (Tex.) 25 S. W. 38 (1894); *Traders' Nat. Bank v. Day*, 7 Tex. Civ. App. 569 (1894); *Bullock v. Gordon*, 4 Munt. 450 (1816).

So, secret trusts and reservations are also condemned, in *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552 (1901); *Currie v. Bowman*, 25 Or. 304 (1894); *La Belle Wagon Works v. Tidball*, 69 Tex. 161 (1897); *Hornthall v. Schoenfeld*, 79 Ala. 109 (1885); *Surget v. Boyd*, 57 Miss. 485 (1879).

Commissions which a debtor is to receive on a stock of goods to be sold by him by agreement which he had transferred to his creditor in payment of a debt, and of which he was to retain possession for the purpose of selling them for the creditor, do not constitute a reservation of an interest in the property which will render the transaction fraudulent as against creditors. *La Belle Wagon Works v. Tidball*, *supra*.

lation of the statute of frauds of 18 Eliz. chap. 5. the statute of fraudulent conveyance which has been re-enacted as §§ 3373-3375, of Mansfield's (Ark.) Digest.

As long as the debtor keeps his property himself he is within his right. And to say

that the plaintiffs could have committed a wrong by advising the debtor to do what he had the right to do is a contradiction in terms.

Erb v. Cole, 81 Ark. 556.

The fraud must lie in the transfer.

Bump, Fraud. Conv. 3d ed. 18.

Whether a mortgagee, who has taken a mortgage from his debtor as security, participated with him in an intention to have the mortgage serve the purpose of securing an unauthorized benefit, or of hindering, delaying, or defrauding other creditors, is a question of fact for the jury. *Howell v. Carden*, *supra*.

1. Taking conveyance fraudulent on its face.

The acceptance by a creditor of a conveyance by his debtor to pay or secure his claim containing provisions designed to hinder, delay, or defraud creditors, would seem to amount to a participation in the debtor's fraud; at any rate such is the case where such provisions are brought to his notice.

Thus, the acceptance by a *cestui que trust* of the provisions of a deed of trust which is clearly fraudulent on its face is equivalent to notice of the fraud, and amounts to a participation therein. *Livesay v. Beard*, 22 W. Va. 585 (1883).

And the acceptance by an assignee or trustee of an assignment or trust deed, containing to his knowledge on its face one or more falsehoods on a material point, calculated to deceive and mislead creditors to their injury, renders him chargeable with notice of his grantor's fraudulent intent. *Douglas Merchandise Co. v. Laird*, 37 W. Va. 687 (1883).

And claiming a benefit under a trust deed, fraudulent on its face, by a person attempted to be secured thereby, renders him a participant in the fraud, and precludes him from receiving any benefit. *Palmer v. Giles*, 5 Jones, Eq. 75 (1850).

And in *Klee v. Reitzenberger*, 23 W. Va. 749 (1884), it was held that in the absence of any fraudulent purpose on the part of the vendee, or knowledge of such purpose on the part of the vendor, his right to the security taken cannot be affected unless the deed is fraudulent on its face.

So, a grantee in a fraudulent conveyance having notice of the fraudulent provision therein is not a bona fide purchaser, though his only motive was to secure payment of his own debt which was just, and such fraudulent provisions were forced upon him as the only means of obtaining payment. *Garland v. Rives*, 4 Rand. (Va.) 282, 15 Am. Dec. 756 (1826).

And if a creditor be privy to a fraudulent intent on the part of his debtor, and take a deed to secure his own debt with provisions to hinder and delay other creditors, the deed will be void, though his motive was to secure his own debt and the other provisions were forced upon him by the debtor as the only means of having the debt secured. *Parr v. Saunders* (Va.), 11 S. E. 979 (1880); *Goshorn v. Snodgrass*, 17 W. Va. 767 (1881).

The taking by a creditor of a chattel mortgage from his debtor as extra security, which mortgage could not be sustained under the laws of the state, however, does not show an intent to defraud which will invalidate a subsequent transfer to the creditor, but merely shows that he mistook as to the validity of the extra security. *Buford v. Cook*, 36 Fed. Rep. 21 (1888).

m. Retention of possession.

It is not here intended to treat generally the questions of the retention of possession under and of provisions therefor in deeds, mortgages, and other conveyances. The design in this subdivision is to consider such retention only so far as it may be deemed to furnish evidence of a fraudulent intent

as against creditors participated in by the transferee.

The retention of possession by a debtor who has sold property to a creditor in payment of his claim would at least appear to be a badge of fraud to be considered in connection with other circumstances in determining the existence of a fraudulent intent participated in by the creditor.

Thus, a conveyance of chattels directly from a husband to his wife by a bill of sale which was delivered, followed by a mere constructive delivery of chattels, the husband continuing to use the property as his own, which was proved for registration in the night about the time the husband was sued by a creditor, is not presumed in law to be fraudulent, but upon the establishment of an indebtedness of the husband to his wife the question of fraud is one for the jury to be submitted with a caution to scrutinize the transaction closely owing to the relationship of the parties. *State, Brown, v. Mitchell*, 102 N. C. 347 (1886).

So, a conveyance by a debtor who, pending suit against him, had threatened to put his property out of his hands unless the plaintiff would settle for a certain sum, which she refused, made to his brother for a balance pretended to be due on a settlement of their partnership accounts, the land being worth several times the amount of such pretended balance, and the deed having been put on record, and verdict found against him in said suit, after which the grantor continued to manage the property and receive the profits as before,—will be deemed fraudulent and void as against the judgment creditor in such suit. *Hamlin v. Wright*, 26 Wis. 50 (1870).

And a transfer for a grossly inadequate price without taking security for the purpose named, giving unusual length of credit for the deferred payment, made in payment of an alleged indebtedness of a father to a son, both residing together as members of one family, the indebtedness and insolvency of the grantor being well known to the grantee, while suits were threatened and pending, made with secrecy and concealment, keeping the deed unacknowledged and unrecorded for over a year, the grantor remaining in possession as before the conveyance and cautioning the justice who took the acknowledgment to keep the matter private, make a prima facie case of fraud which will put upon the grantee the burden of repelling the conclusion that the grantor entertained a fraudulent design, fully known to and participated in by the grantee. *Hickman v. Trout*, 83 Va. 478 (1887).

And an assignment by a trader in embarrassed circumstances of substantially his whole property to a single creditor for an express consideration of the release of a debt then owing to the creditor of £3,271 when in fact only £1,370 was due, accompanied by his verbal agreement that he should undertake the payment of the assignor's debts, and followed by an agreement by the assignor to manage the business as a servant of the assignee at a weekly salary, after which the business was carried on in the name of the assignor as before, with nothing to show that he was not the real as well as the apparent owner, is void as against a trustee in bankruptcy as an act of bankruptcy, and as against the assignor's creditor under the statute 13 Eliz. chap. 5. *Ex parte Chaplin*, L. R. 26 Ch. Div. 319, 53 L. J. Ch. N. S. 732 (1884).

So, in *Hempstead v. Johnston*, 18 Ark. 123, 65 Am.

And a conveyance to be fraudulent must be calculated to assist in the perpetration of a fraud.

Hill v. Woodberry, 49 Fed. Rep. 138, 4 U. S. App. 69; *Baer v. Rooks*, 50 Fed. Rep. 898, 4 U. S. App. 403; *Burrill*, Assignm. § 351.

Dec. 458 (1856), the rule is said to be that such possession subsequent to the sale is prima facie evidence of fraud, and it has been held to be conclusive.

Thus, in *Kirtland v. Snow*, 20 Conn. 23 (1849), it was held that where a creditor neglects to take and retain possession of property purchased in payment of his claim, it is conclusive evidence of a trust which will render the transaction fraudulent and void as to other creditors.

So, the fact that a mortgagor of personal property is permitted to retain possession thereof and sell from the stock in the usual course of business raises a presumption of fraud as to creditors, and casts upon the mortgagee the burden of proving good faith, but will not *per se* render the mortgage void where it is not fraudulent on its face. *Sherwin v. Gaghagen*, 39 Neb. 238 (1894).

And the retention of possession of mortgaged property by the mortgagor for three years after the date of the mortgage, the mortgagor being insolvent and having no other attachable property, is a circumstance tending to show fraud, but is not conclusive evidence of it. *North v. Crowell*, 11 N. H. 251 (1840).

But retention of possession by a mortgagor or grantor in a deed of trust, is not *per se* fraudulent. It may or may not be fraudulent as to other creditors according to the circumstances of the case, but in order that the possession may be innocent, the deed should be recorded or notice of it brought home to the party before he has dealings with the mortgagor. *Hilliard v. Cagle*, 46 Miss. 309 (1872).

And the presumption of fraud arising from the absence of a change of possession of mortgaged property is not conclusive but may be entirely rebutted by proof of good faith and an absence of an intent to defraud. *First Nat. Bank v. Lowrey Bros.* 36 Neb. 290 (1893).

So, a mortgagee who establishes his good faith and the absence of any fraudulent intent need not also explain why there was not an immediate delivery of the property and an actual and continued change of possession. *Ibid.*

And the fact that mortgaged goods were not removed from the store, and that one of the mortgagors remained in the store apparently in charge or at least partly so, and that one of the mortgagors refused to secure other debts, either by turning over goods or by executing mortgages, and that goods were purchased of other creditors shortly before the execution of the mortgage, is not sufficient to overturn a finding that the mortgage was valid, where it was given to secure bona fide debts and the intent to defraud is denied. *Grimes v. Farrington Bros.* 19 Neb. 44 (1896).

But the rule that possession by the vendor subsequent to a sale is prima facie evidence of fraud does not apply to mortgages and deeds of trust where the grantor by the terms of the instrument is permitted to retain possession of the property until default of payment. *Hempstead v. Johnston*, 18 Ark. 123, 65 Am. Dec. 458 (1856).

And the possession of a husband and wife at the time of taking a mortgage from the wife upon property in her name will not charge the mortgagee with notice of fraud on the part of the mortgagor, or affect levies made upon the property as that of the husband subsequent to the conveyance to the wife. *Shorten v. Drake*, 38 Ohio St. 76 (1882).

And fraud will not be inferred in a deed of trust

Fraud does not consist in mere intention but in intention carried out by hurtful acts.

Wait, Fraud. Conv. § 3.

Even if Jones & Fulton had had the money to pay the plaintiffs, they would have had the right to take the goods in preference.

unless it postpones payment for an unreasonable length of time after maturity of debts secured by it, and provides that the grantor shall retain possession of the property until default of payment with a fraudulent intent to cover up the property for the use of the grantor. And a deed of trust made on the 8th of April to secure debts then due, allowing the debtor until the 1st of January following to pay such debts, and permitting the grantor to hold possession of the property until default, will not be held to be fraudulent and void as to creditors where it does not appear that the value of the property embraced in the deed exceeded the amount of the debt secured thereby. *Hempstead v. Johnston*, *supra*.

But a mortgage taken by a bona fide creditor who had notice of the insolvency of his debtor, including stock and provisions then on hand or which might afterwards at any time be on hand, postponing the law day nearly six years and leaving the possession in the meantime in the mortgagors, is fraudulent and void as to other creditors where the property greatly exceeds in value the amount of the debt. *Wiley v. Knight*, 27 Ala. 338 (1855).

And a mortgage executed by an insolvent or failing debtor to a creditor who has knowledge of his condition and whose debt does not bear interest, conveying the debtor's entire stock together with such other goods as he might from time to time purchase, fixing no law day but authorizing the mortgagee to sell at public or private sale on default, is fraudulent and void as against existing creditors. *Price v. Mazange*, 31 Ala. 701 (1858).

And where a mortgage was given to a sister of the mortgagor's wife who lived in his family on the mortgaged premises, which was not recorded because the wife did not join, but was surrendered and a second executed upon the commencement of action against the mortgagor by his creditors without any adjustment of accounts, the wife joining, which was duly recorded, it is fraudulent and void as against creditors, where the mortgagor carried on the farming business in part in his own name, and acted according to his own wishes, rendering no account and claiming that the mortgage was given to protect his home from his other creditors, though it was given to secure a real indebtedness. *Decker v. Wilson* (N. J.) 15 Atl. 816 (1888).

And in *Howell v. Carden*, 99 Ala. 100 (1892), an unreasonable postponement of the collection of a judgment secured by mortgage, the mortgagee allowing the mortgagor to retain and use the property in the meantime, the property being perishable or of such a character as to be profitable in its use, was treated together with the fact that the mortgage covered substantially all of the debtor's property and more than enough to afford ample security and that the mortgagee knew of other creditors, as sufficient to invalidate the mortgage.

And an assignment by a debtor to a creditor under which the debtor was permitted to remain in possession, considered in connection with the fact that the instrument was withheld from record to prevent injury to the debtor's credit, there being nothing to show the change of ownership, was held sufficient to invalidate the transaction as against creditors, in *Means v. Dowd*, 128 U. S. 273, 32 L. ed. 429 (1888).

That a creditor who has taken possession of a stock of mortgaged goods under a mortgage given to him by the debtor permits the debtor to sell such property under a written contract as agent, how-

There can be no assignment unless there is a conveyance to a trustee to raise a fund to pay debts, and here there is neither a trustee nor a fund to be raised.

Fecheimer v. Robertson, 53 Ark. 101; *Riogan v. Wolf*, 53 Ark. 538; *Goodbar v. Locke*, 56 Ark. 315; *Costello v. Chamberlain*, 36 Neb. 45.

ever, does not necessarily or conclusively show a collusive understanding between them. *Standard Implement Co. v. Parlin & O. Co.* 51 Kan. 632 (1893).

And the creditor making a valid purchase of his debtor has the right to employ him as clerk to assist in winding up the business. *Bamberger, B. & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374 (1895).

And the employment by a creditor of a debtor who has transferred to him his mill and residence in payment of a debt, to run the mill at a fixed commission per month and use of the residence, does not necessarily render the transaction fraudulent in fact. *Crawford v. Neal*, 144 U. S. 585, 36 L. ed. 552 (1891).

And the employment by a trustee in a trust deed under which he had taken possession absolutely, several days after its execution, of one of the grantors to assist in the sale of goods, which was not prearranged, and permission to one of such creditors to use a buggy and horses which were embraced in the conveyance, will not invalidate the deed as against creditors. *Lewis v. Alexander* (Tex.) 31 S. W. 414 (1895).

And the insertion in a deed of trust of a provision that the trustees shall employ the assignor at a fixed salary to help to dispose of the property conveyed does not render the deed void upon its face, but is evidence of a fraudulent intent which should be submitted to the jury. *Frank v. Robinson*, 96 N. C. 28 (1887).

So, the use by a mortgagor of a growing crop, of some of it, will not invalidate the mortgage as to other property or authorize an inference that such use was by virtue of a secret benefit reserved to the mortgagor, in the absence of anything to show that the mortgagees consented to or knew of such use. *Pugh v. Harwell* (Ala.) 18 So. 535 (1895).

And the sale thereof by a mortgagor does not affect the validity of the mortgage, in the absence of anything to show that the mortgagees had any knowledge that the mortgagor proposed to sell or was selling such property. *Ibid.*

And the use of a quantity necessary to secure the harvesting of the crop does not vitiate the mortgage though the mortgagee consented thereto. *Ibid.*

And the transfer of a small part of mortgaged property to a third person in payment of a debt, with the consent of the mortgagee, will not of itself render the mortgage fraudulent and void as against creditors, there being no agreement by which the mortgagor was to sell any part of the goods in the usual course of trade. *Chicago Lumber Co. v. Fisher*, 18 Neb. 334 (1885).

And an appropriation of moneys by a mortgagor under a security in the nature of a mortgage providing that the mortgagor was to act as the agent of the transferees in disposing of the goods and render weekly statements of accounts to his principals with remittances, does not render the transaction invalid as to creditors unless it is shown that such appropriation of the proceeds was with the knowledge or the consent of the mortgagee company or some member thereof. *Havens v. Exstein*, 31 N. Y. S. R. 43 (1890).

But a mortgage given with a tacit or express understanding between the parties that the mortgagor should be permitted to deal in the property for his own benefit, is fraudulent and void as to creditors, as it must be presumed one of the purposes, if not the main purpose, for giving it, was to

cover up the mortgagor's property and thus hinder and delay his other creditors. *Potts v. Hart*, 99 N. Y. 168 (1885); *Hedman v. Anderson*, 6 Neb. 392 (1877).

And an agreement between a mortgagor and a mortgagee that the mortgagor may sell or dispose of any of the property mortgaged for his own benefit establishes conclusively that the mortgage was not given for the sole purpose of securing a debt to the mortgagee or of giving him any real interest in the property, but for the purpose of better enabling the mortgagor to enjoy the benefit thereof at the expense of his creditors. *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755 (1868).

The reservation in a mortgage by the mortgagor of the right to sell the mortgaged property in the usual course of trade shows conclusively that it was intended as a shield and protection to the mortgagor, and operates as a fraud on the rights of the creditors of the mortgagor, and is therefore void though the mortgagee had taken possession of the property through his agents. *Wells v. Langbein*, 20 Fed. Rep. 183 (1884).

And the subsequent dealing by a mortgagor with mortgaged property with the knowledge and assent of the mortgagee is sufficient to warrant a finding of the existence of an arrangement that the mortgagee might sell and dispose of the property and apply the avails to his own use. *Potts v. Hart*, *supra*.

And it has been repeatedly held that a mortgage or a deed of trust providing that the grantors should be permitted to remain in possession of the property conveyed and use the same and enjoy the profits thereof entire and distinct, is fraudulent on its face. But these cases have been omitted as turning upon the question of validity of the instrument rather than upon that of the fraudulent participation of the mortgagee or grantee.

Whether a mortgage was taken by a creditor with a bona fide intent to protect himself or with intent to wrong or defraud others is a question for the jury where the evidence tends to show that there was some qualified and conditional understanding as to the possession of the mortgaged property. *Crawford v. Nolan*, 70 Iowa, 97 (1896).

And where a mortgage is lawful upon its face, and proves to have been given to secure a debt fairly and honestly owing by the mortgagor to the mortgagee, and has been filed according to statute, indication of fraud arising from possession of the goods and the conduct of the parties respecting them must be determined by the jury. *Gardner v. McEwen*, 19 N. Y. 123 (1859).

So, where goods sold or mortgaged are left in the possession and under the control of the vendor or mortgagor, the statutory presumption of fraud arising therefrom may be rebutted by proof of good faith; and where there is evidence of good faith, as, for example, proof of consideration, the question of fraud is one of fact for the jury. *Thompson v. Blanchard*, 4 N. Y. 303 (1850).

And so is the good faith of a mortgage taken by a father from his son on his stock in trade for an amount which exceeds its value, leaving the son in possession and permitting him to sell goods in the ordinary course of business, where the son began business on money borrowed from his father shortly before, and there was no reason to suppose he had made money. *King v. Hubbell*, 42 Mich. 597 (1880).

and thereby induces him to levy is a party to the trespass.

Davis v. Newkirk, 5 Denio, 94; *Knight v. Nelson*, 117 Mass. 459; *Loejoy v. Murray*, 70 U. S. 3 Wall. 9, 18 L. ed. 131; *Herring v. Hop-pock*, 15 N. Y. 413; *Cabell v. Hamilton-Brown*

Shoe Co. 81 Tex. 108; *Wetzell v. Waters*, 18 Mo. 396; *Leshner v. Getman*, 30 Minn. 329; *Screws v. Watson*, 48 Ala. 628; *Luebbering v. Oberkoetter*, 1 Mo. App. 393; *Lewis v. Johns*, 34 Cal. 629; 2 Freem. Executions, § 273, p. 892; 2 Brandt, Suretyship, § 490.

n. Failure to record.

The failure of a creditor to record a conveyance given him by his debtor, or to cause it to be recorded, is not as an independent and isolated fact sufficient evidence of a fraudulent intent. *First Nat. Bank v. Jaffray*, 41 Kan. 601 (1899); *Stewart v. Hopkins*, 30 Ohio St. 502 (1876).

And the withholding of a trust deed from record does not render it fraudulent *per se* as to third persons who without notice of it extend credit to the grantor. *Day v. Goodbar*, 69 Miss. 687 (1892).

But it is a matter for consideration in connection with the other facts of the case in determining the question as to whether or not it was fraudulent. *Stewart v. Hopkins*, and *Day v. Goodbar*, *supra*.

In *Day v. Goodbar*, *supra*, *Gill v. Griffith*, 2 Md. Ch. 270 (1848), *infra*, was distinguished upon the ground that it was decided under Maryland statutes so widely different from those of Mississippi that it is inapplicable there.

And *Hilliard v. Cagle*, 46 Miss. 309 (1872), *infra*, was criticised therein and spoken of as a case valuable only as showing a state of facts which led the court to the conclusion that the scheme there condemned was fraudulent as to subsequent creditors.

Thus, the failure of a nonresident grantee in an absolute conveyance intended as a mortgage, to record it, will not charge him with participating in a fraudulent intent entertained by the grantor, where he did not know that registration was necessary. *Tryon v. Flournoy*, 80 Ala. 321 (1885).

And the neglect of a creditor holding a mortgage to secure judgment notes to record the mortgage, and his failure to take prompt measures to collect the notes when due, or give notice to others dealing with the debtor when not asked to do so, is not evidence of fraud as against subsequent creditors. *Field v. Ridgely*, 116 Ill. 424 (1896).

So, the failure of a creditor to place a deed of trust given to secure an indebtedness due him on record will not invalidate the deed in the absence of anything to show that it was withheld from record in pursuance of an agreement or understanding with the debtor. *Williams v. Simons*, 70 Fed. Rep. 40 (1896).

And the withholding by a creditor of a conveyance made to him as security by his debtor from record with an honest belief that his indebtedness would be paid, and without any agreement or understanding with the debtor, does not render the conveyance fraudulent as to other creditors. *First Nat. Bank v. Jaffray*, 41 Kan. 601 (1899).

And the mere failure or neglect of a creditor to record a deed given for its security in November until the following March will not invalidate the transfer as against creditors, where there is nothing to show that the grantor knew of, requested, or desired such want of action on the part of the grantee. *Burruss v. Trant*, 88 Va. 900 (1892).

And an unrecorded mortgage, conveying not more than one third of the mortgagor's property, which after several renewals is at last recorded within the time allowed by the statute, is not void as against simple contract creditors whose debts were incurred in the meantime, unless it was withheld from record for the fraudulent purpose of upholding the credit of the debtor, or otherwise impeached by proof of actual or positive fraud upon the part of the mortgagee. *Mobile Sav. Bank v. McDonnell*, 87 Ala. 736 (1888).

In *Mobile Sav. Bank v. McDonnell*, *supra*, *Blenderhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080 31 L. R. A.

(1882), *infra*, was distinguished upon the ground that in that case the secured creditor not only knew of the debtor's insolvency, but actively concealed the mortgage by purposely withholding it from record and in the meantime representing the mortgaged debtor as having a large estate and unlimited credit for the fraudulent purpose of giving him a fictitious credit.

And *Hilliard v. Cagle*, 46 Miss. 309 (1872), *infra*, was criticised therein, the court saying that that case seems to have gone to the extent of creating an estoppel in favor of creditors generally without any actual fraud being imputed to the mortgagee in withholding his mortgage from registration, but that view is contrary to the spirit of the registration statute and does not seem to be based upon sound reasoning.

So, that a conveyance from a husband to his wife of all his property in payment of a bona fide indebtedness was made secretly after suit threatened, and not recorded until some time afterwards, and then only on the grantor advising it, and that there was no change of possession, the husband continuing to cultivate and enjoy the lands, does not render the conveyance invalid. *Hill v. Bowman*, 35 Mich. 191 (1876).

And an assignee for the benefit of creditors does not acquire a right by virtue of the assignment which is superior to a mortgage which had been left unrecorded but not by any collusion between the mortgagee and mortgagor or any design to enable the mortgagor to obtain a fictitious credit on the faith that the property covered by the mortgage was unencumbered, and no such right is given to the assignee by R. L. Pub. Stat. chap. 178, § 9, declaring that no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered and retained by the mortgagee, or unless the said mortgage be recorded, as the assignee simply succeeds to the rights of the mortgagor. *Wilson v. Esten*, 14 R. I. 621 (1885).

And in *Magovern v. Richard*, 27 S. C. 272 (1886), a mortgage for a valuable consideration, not taken for the purpose of hindering, delaying, or defeating creditors, was held valid though the mortgagor was insolvent and the mortgage embraced all of the debtor's visible property and was withheld from record by agreement for forty days.

But the failure of a chattel mortgagee to have a mortgage recorded for forty-three days, and to disclose its existence to other creditors when the financial condition of the debtor was being discussed, and a promise by him to the debtor that he would not disclose its existence to other creditors who were demanding payment or security for their claims, are strong evidence tending to show a fraudulent intent to hinder and delay creditors. *Wafer v. Harvey County Bank*, 46 Kan. 597 (1891).

And the failure of the grantee in a deed absolute on its face but intended as a mortgage, expressing a consideration of \$85,000, given to secure an indebtedness of \$44,000, to place it on record for more than a year after it was given, should be taken into consideration in the light of surrounding facts. In determining whether or not it was fraudulent as to the grantee, and is sufficient to show an intent to enable the mortgagor to keep up a credit to which he was not entitled, and obtain money from others whereby a fraud would be perpetrated upon them. *Dobson v. Snider*, 70 Fed. Rep. 10 (1895).

Messrs. E. W. Rector, C. V. Teague, and Wood & Henderson, for appellees:

The sale to appellants by Jones & Fulton was made with intent to cheat, hinder, or delay the creditors of Jones & Fulton, and is therefore void.

Courts necessarily allow great latitude in admitting evidence where fraud is the issue. Fraud may be inferred from the circumstances proved in the particular case.

Bigelow, Fr. p. 146; *Dyer v. Taylor*, 50 Ark. 319; *Rea v. Missouri*, 84 U. S. 17 Wall. 532,

And a party cannot be permitted to take a bill of sale or mortgage of chattels for his own security, leaving the mortgagor in possession and ostensibly the owner, and at his request keep the public from a knowledge of its existence, withholding it from record for an indefinite period, renewing it periodically, and then place the last renewal on record to the prejudice of others whom the possession and ostensible ownership of the mortgaged property by the mortgagor had induced to confide in him. *Gill v. Griffith*, 2 Md. Ch. 270 (1848).

And a deed absolute on its face, duly acknowledged and recorded, reciting a consideration of \$2,000 in cash paid, which was really a security for a past indebtedness of \$400, and future advances in all to the amount of \$2,000, the grantee giving at the same time to the grantor his obligation to reconvey the land upon the payment of the amount, with the understanding that the obligation to reconvey was not to be recorded or made known for the purpose of preventing injury to the credit of the grantor and to prevent his property from being attached, is fraudulent and void as to creditors. *Ferguson v. Johnston*, 36 Fed. Rep. 134 (1888).

So, delay by a mortgagee in filing a chattel mortgage at the request of the mortgagor and to prevent injury to his credit has been held to estop him from asserting such mortgage as against creditors who gave credit to the mortgagor after its execution upon the faith that his property was unencumbered, though the mortgagee had no actual intent to defraud. *Standard Paper Co. v. Guenther*, 67 Wis. 101 (1886); *Sanger v. Guenther*, 73 Wis. 356 (1889).

And an agreement between a grantor in a trust deed and the beneficiary that the deed is not to be recorded as provided by law so that it may not affect the financial standing of the grantor, is express evidence of a fraudulent intent, and this, in connection with representations that the credit of the grantor is good, when the parties must have known that it was doubtful, whereby the grantor is enabled to obtain large credit, is conclusive. *Stock-Grower's Bank v. Newton*, 13 Colo. 245 (1889).

And a mortgage executed by an insolvent mortgagor, covering his entire estate, to a creditor, who knows of his insolvency and who conceals the mortgage and withholds it from record for the purpose of giving the mortgagor a fictitious credit, and represents him as having a large estate and unlimited credit, by means of which he is enabled to contract other debts which he cannot pay, is fraudulent and void as to creditors. *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080 (1882).

And such a mortgage intended to prefer a creditor who has reasonable cause to believe the mortgagor to be insolvent and knows it to be made in fraud of the provisions of the bankruptcy act, and who for the purpose of evading that act conceals and withholds the mortgage from record for several months, is void under the bankruptcy act, though executed more than two months before the filing of a petition in bankruptcy against the mortgagor. *Ibid.*

So, the withholding of mortgages from record pursuant to an agreement between the parties for the purpose of maintaining the credit of the mortgagor renders the transaction fraudulent as to other creditors, under Iowa Code, § 1923, making a sale or mortgaging of personal property of which the vendor or mortgagee retains possession invalid as to creditors unless recorded. *Goll & F.* 31 L. R. A.

Co. v. Miller, 87 Iowa, 426 (1893); *Falker v. Linehan*, 88 Iowa, 641 (1893); *Liddle v. Allen*, 90 Iowa, 738 (1894).

And deeds of trust which by agreement between the mortgagor and mortgagee were to be withheld from record so that the mortgagor's credit should not be impaired by reason of their record, the mortgagor to notify the mortgagee in case of danger of insolvency or loss to have the deeds recorded, will be postponed or set aside by a court of equity as fraudulent as against creditors. *Central Nat. Bank v. Doran*, 109 Mo. 40 (1892).

And the same rule was applied to an absolute deed given as security, which was withheld from record for three years, in *State Sav. Bank v. Buck*, 123 Mo. 141 (1894).

And a mortgage thus made will not be allowed to prevail against a conveyance to trustees for the benefit of creditors generally. *Hildeburn v. Brown*, 17 B. Mon. 779 (1856).

So, a deed of trust made by a merchant largely indebted to his commission merchants, conveying all of his property for the security of such indebtedness and for any future indebtedness incurred, under the provisions of which he was to continue in possession and conduct the business as before, receiving advances and sending cotton to his factors in order to prevent injury to their credit, which was withheld from record pursuant to an agreement by the parties, is fraudulent and void as to subsequent creditors. *Hilliard v. Cagle*, 46 Miss. 300 (1872).

And that the parties kept an assignment secret and from record until a creditor was about to procure judgment, when it was recorded, and that the insolvent assignor was permitted for several months to continue in possession and control of the goods and to deal with them as his own, together with the fact that no change was made in the manner of conducting the business, and no sign was put up indicating any change of ownership, the same books having been kept by the same bookkeeper and entries made in the same manner as before the assignment, and the employment of the assignor by the assignee to conduct the business, sufficiently shows that the assignment was made to hinder and delay creditors. *Means v. Dowd*, 128 U. S. 273, 32 L. ed. 429 (1889).

Withholding a mortgage from record pursuant to an agreement with the mortgagor, however, is not of itself sufficient to justify a holding as matter of law that such mortgage is fraudulent and void as to creditors, but is a badge of fraud to be considered with all the other facts and circumstances attending the transaction. *Hutchinson v. First Nat. Bank*, 133 Ind. 271 (1882); *Folsom v. Clemence*, 111 Mass. 273 (1873).

And it is not invalidated thereby when such agreement to withhold was not made to deceive but in good faith, and credit was not given on the strength of the apparent title thereby shown. *Banner v. Robinson* (Tex.) 34 S. W. 355 (1896).

And a mortgage is not rendered invalid as to creditors on the ground of the participation of the mortgagee in the fraudulent intent of the mortgagor because the mortgagee refrained at the request of the mortgagor from placing it on record until after the mortgagor had become indebted to another person, such other indebtedness not being in the mind of either at the time of making the mortgage, and the mortgagee having no knowledge or suspicion of the mortgagor's insolvency. *Flem-*

21 L. ed. 707; *Sparks v. Mack*, 81 Ark. 666; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154.

The creditor who buys property for the purpose of collecting his claim must act with good faith in the matter and must not take more of his debtor's property than is necessary to pay his claim at a fair price.

Christian v. Greenwood, 28 Ark. 258, 79 Am.

Dec. 104; *Wood v. Keith*, 60 Ark. 431; *Sparks v. Mack*, *supra*; *Twyne's Case*, 3 Coke, 81b; *Pritchett v. Pollock*, 82 Ala. 169; *Carden v. Lane*, 48 Ark. 219.

The creditors of *Jones & Fulton*, who were getting small pittances on their claims would be dissatisfied, and some of them would refuse to ratify the agreement. Hence the parties to

ington Nat. Bank v. Jones, 50 N. J. Eq. 244 (1892).

In *Flemington Nat. Bank v. Jones*, *supra*, *Blenerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080 (1882), was distinguished upon the ground that in that case the mortgagor was hopelessly insolvent to the knowledge of the mortgagee, who kept the mortgage from record to enable the mortgagor to postpone open bankruptcy long enough to give the mortgage sufficient age to have preference under the bankruptcy law, representing in the meantime that the mortgagor was solvent, and actively aiding in bolstering his credit.

And *Central Nat. Bank v. Doran*, 109 Mo. 40 (1892), was distinguished therein upon the ground that the mortgagor in that case was engaged in a hazardous business and the mortgagee withheld the mortgage from record for the express purpose of giving the mortgagor a credit to which he was not entitled, and enable him to use it in making purchases on credit.

And *Standard Paper Co. v. Guenther*, 67 Wis. 101 (1886), was distinguished therein upon the ground that in that case the business was hazardous and the desperate condition of the mortgagor was known to the mortgagee, and the subsequent creditor relied upon the unencumbered condition of the debtor's property.

And *Folsom v. Clemence*, *supra*, and *Stewart v. Hopkins*, 20 Ohio St. 502 (1876), *infra*, XI., were distinguished therein upon the ground that the mortgagors were engaged in a hazardous business in which credit was needed, and in which creditors were likely to give credit on the strength of a large stock of goods not encumbered by any judgment or mortgage.

And *Hilliard v. Cagle*, 46 Miss. 309 (1872), was distinguished therein upon the ground that in that case the mortgage was kept from the record in order to enable the mortgagor to continue in business and to buy more cotton on credit.

And *Hildeburn v. Brown*, 17 B. Mon. 779 (1856), was distinguished therein upon the ground that it was decided under a statute making unrecorded conveyances void as against creditors.

c. Other circumstances and conditions tending to show participation.

The circumstances and conditions which tend to show participation are necessarily as various and varied as the facts which gave rise to the numerous cases on the subject. Such circumstances and conditions, however, have necessarily been made to appear in the previous subdivisions of this note so far as they fall within the classification there adopted, and it is the intent of this subdivision to consider only such matters tending to show, or which have been asserted as tending to show, participation as do not fall within that classification, and do not seem readily susceptible of classification.

A transfer by a debtor to a creditor will not be conclusively deemed fraudulent in character because it covers substantially all of the debtor's property. *Remington Paper Co. v. O'Dougherty*, 36 Hun, 79 (1885); *Bishop v. Stebbins*, 41 Hun, 243 (1886).

And an intent on the part of a grantee to defraud or to concur in or to aid in carrying out or consummating a fraud on the part of a grantor, cannot be 31 L. R. A.

inferred from the fact that they received transfers of all the property of the grantor and must have known that his other creditors could not be paid. *Auburn Exch. Bank v. Fitch*, 48 Barb. 344 (1867).

It is a mere circumstance to be weighed among others in determining the intent and purpose of the party. *Bishop v. Stebbins*, *supra*.

But a sale of all the property of an insolvent debtor upon a long and unusual credit with intent to hinder and delay creditors, known to the purchaser, who aided in its accomplishment, is invalid though he intended finally to pay his entire indebtedness. *Roberts v. Radcliff*, 36 Kan. 502 (1886).

And a mortgage made by a father to his two sons in the night-time under suspicious circumstances, he at the same time transferring all of his lands and personal property to them, furnishes proper evidence on the question of fraud, but does not raise a conclusive legal inference thereof. *Herkelrath v. Stookey*, 63 Ill. 486 (1872).

So, proof of suspicious circumstances, such as great haste, consummating the sale by night, etc., does not necessarily show fraud, but may be explained away by evidence that the vendor owed the purchaser an honest debt, and that the agreed price was not greatly less than the value of the goods, and that no benefits were reserved. *Hodges v. Coleman*, 76 Ala. 103 (1884).

But the fact that a sale to a creditor in payment of his debt was made after business hours and without a written inventory does not necessarily imply bad faith or a design to defeat or defraud creditors. *Davis v. McCarthy*, 52 Kan. 116 (1893).

And fraud in fact in a deed of trust of a stock of goods given to secure certain creditors is not established by proof that other creditors were urging their claims and watching the mortgagor's movements, and that it was made hurriedly in the night and registered at an unusual hour, and that the grantor's wife and clerk without his knowledge took some of the goods out of the store after the deed was executed. *Reeves v. John*, 95 Tenn. 4 (1895).

Neither is participation by a creditor who purchases goods from an embarrassed debtor to pay a bona fide debt, in the fraudulent intent of the debtor, shown by proof that the debtor had other assets out of which he could have paid the creditor, and that the creditor knew it. *Wood v. Keith*, 60 Ark. 425 (1896).

And a statement by a creditor who takes property from his debtor, that he did it to secure himself, is not sufficient to establish a fraudulent intent upon his part. *Bank of Commerce v. Schlotfeldt*, 40 Neb. 212 (1894).

But a mortgage is clearly void as against creditors of the mortgagor for fraud in fact where it is proved that both mortgagor and mortgagee had declared that it was made to protect the mortgagor's property against a debt due to the United States and against other debts. *Farmers' Bank v. Douglass*, 11 Smedes & M. 469 (1848).

So, a mortgage is not affected by statements made in good faith by the mortgagee to creditors of the mortgagor that the latter is doing a good business and will be able to meet his obligations, although the statements prove to be untrue, where there is nothing to show that they were not made in good faith, as they are mere opinions. *Chafey v. Mathews*, 104 Mich. 103, 27 L. R. A. 568 (1896).

said bill of sale, anticipating that that would occur, secretly provided for such contingency, and in so doing they committed a fraud upon the creditors of Jones & Fulton.

Sparks v. Mack, 81 Ark. 670; Burrill, Assigmn. 5th ed. p. 255; *Lukins v. Aird*, 73 U. S. 6 Wall. 78, 18 L. ed. 750.

If the firm is insolvent at the time a transfer

And the mere false statement of the financial standing of a business firm by the president of a bank of the same community, to a party about to sell goods to it, does not show that there was at the time no honest indebtedness existing in favor of the bank against the business firm, or impeach the integrity of a subsequent conveyance by such firm to secure the bank. *Stokes v. Burns* (Mo.) 38 S. W. 460 (1895).

And the sending out by creditors to their collecting agents and attorneys a circular letter containing a memorandum stating that a debtor owed them \$54.46, which simply included the amount then due on open account but did not include two promissory notes for the sum of over \$1,900, is not sufficient to impeach the bona fides of a sale by the debtor to such creditor of his stock of goods for \$2,000 which was credited to his indebtedness. *Williams v. Simons*, 70 Fed. Rep. 40 (1895).

So, a statement by a creditor to a falling debtor, that he could be closed up if he did not give him a mortgage upon all of his property, is not sufficient to show that the mortgage given pursuant to such statement was made to hinder and delay other creditors. *Rouse v. Frank*, 84 Ga. 623 (1890).

And a request by a banker who advances money to a customer for a chattel mortgage, as collateral, raises no inference of fraud which will invalidate a subsequent transfer of his property by the customer to the bank where his business was carried on in a careless and extravagant way, and the banker might well have anticipated the difficulties and embarrassments which subsequently befell him. *Buford v. Cook*, 36 Fed. Rep. 21 (1888).

And a sale by a debtor to a creditor will not be set aside as fraudulent as against other creditors, where the careless and extravagant way in which the debtor carried on his business sufficiently explains most of the suspicious circumstances. *Ibid*.

Nor will a conveyance by a debtor in failing circumstances of his property in trust to secure certain of his creditors, which is void, affect the validity of a subsequent sale to such creditors, made in good faith to pay an actual debt. *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed. 329 (1885).

And a conveyance by an insolvent debtor in part payment or satisfaction of a prior indebtedness is not invalidated by a subsequent independent transaction on the same day whereby the debtor sells merchandise to satisfy the rest of the debt to the same vendee paying a small sum to the debtor to balance the account. *Buford v. Shannon*, 95 Ala. 205 (1891).

And where a sale by a debtor to a creditor is valid, the making of a general assignment by the debtor on the same day will not render it illegal. *Bamberger, B. & Co. v. Schofield*, 160 U. S. 149, 40 L. ed. 374 (1895).

But the fraudulent purpose of an insolvent debtor in secreting a part of his estate and executing a deed of trust upon his stock in trade to a bank, will be imputed to a second conveyance made at the same time to secure other creditors, where it is part and parcel of the entire transaction of which the primary purpose was to give priority to the bank, and there is no purpose that the creditors named in the second conveyance shall receive payment upon the debts thereby secured, and the prior deed if upheld would absorb the 31 L. R. A.

of the firm property to make such payment is made, it is fraudulent and void as to existing creditors of the firm.

Goodbar v. Cary, 16 Fed. Rep. 816; *Rogers v. Batchelor*, 37 U. S. 12 Pet. 231, 9 L. ed. 1063; *Koop v. Herron*, 15 Neb. 73; *Pritchett v. Pollock*, *supra*; *Wilson v. Robertson*, 21 N. Y. 587; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am.

whole estate. *Brister v. Moore* (Miss.) 16 So. 596 (1895).

And a mortgagee who takes a mortgage from a debtor who had previously conveyed the same property in trust for creditors, which conveyance was fraudulent, cannot claim as an honest purchaser for a valuable consideration where he was aware of such previous conveyance, and though a judgment creditor, he cannot take such conveyance where he had not taken out execution on his judgments and levied on the land fraudulently conveyed. *Fox v. Willis*, 1 Mich. 321 (1852).

Nor does the fact that a mortgage held by a creditor against a failing debtor happens to be dated on Sunday, show that it was antedated for some fraudulent purpose as against creditors. *Leake v. Anderson*, 43 S. C. 448 (1895).

And an intent manifested by a father to defraud his creditor does not warrant the assumption that he furnished his son with the money with which he purchased a quantity of his father's property which was sold under execution,—especially where it appears that the son had or might have had independent means. *Abney v. Kingsland*, 10 Ala. 355, 44 Am. Dec. 491 (1846).

So, the voluntary execution of a chattel mortgage by a debtor to his creditor, which he sends to the registry of deeds for filing without the creditor's knowledge, does not necessarily or conclusively show any fraudulent collusion between them. *Standard Implement Co. v. Parlin & O. Co.*, 51 Kan. 632 (1893).

And the neglect of a mortgagee to foreclose, as well as the expectation on the part of the mortgagor that he would not, does not show fraud as against creditors where the debt was an honest previously existing one, and the mortgage was given for no more than was justly due. *Billings v. Billings*, 31 Hun, 65 (1883).

And a short delay by a mortgagee in proceeding to enforce his mortgage after the lapse of the law days will not render an otherwise valid mortgage inoperative and void. *Pugh v. Harwell* (Ala.) 18 So. 535 (1895).

And a deed of trust given by a depositor to a bank, conveying \$1,400 worth of property to secure a debt of \$1,600 due the bank, exclusive of attorneys' fees, is not rendered invalid as to creditors by a provision in it for attorneys' fees to the amount of \$300. *Phillips v. Schoelkopf* (Tex.) 29 S. W. 918 (1894). Affirmed in 29 S. W. 645 (1895).

Or by the bank permitting a depositor to withdraw \$223 from deposit on the night the conveyance was made. *Ibid*.

Nor is a conveyance by a debtor in failing circumstances invalidated by the fact that some portion of the payment therefor consisted of outlawed obligations of the grantor; that fact, at most, could but be regarded as a circumstance which might arouse suspicion. *Fraser v. Passage*, 63 Mich. 551 (1896).

Nor does the fact that a part or the whole of a debt due from a husband to his wife was subject to the bar of the statute of limitations show that the debt was not bona fide or was fraudulent,—especially when the husband was possessed of large means. *Leake v. Anderson*, 43 S. C. 443 (1895).

So, a conveyance by a debtor to his creditor to secure a bona fide debt is good though the creditor

Rep. 683; *Keith v. Fink*, 47 Ill. 272; *Knauth v. Bassett*, 34 Barb. 31; *Cox v. Platt*, 32 Barb. 126; *French v. Lovejoy*, 12 N. H. 458; *Burrill, Assignm.* 5th ed. p. 307; *Burtus v. Tisdall*, 4 Barb. 571; *Ransom v. Van Decenter*, 41 Barb. 307.

The contract necessarily had the effect to

hinder and delay creditors, and was therefore fraudulent and void.

2 Bigelow, Fr. 375.

The sale of the property to appellants was an assignment and void for failure to comply with the laws of the state.

Richmond v. Mississippi Mills, 52 Ark. 30,

knew that the debtor had no other property with which to pay other debts, and that the debt was barred by the statute of limitations. *Hale v. Stewart*, 7 Hun, 501 (1876).

And an absolute and unconditional sale by a debtor to a creditor in payment of his claim is not invalidated by the fact that the creditor had made no inventory until after the sale and change of possession, and failed to execute a receipt or release to the debtor. *Chamberlain v. Dorrance*, 69 Ala. 40 (1881).

And a claim by a banker who started in business with a capital of \$10,000, that he had advanced to a debtor, who afterwards transferred his property to him, the sum of \$23,000 in six years, will not raise an inference of fraud which will invalidate the transfer where the business of the debtor was such that it is obvious that he must have somewhere obtained funds therefor. *Buford v. Cook*, 36 Fed. Rep. 21 (1888).

And the insolvency of a trustee in a trust deed of electrical goods, and his want of skill in the use and handling of such goods, would not invalidate the trust deed as against creditors, but may be looked to and taken into consideration by the jury for the purpose of determining with other facts and circumstances whether the purpose of the deed was to delay, hinder, and defraud creditors. *Lewis v. Alexander* (Tex.) 31 S. W. 414 (1895).

But the execution of a mortgage after the mortgagor has been sued, to one in his employment who had no means of subsistence other than his labor and who was the mortgagor's son-in-law, to secure wages partly due and partly to become due, which was falsely dated and of which the mortgagor remained in possession, are items of evidence to be considered by the jury upon the question of the bona fides of the conveyance. *Perry v. Hardison*, 99 N. C. 22 (1888).

So, an absolute conveyance intended only as security will be held to be fraudulent where the grantee or mortgagee conceals the nature of the conveyance and claims it to be absolute. *Fuller v. Griffith* (Iowa) 60 N. W. 247 (1894).

And an absolute conveyance for the purpose of securing a debt, with an understanding between the parties that the land is to be reconveyed upon payment of the debt, is void as against creditors. *Smith v. Lowell*, 6 N. H. 87 (1832).

And wards to whom an insolvent guardian had conveyed certain property in trust to satisfy an indebtedness, who attained their majority and settled with the guardian, accepting the property conveyed, pending an action by general creditors to set aside such conveyance, take subject to the rights of such creditors. *Thomas v. Pyne*, 55 Iowa, 348 (1880).

So, making loans at intervals during a period of six months, amounting to the sum of \$2,888 without providing any more authenticated evidence than a pencil memorandum made by the lender which had the appearance of all the entries having been made at one time, furnishes sufficient evidence of a fraudulent combination to require the submission of the cause to the jury. *Brinks v. Heise*, 84 Pa. 251 (1877).

And proof that the president of a private corporation called a meeting of the board of directors, consisting of two members besides himself, and personally procured the attendance of the other two directors for the purpose of passing a

resolution authorizing him as president to mortgage the property of the corporation to himself individually, which resolution was passed, one of the members voting in the negative and the other in the affirmative and the president deciding the tie, and that the mortgage executed pursuant thereto was intended to hinder and defraud a creditor of the company, is sufficient to invalidate the mortgage without further proof as to fraudulent intent or notice thereof on the part of the mortgagee. *Burley v. Marsh*, 11 Neb. 291 (1881).

IV. Participation by agent.

The ordinary rules of agency apply to render a principal liable for the participation of his authorized agent in taking a transfer from a debtor though he is himself innocent.

Thus, the conveyance by a husband of his interest in lands to a trustee, who conveys the same to the wife, for which she gives up a valid indebtedness against her husband, made on the part of the husband for the purpose of placing it beyond the reach of his creditors, does not make her a purchaser in good faith, though she had no actual knowledge of his insolvency or intended fraud, where he acted as her agent in the matter which made his object, purpose, and intent hers. *Trumbull v. Hewitt*, 65 Conn. 80 (1894).

And a note and mortgage made by a debtor to the wife of another, with the intent, participated in by both, to defraud the mortgagor's creditors, but which was not known to the wife, is invalid as against creditors as her title rests on the acts of her husband, who acted as her agent, his knowledge being regarded as hers. *Clark v. Fuller*, 39 Conn. 238 (1872).

And the receipt of goods from a debtor by the agent of a creditor in payment of his claim under a secret understanding that the excess over the debt should be held for the debtor, or that there should be a secret trust for his benefit, invalidates the transfer as against other creditors, though the preferred creditor did not participate in the intent, as the agent's act must be deemed in law to be his. *Greenleve v. Blum*, 50 Tex. 124 (1883).

V. Participation as between trustees and beneficiaries.

Trustees and beneficiaries under a trust deed cannot hold with notice of the fraudulent intent of their grantor or of fraud rendering his title void, even in states where such trustees and beneficiaries occupy the position of purchaser for a valuable consideration. *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 606 (1890).

And in Virginia and West Virginia notice to trustees in a trust deed of a fraudulent intent upon the part of the grantor is notice to the beneficiaries, and the trustees are chargeable with a knowledge of all the facts that inquiry would have disclosed. *Ibid.*

And in *Crow v. Beardsley*, 68 Mo. 435 (1878), it was held that the participation either of the trustees or the beneficiaries in a deed of trust in fraud of the grantor is sufficient to defeat the deed as against creditors.

And the rule that notice to a trustee is notice to the cestui que trust applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds under it. *Crumlish v. Shenandoah Valley R. Co.* 32 W. Va. 244 (1889).

4 L. R. A. 418; *Costello v. Chamberlain*, 36 Neb. 45; *Atkins v. Scope*, 38 Ark. 539.

Appellants had no cause of action against appellees on the bond.

There is no statute authorizing the sheriff to require an indemnity bond in attachment pro-

ceedings. If the sheriff was guilty of a tort in making the levy, and the court should hold that appellees, by signing said bond, are equally guilty with him, then the appellants might have sued appellees for the tort, but they have not seen proper to do so. They elected to sue

So, it has been held that when a conveyance is made in trust to a third party for the benefit of certain preferred creditors, it is immaterial whether an intent upon the part of the grantor to defraud his creditors was or was not known to either the trustee or the beneficiary. *Simon v. Ash*, 1 Tex. Civ. App. 202 (1892).

And that a deed of trust made to secure an antecedent debt is void if made with fraudulent intent by the grantor, though neither the trustee nor the *cestui que trust* participated in the fraudulent intent, and the fraud of the grantor is not apparent upon the face of the deed, the question of the existence of the fraud being one for the jury. *Harney v. Pack*, 4 Smedes & M. 229 (1845).

In West Virginia, however, a trustee in a deed of trust or assignment made to secure creditors is regarded as a purchaser for value, and in order to invalidate it notice of the grantor's fraudulent intent must in some way be brought home to him or to the creditors secured thereby. *Douglas Merchandise Co. v. Laird*, 37 W. Va. 667 (1893); *Duncan v. Custard*, 24 W. Va. 780 (1884).

And the prevailing rule would seem to be that a fraudulent intent upon the part of a grantor in a trust deed will not invalidate it as against creditors where the beneficiary thereunder did not know of or participate in such intent. *Lewis v. Alexander* (Tex.) 31 S. W. 414 (1896).

And that in order to avoid a deed of trust upon the ground of a fraudulent intent upon the part of the grantor, notice of such intent upon the part of the creditor for whose benefit it was made must be established. *Sonnentheil v. Texas Guaranty & T. Co.* (Tex.) 30 S. W. 945 (1895).

And that the guilty knowledge and participation of a trustee in a trust deed given for the benefit of certain creditors in the fraudulent intent of the grantor, will not affect the validity of the instrument as to claims of an innocent beneficiary. *Solomon v. Wright*, 8 Tex. Civ. App. 565 (1894); *Kraus v. Haas*, 6 Tex. Civ. App. 665 (1894); *Byrne v. Becker*, 42 Mo. 264 (1868).

In *Solomon v. Wright*, *supra*, *Simon v. Ash*, *supra*, was dissented from and disapproved of.

And in *Kraus v. Haas*, *supra*, *Simon v. Ash*, *supra*, was dissented from.

Thus, the beneficiaries in a trust deed are not to be considered in determining whether or not it was fraudulent to other creditors where it appears that one of them was otherwise secured and paid no attention to it, and that another, when notified, did not signify his intention to consent or dissent, but obtained judgment on his claim, and the others had such notice of the condition of affairs as charged them with knowledge of the intent with which the conveyance was made. *W. W. Kendall Boot & S. Co. v. Johnston* (Tex.) 24 S. W. 583 (1893).

And a mortgage given by a firm to one of the members thereof as nominal mortgagee to secure a note given by the firm to a bank which was made by the firm with intent to defraud its creditors, participated in by the nominal mortgagee, is not void in the hands of the bank in favor of subsequent attaching creditors. *First Nat. Bank v. Ridenour*, 46 Kan. 707 (1891).

So, it is not necessary that a trustee in a deed of trust should participate in the fraudulent intent with which the deed was made to render it invalid: his intent does not affect it. *Eigenbrun v. Smith*; 98 N. C. 207 (1887).

But notice to a trustee in a trust deed of the 31 L. R. A.

fraudulent intent with which the grantor executed it, is notice to the *cestui que trust* where he acted in the matter by agreement between the grantor and the *cestui que trust*. *Pope v. Pope*, 40 Miss. 516 (1866).

VI. Participation by one of several beneficiaries.

The rule has been laid down that the honest intent of one of two mortgagees will not sustain the mortgage where the other participated in the fraudulent intent of the mortgagor. *Adams v. Niemann*, 46 Mich. 135 (1876).

And it has been held that a trust deed made for the benefit of certain preferred creditors, reciting debts which are false and fictitious in whole or in part, is wholly void for fraud, though some of the debts are good, and it matters not whether the other creditors whose claims are good knew of the fact or not. *Simon v. Ash*, 1 Tex. Civ. App. 202 (1892).

And that a trust deed given by a debtor to a creditor, which includes several feigned notes is void *in toto* as against other creditors, though there were also bona fide debts included, and there was no evidence of any complicity in the fraud on the part of the trustee. *Stone v. Marshall*, 7 Jones, L. 300 (1859).

And in *Seaman v. Nolen*, 68 Ala. 463 (1880), it was held that a conveyance by a debtor to two creditors, one of whom had attempted to procure the conveyance to himself, using inducements and representations which tainted the transaction with fraud, joining with the other upon the debtor's refusal to sell, and both accepting a joint conveyance and being equal participants in the fruits of the transaction, is fraudulent and void as to creditors as to both grantees.

But the prevailing rule would seem to be that where a conveyance is made to satisfy the claims of several grantees or creditors, and the consideration for the purchase emanates from each, the conveyance is valid as to those grantees or creditors whose purchase was bona fide or supported by a valid consideration, although the title of other creditors or grantees may fail on account of some vice or fraud in their purchase. *Hamilton Brown Shoe Co. v. Whitaker*, 4 Tex. Civ. App. 380 (1893).

Thus, a beneficiary in a trust deed given to secure different claims, whose debt is valid and who acts merely for the purpose of securing his debt and not with any purpose to aid and assist the insolvent debtor to hinder, delay, and defraud other creditors, will be protected although fictitious debts are included in the deed of trust. *Muse v. Chaney* (Tex.) 30 S. W. 374 (1895).

And a chattel mortgage made by a debtor for the benefit of certain preferred creditors is not rendered invalid by the fact that one of the creditors was insolvent and his debt secured by the mortgage was fictitious, in the absence of evidence or knowledge or concurrence of the assignee or other creditors secured. *Howell Bros. Shoe Co. v. Mars*, 82 Tex. 493 (1891).

So, a deed of trust, given in part to secure fraudulent debts and in part, to secure bona fide debts, is not fraudulent and void *in toto*, where the creditors to whom the bona fide debts were due had no notice of any dishonest purpose on the part of the grantor. *Billups v. Sears*, 5 Gratt. 31, 50 Am. Dec. 105 (1848).

An honest creditor does not lose his security because the mortgage constituting it embraces a separate claim of a party who participated with

appellees on contract and they are bound by their complaint.

Pom. Rem. & Rem. Rights, 558-564, and notes; *Sumner v. Rogers*, 90 Mo. 324; 1 Enc. Pl. & Pr. p. 194; *Campbell v. Rotering*, 42 Minn. 115; *Thebaud v. National Cordage Co.*, 57 Fed. Rep. 567; 10 Am. & Eng. Enc. Law, p. 413, and notes, p. 432.

the mortgagor in perpetrating a fraud of which he had no knowledge, where the claims of the mortgagees were distinct and divisible. *Morgan v. Worden* (Ind.) 32 N. E. 783 (1892).

And though some of the beneficiaries in a deed of trust for the benefit of several creditors may have had notice of a fraudulent intent on the part of the makers of the deed, if others accepted it without notice, they would be entitled to have it enforced for their own benefit notwithstanding any fraud with which the others were chargeable. *Sonnentheil v. Texas Guaranty & T. Co.* (Tex.) 30 S. W. 945 (1895).

And a mortgage securing a number of different creditors each acting for himself and knowing nothing of the claim or intention of the others or of the relation between the grantor and such others, is good as to the claim of an innocent purchaser who acted in good faith in obtaining security for an honest debt, though some of the other creditors had acted fraudulently. *Rider v. Hunt*, 6 Tex. Civ. App. 238 (1894).

In *Rider v. Hunt*, *supra*, the contrary ruling in *Simon v. Ash*, 1 Tex. Civ. App. 210 (1892), was disapproved.

Where some of the mortgagees in a mortgage given to secure several debts have guilty knowledge of, or participated in, a fraudulent intent entertained by the mortgagor, and others have not, the mortgage will be valid as to those who acted in good faith and invalid as to the others who did not. *Kraus v. Haas*, 6 Tex. Civ. App. 665 (1894).

So, in *Kraus v. Haas*, *supra*, *Simon v. Ash*, *supra*, was disapproved.

And *Cox v. Miller*, 54 Tex. 27 (1880), was criticized and disapproved therein, the court saying that that case cites a number of cases to sustain the proposition that the grantee will be affected by the fraud in a deed if he attempts to claim under it, though in fact he had no knowledge of the fraudulent intent of the grantor, but we find that every one of them are made to turn upon the good or bad faith of the grantee or mortgagee.

So, a creditor whose debt is secured by a deed of trust, and also by personal indorsement, is not affected by any fraud committed by any other creditor secured by said deed or even by the party whom he holds as an indorser upon his claim, when he had no notice of such fraud or reasonable cause to suspect it at the time of the execution of the deed. *Sonnentheil v. Texas Guaranty & T. Co.* (Tex.) 30 S. W. 945 (1895).

VII. Effect of other accompanying purposes besides that to defraud.

The invalidity of a transfer resulting from an intent to defraud creditors, participated in by the transferee, is not cured or affected by the fact that that intent was not the sole purpose of the parties making and taking it.

Thus, a mortgage need not have been executed simply or for the sole purpose of aiding the mortgagor in putting the property out of the reach of his other creditors in order to be fraudulent and void; it is sufficient if it was intended, in part at least, to shield the debtor from his other creditors, and to enable him to hold them at arm's length or to obtain compromises from them. *Fink v. Alger*, 8 Mo. App. 186 (1887).

Harrod, Special Judge, delivered the opinion of the court:

The appellees contend that the judgment should be affirmed, without regard to whether there were errors committed against the appellants at the trial, because, as they claim, the suit instituted by the plaintiffs cannot be maintained under the law. They claim

And substantially the same ruling was made in *Wood v. Keith*, 60 Ark. 425 (1895).

And a mortgage given and received for the purpose of keeping the mortgaged goods out of unfriendly hands, under which possession was not taken by the mortgagee, is fraudulent and void as against creditors, though given to secure a bona fide debt or actual advances of money. *Goodhue v. Berrien*, 2 Sandf. Ch. 630 (1845).

And a chattel mortgage contrived by the parties with intent to hinder, delay, or defraud the creditors of the mortgagor, or to protect his property from his other creditors, or to deceive his creditors as to the amount of his encumbrance, is void as to such creditors though the mortgagee accepted it to secure a just debt due him. *Cordes v. Strasser*, 8 Mo. App. 61 (1879).

See also, as to effect of fraudulent participation though conveyance is made to secure a just debt, *supra*, III. a.

Nor can a mortgage taken by a creditor from a debtor to secure the payment of his claim stand as against the mortgagor's creditors if it was any part of the purpose of the mortgagee taking it to secure thereby a benefit to the mortgagor involving the hindering, delaying, or defrauding of other creditors. *Howell v. Carden*, 99 Ala. 100 (1892).

So, a chattel mortgage executed in part to indemnify the mortgagee against a liability on a redelivery bond, is invalid where another and important object was to delay and defraud the creditors of the mortgagor which was participated in by all parties and cannot be separated to any extent. *Winstead v. Hulme*, 32 Kan. 568.

And a mortgage made with the double purpose of securing a bona fide debt from the mortgagor and of preventing creditors from attaching the property, is fraudulent as to creditors. *Crowninshield v. Kirtledge*, 7 Met. 520 (1844).

And a deed of trust reciting as its object that it was to secure certain creditors and indemnify them against certain liabilities, the debtor being then deeply insolvent and about to fail, is fraudulent and void as against creditors, where it appears that one of the objects the parties had in view was to secure the property against apprehended attachments and to prevent a sacrifice of the property, it being understood that the debtor should thereafter make a general assignment. *Johnson v. Whitwell*, 7 Pick. 71 (1828).

And a deed by a debtor to a creditor designed as security for the creditor's claim, in which the claim was used as a colorable consideration to enable the debtor to withhold his property from other creditors and to provide means for the debtor to continue to carry on his business, is fraudulent and void though one of the objects was to secure the payment of the creditor's claim. *Constantine v. Twelves*, 29 Ala. 607 (1857).

And one who purchases property at a sheriff's sale with money furnished by the execution debtor cannot hold the property as against creditors though it was made in part for the payment of a valid debt due an infant ward of the grantee. *Tatum v. Hunter*, 14 Ala. 557 (1848).

In *Tatum v. Hunter*, *supra*, *Anderson v. Hooks*, 9 Ala. 704 (1846), *infra*, VIII., was distinguished on the ground that in that case it did not appear that any person participated in the fraud but the grantor.

that the bond was personal to the sheriff, and that he alone can sue on it, and that he cannot sue until he has been damaged. It is also said that the statute makes no provisions for an indemnity bond in attachment cases; and it is further urged as a defense against the action of the plaintiffs that it is doubtful whether the defendants, by signing the bond,

became participants in the trespass; and, if they did become so, it is claimed that they could only be sued in trespass, and not on the bond.

If this suit was by the sheriff against the defendants on the bond, it would be necessary for him to show how and in what respect he had been damaged; and in such a case it

A purpose to hinder and delay creditors on the part of a vendor, which was only contemplated as an incident, however, the real purpose and object of the transfer being to pay debts due to the parties named in the conveyance, will not invalidate the transfer, but if the intention to hinder and delay creditors influenced him in whole or in part as an object of making the deed it would be void. *Simon v. Ash*, 1 Tex. Civ. App. 202 (1892).

And representations by a creditor to his debtor that he wished security not so much for his own protection as to secure the property on which it was given from attachment by other creditors made for the purpose of obtaining a transfer of property to secure a debt, are not conclusive evidence of a fraudulent intent upon his part, but mere circumstances to be left to the jury. *Reynolds v. Wilkins*, 14 Me. 104 (1836).

VIII. *Effect of relationship or intimacy of the parties.*

What is here intended to be covered is the effect of relationship or intimacy as evidence or as raising an inference of participation by the creditor in the fraud of the debtor. Questions as to the general effect of relationship upon conveyance are omitted.

The relationship of the parties to a transfer is a fact for the jury where its good faith is impeached, though the transferee is a creditor. *Hough v. Dickinson*, 58 Mich. 89 (1885).

And the facts that the mortgagor is a step-daughter of the mortgagees, and that they lived together as members of the one family, may be taken into consideration by the jury in determining the good faith of the transaction between them. *Whitson v. Griffiths*, 39 Kan. 211 (1888).

But knowledge of or participation in a fraud of a debtor in making a transfer of property to his creditor in payment of a debt, and knowledge of the debtor's financial straits, is not a necessary inference to be drawn from the extent or character of their intimacies and friendship, but is a proper subject for the consideration of the jury. *Johnson v. Jones*, 16 Colo. 138 (1891).

And that a debtor was in embarrassed circumstances and was related to his grantor, and that they lived contiguous to each other, will not warrant the inference that the creditor participated in a fraudulent intent of the debtor in making a conveyance to him in satisfaction of his claim. *Anderson v. Hooks*, 9 Ala. 704 (1846).

And the fact that a preferred creditor is the debtor's wife does not affect a sale and delivery of goods by him to her in satisfaction of an honest debt. *Jewell v. Knight*, 123 U. S. 426, 31 L. ed. 190 (1887).

And where a mortgage is given in good faith and for a valuable consideration, it is not invalidated by the fact that the mortgagee was a relative or friend of the mortgagor, where it was not given to defraud creditors and the execution of the mortgage was immediately followed by a delivery of possession of the mortgaged property. *Davis v. Schwartz*, 155 U. S. 631, 39 L. ed. 290 (1894).

But a transfer by a debtor of property which at a fair valuation is ample to satisfy all that he owes to pay a single creditor who is a near relative, casts the burden of proof as to the validity of the 31 L. R. A.

entire transaction upon the purchaser. *Demarest v. Terhune*, 18 N. J. Eq. 532 (1867).

And a conveyance by a father to a son whose business relations were very intimate, of property not exceeding in value the debts due the son and for which he was security, the son knowing of his father's insolvency at the time, and a deposit by the father in the name of the son, without his knowledge, of \$2,300 at that time, which a few days thereafter was withdrawn at the father's request and returned to him, gives rise to a question of fact to the jury whether or not the son aided and assisted his father in placing his money and property beyond the reach of creditors for the purpose of hindering, delaying, and defrauding them. *Hargadine v. Davis (Tex.)*, 26 S. W. 424 (1894).

Other cases will be found in the different sections of this note in which the conveyances were between relatives and intimate friends, but as they turned upon other questions, and as no effect was apparently given to that fact, they are not here included.

IX. *Conveyances taken from a fraudulent grantee.*

A transfer of property to pay a just debt due to the transferee, taken without any notice on his part or any fraud between his vendor and the person from whom such vendor purchases, is effectual to pass title to him as against creditors of the original vendor, no matter what fraud may have been perpetrated between such original vendor and his immediate vendee. *Knox v. Hunt*, 18 Mo. 174 (1853).

And a conveyance of goods to secure an advance made bona fide and without notice is good and passes title as against creditors of a former owner, though he had fraudulently transferred them to the person making such transfer. *Morewood v. South Yorkshire R. & River Dun Co.* 3 Hurlst. & N. 798, 28 L. J. Exch. 114 (1858).

So, a bona fide mortgagee from a husband and wife of lands to which the wife held title, which had been conveyed to her by her husband for the purpose of defrauding his creditors, will not be affected by the fraud. *Shorten v. Drake*, 38 Ohio St. 76 (1882); *Sedgwick v. Place*, 12 Blatchf. 163 (1874).

And a conveyance by one to another and by him to a third person pursuant to the direction of the first, does not show a conspiracy between them for the purpose of defrauding the creditors of the first grantor where it does not appear that the first grantee knew that his grantor was owing any one but himself, and he conveyed to the second grantee to procure payment from him, and the second grantee had no knowledge of any debts owing by the original grantor except those which he paid to secure the conveyance as a part of the purchase price, and his object was to secure payment of a debt due him from the original grantor. *Des Moines Ins. Co. v. Lent*, 75 Iowa, 522 (1888).

So, the rights of a purchaser under a deed of trust valid on its face, but which is rendered fraudulent as to creditors by the dealings of the grantor under it, are not affected by such fraudulent conduct, and his title will prevail over a judgment against the grantor rendered subsequent to the execution of the deed. *Baldwin v. Little*, 64 Miss. 126 (1886).

And voluntary conveyances to a grantee are not

might be necessary to determine whether the statute contemplates the indemnity bond mentioned, although it is questionable even in that case whether the defendants, having executed the bond under the circumstances, would be heard at all to contest its legality.

But there is no such case here, for this is not a suit on the bond, but a suit against the defendants to recover the value of the plaintiffs' goods, which it is claimed were taken to pay the debt of another, and for which taking it is alleged the defendants were responsible.

sufficient to put purchasers and mortgagees from such grantee upon inquiry as to whether such voluntary conveyances were fraudulent, as it is not to be inferred that the grantor was indebted or that he had not retained sufficient property to pay his debts if he had any. *Yardley v. Torr*, 67 Fed. Rep. 857 (1885).

So, a purchase of goods on credit by means of fraudulent representations of the purchaser is not ground for annulling a sale of the goods subsequently made to secure a debt for borrowed money due a person ignorant of such representations, where there was no collusion with the buyer to defraud other creditors. *Jones v. Christian*, 86 Va. 1017 (1890).

And an arrangement between a creditor and his debtor and one to whom his debtor had transferred property with intent to defraud creditors, by which the transferee conveyed a part of the property to the creditor in payment of his claim, made in good faith upon the part of the creditor, is valid as against other creditors, although the creditor taking the property knew of the fraudulent character of the transfer from the debtor to the original transferee. *Butler v. White*, 25 Minn. 432 (1879).

And a mortgagee who takes a mortgage from a fraudulent grantee, made at the request of a fraudulent grantor upon the property conveyed by the fraudulent conveyance, who is ignorant of the fraudulent character thereof, is protected as a purchaser in good faith and for a valuable consideration, although the conveyance may be set aside in an action brought by other creditors. *Murphy v. Briggs*, 89 N. Y. 446 (1882).

And mortgages given by a fraudulent grantee at the request of the fraudulent grantor upon the property fraudulently conveyed to secure debts of the grantor existing at the time of the conveyance to creditors who were ignorant of his pecuniary condition and ability and of his intent in making the conveyance, take precedence over the rights of creditors attacking the conveyance. *Murphy v. Moore*, 23 Hun. 95 (1880).

A conveyance made and received for the purpose of defrauding creditors of the grantor is good as between the parties to it, and will support a mortgage given by the grantee to a bona fide purchaser for a valid consideration, though the assignee in bankruptcy of the grantor can hold the grantee for the value of the property mortgaged. *Brooks v. D'Orville*, 7 Ben. 485 (1874).

But mere knowledge or notice of such fraud is sufficient to charge him with participation therein.

Thus, a mortgagee with notice of a claim that his mortgagor holds under a fraudulent conveyance stands in the same situation with respect to the title as such mortgagor. *Stewart v. Iglehart*, 7 Gill & J. 132, 28 Am. Dec. 202 (1835); *Treusch v. Ottenburg*, 44 Fed. Rep. 867, 6 U. S. App. 403 (1893); *Knox v. Hunt*, 18 Mo. 174 (1853).

And an antecedent creditor who knows that his debtor procured goods and merchandise by fraudulent means cannot secure a lien by chattel mortgage on such fraudulently procured goods adverse to the innocent vendors thereof. *Wafer v. Harvey County Bank*, 46 Kan. 507 (1881).

So, a mortgage made by a wife on a leasehold estate, fraudulently conveyed to her by her husband, to creditors of the husband's firm after it had failed, as security for an existing debt, is invalid where they had knowledge of all the facts which

R. A.

invalidated her title. *Sedgwick v. Place*, 12 Blatchf. 163 (1874).

And a mortgagee, whose mortgage was given him without notice and for a sufficient consideration by a fraudulent grantee, has no right after he has been notified of bankruptcy proceedings against the fraudulent grantor and of the claim of the assignee in bankruptcy that the property was fraudulently conveyed, to assign the mortgage to another, and the assignee of such a mortgage with notice acquires no greater rights than the assignor had. *Brooks v. D'Orville*, *supra*.

But a creditor of a debtor who has made a fraudulent conveyance may, with the consent of his debtor, take a valid mortgage in good faith to secure his claim from the purchaser of the goods thus conveyed, without being required to resort to other means to reach the goods, though he had notice of the fraud. *Brown v. Webb*, 20 Ohio St. 399 (1881); *Copenheaver v. Huffaker*, 6 B. Mon. 18 (1845).

And one who takes a mortgage innocently and in good faith upon real property from the person holding the legal title under a conveyance which is fraudulent and void as to creditors of the grantor may, upon acquiring subsequent knowledge of the fraud, buy in an outstanding paramount title, not affected thereby, for his own benefit. *Gjerness v. Mathews*, 27 Minn. 320 (1890).

But the statutory trust in favor of a creditor of a husband who advances the purchase money of lands and procures their conveyance to his wife with intent to defraud, participated in by her, will prevail over the equity of a creditor who procures a mortgage upon the land from the wife to secure a precedent debt. *Wood v. Robinson*, 22 N. Y. 564 (1860).

And taking a mortgage by a creditor who lived in the same neighborhood with his debtor and who was his brother-in-law, from a fraudulent grantee of the debtor and after suit brought to impeach the conveyance for fraud, taking an absolute conveyance of the property mortgaged, there being no proof as to the value of the land, and the consideration expressed in the deed being less than the debt specified in the mortgage, justifies an inference of fraud in such mortgage and deed. *Copenheaver v. Huffaker*, 6 B. Mon. 18 (1845).

X. Presumptions and burden of proof.

Presumptions and burden of proof as to participation by a transferee in the fraudulent intent of his debtor making the transfer are all that is intended to be here touched, and cases as to presumptions and burden of proof of fraud generally have been omitted.

A creditor will be presumed to have acted with a view to his own security where he purchases unconditionally from his debtor in satisfaction of his claim covering its whole value, though the debtor may have entertained the intent also to defeat other creditors. *Ford v. Williams*, 3 B. Mon. 530 (1843).

And a mortgage given to secure a previous existing honest debt for no more than the amount justly due cannot be regarded as fraudulent as against other creditors but will be deemed to have been given to secure the creditor in preference to others. *Billings v. Billings*, 31 Hun. 65 (1883).

Conveyances taken by a creditor for the security or satisfaction of a debt due him are prima facie good within the statute of frauds. *United States v. Bank of United States*, 8 Rob. (La.) 262 (1844).

The contention of appellees that it is doubtful whether they became participants in the trespass by making the bond in our opinion, is not well taken. It seems to us that that act made them the real principals in the transaction. In order to maintain the

action, it is only necessary for plaintiffs to show—First, that they owned the goods taken; second, their value; and, third, that the defendants participated in the taking or caused the same. And the right to maintain the suit cannot be made to depend upon the

And a transfer by a debtor to a creditor in payment of his claim should not be held invalid where the conduct of a grantee is not inconsistent with the theory that he did not participate in the fraudulent purpose of the grantor. *Smith v. Jensen*, 13 Colo. 213 (1889).

And the burden of proof to establish participation by a purchaser or mortgagee in the fraudulent intent of the vendor or mortgagor rests with the attacking creditor. *Hausmann v. Hope*, 20 Mo. App. 163 (1886); *Benson v. Maxwell*, 21 W. N. C. 446 (1887); *Nichols v. Bancroft*, 74 Mich. 191 (1889); *Bamberger, B. & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 874 (1895); *Hodges Bros. v. Coleman*, 76 Ala. 103 (1884); *Pollak v. Searcy*, 84 Ala. 259 (1887).

But an act the necessary result of which is to place a debtor's property beyond the reach of lawful process, is presumed to have been done with a fraudulent intent, but when it is regular and fair upon its face, the intent must be gathered from the surroundings. *Crawford v. Beard*, 12 Or. 447 (1885).

And the burden of proof rests with the mortgagee to show that a mortgage executed in contemplation of insolvency for an amount in excess of the indebtedness secured was taken in good faith and for an honest purpose, and to explain the discrepancy. *Lombard v. Dows*, 66 Iowa, 243 (1885); *Heim v. Chapel* (Minn.) 64 N. W. 825 (1895).

So, a transfer by a debtor of property which at a fair valuation is ample to satisfy all that he owes, to pay a single creditor who is a near relative, casts the burden of proof as to the validity of the entire transaction upon the purchaser. *Demarest v. Terhune*, 18 N. J. Eq. 532 (1867).

And a reservation in a mortgage given by a debtor to a creditor in contemplation of insolvency of power to sell a part of the mortgaged property, accounting for the proceeds, raises a presumption of fraud which will shift the burden of proof to the creditor to explain the transaction where he was aware of the contemplated insolvency. *Tickner v. Wiswall*, 9 Ala. 305 (1846).

And a deed of trust given by a debtor of all his property and of crops to be raised, to one who knew of his embarrassed financial condition to secure a note for \$4,000 when he only owed \$19 or \$20, and the grantee advances \$400, the property being worth over \$1,900, will be presumed to have been fraudulent with the participation of the grantee, and the burden of proof rests with him to explain the facts and overcome the presumption. *Henry v. Harrell*, 57 Ark. 509 (1893).

As to presumptions and burden of proof with reference to particular facts and circumstances, see the respective subdivisions of this note.

XI. Participation under bankruptcy and insolvency laws.

The bankruptcy and insolvency laws of a number of the states, and the Federal bankruptcy act (since repealed), prohibit preferences or preferences beyond a designated amount by insolvent debtors, and provide that transfers made in contemplation of insolvency or within a designated time before insolvency shall be void as to creditors.

Within these statutes notice to or knowledge by the creditor taking the transfer or accepting the preference would seem to constitute participation in the debtor's intent to commit a fraud upon the act, which will invalidate the transaction.

Thus, a transfer by an insolvent debtor to a creditor with intent to prefer him contrary to the 31 L. R. A.

provisions of the Minnesota insolvent act, is invalid where such facts are known to the creditor as are sufficient to put a person of ordinary prudence upon inquiry, and such inquiry would have brought the required information. *Holcombe v. Ehrmantraut*, 46 Minn. 397 (1891).

And a sale by a debtor to a creditor, giving him an advantage over other creditors, will be deemed under the Louisiana statute to have been made in fraud of creditors, where the purchaser knew that the vendor was insolvent. *De Blanc v. Martin*, 2 Rob. (La.) 39 (1842).

And a sale made with intent to give preferences to certain creditors and to hinder and delay others, which intent is known to and shared in by the purchaser, is void under the Iowa statute prohibiting preferences though there is no actual intention to defraud creditors. *Bixby v. Carskaddon*, 55 Iowa, 533 (1881).

So, if a creditor who purchases property from an embarrassed debtor in payment of his debt intends thereby to assist the debtor in defrauding his other creditors, his purchase is invalid though his debt was bona fide and one of his objects in making the purchase was to save it. *Wood v. Keith*, 60 Ark. 425 (1895); *Howell v. Carden*, 99 Ala. 100 (1892); *Palmour v. Johnson*, 84 Ga. 91 (1889); *Phinlitz v. Clark*, 62 Ga. 623 (1879).

And a deed made by a debtor to a creditor, which is fraudulent as to creditors, is not relieved from the taint of fraud by proof that it was made ostensibly to discharge the debt. *Merry v. Bostwick*, 13 Ill. 398, 54 Am. Dec. 434 (1851).

So, a bill of sale from the sheriff having five executions against an embarrassed trader of all his goods which he had seized under such execution, made with an understanding that they should remain on the trader's premises to enable him to repurchase them, the object being, not simply to relieve him from a forced sale of his goods, but also to protect them from the judgments of other creditors, is invalid under 13 Eliz. chap. 5, § 1, and as an act of bankruptcy. *Graham v. Furber*, 14 C. B. 410, 2 C. L. Rep. 10, 462, 23 L. J. C. P. 51, 18 Jur. 226 (1854).

So, a chattel mortgage, though made to secure an antecedent debt, is void as giving a preference to creditors, and as in fraud of the bankruptcy act, where at the time it was given the mortgagee had knowledge of the insolvency of the mortgagor. *City Nat. Bank v. Goodrich*, 3 Colo. 139 (1876).

And a mother who receives a chattel mortgage from her sons doing business as partners upon their entire stock with knowledge of their insolvent condition is not entitled to any preference as a bona fide secured creditor over other creditors. *Cron v. Cron's Estate*, 56 Mich. 8 (1885).

And a contract for the transfer of property, which gives one creditor a preference over others, is fraudulent if the party to be benefited thereby knew of the insolvency of the obligor, which knowledge must be shown by the party attacking the contract. *White v. Trotter*, 14 Smedes & M. 30, 53 Am. Dec. 112 (1850).

So, a mortgage taken for the purpose of preventing an equal distribution under the bankrupt law, and to prevent its having its free course, is void when the mortgagor was insolvent in fact and the mortgagee had reasonable cause to believe him to be insolvent and that he was acting in contemplation of insolvency. *Beals v. Quinn*, 101 Mass. 262 (1869).

existence or nonexistence of any statute. It is simply the common right that every one has to recover the value of his property when wrongfully taken. The plaintiffs, if they owned the goods, could have sued McGuire and the sheriff and the defendants jointly,

if they desired, or either of them separately. *Lovejoy v. Murray*, 70 U. S. 3 Wall. 19, 18 L. ed. 134. The only issue in this controversy that was really contested is whether plaintiffs owned the goods levied on under the McGuire attachment. Their claim rests

And a transfer made while the vendor was insolvent or in contemplation of insolvency, the payment for which was made with a view to give preferences to the transferee over other creditors, the transferee having reasonable cause to believe that the vendor was insolvent or in contemplation of insolvency, authorizes the jury to infer that such transferee had reasonable cause to believe that the vendor intended the transfer as a preference. *Abbott v. Shepard*, 142 Mass. 17 (1886).

So, a sale by an insolvent debtor for the avowed purpose of securing creditors to a greater extent than is lawful under the provisions of the New York assignment law of 1887, of all his property to assignees of insufficient responsibility, substantially on credit and for the purchase price, taking the notes of the assignee on long time, is sufficient to warrant a finding that it was made with intent to defraud creditors. *Evans v. Sims*, 82 Hun, 386 (1894).

And a purchase by one who had reasonable cause to believe that it was the vendor's intent to contravene the insolvent laws would be void although the benefit of the preference thereby intended might inure, not to himself, but to another and wholly bona fide and innocent creditor, who by reason of his innocence could retain the payment. *Crafts v. Belden*, 99 Mass. 535 (1869).

So, a mortgage given by an insolvent corporation to secure an existing debt with intent to prefer a creditor who has reason to believe that the corporation is insolvent and that a preference is intended in fraud of the insolvency law, made within four months of the filing of a petition in insolvency, is invalid. *Clay v. Towle*, 78 Me. 86 (1886).

And a mortgage given by a failing debtor within four months of his insolvency to a mortgagee knowing his condition or having reasonable cause to suspect it, is invalid under the laws of Vermont prohibiting a conveyance by a debtor to a creditor within four months of insolvency where the creditor had reasonable cause to believe him insolvent or in contemplation of insolvency. *Knower v. Haines*, 31 Fed. Rep. 513 (1887).

And a mortgage executed by an insolvent debtor with intent to prefer a creditor who has reasonable cause to believe him to be insolvent, and knows it to have been made in fraud of the bankruptcy act, and who for the purpose of evading that act conceals and withholds the mortgage from record for several months, is void under the bankruptcy act, though executed more than two months before the filing of a petition in bankruptcy against the mortgagor. *Blennerhassett v. Sherman*, 105 U. S. 100, 26 L. ed. 1080 (1882).

And in *Forbes v. Howe*, 102 Mass. 428, 3 Am. Rep. 475 (1869), an instruction that if a creditor had reasonable cause to believe that his debtor was insolvent, and with that knowledge took nearly all his property to secure himself at the same time knowing that the law required that his property should be divided equally among his creditors, it would go far towards supporting the inference that he had reasonable cause to believe that the debtor intended the mortgage as a preference, is not obnoxious to the objection that it is in the nature of a charge with respect to matters of fact.

So, a chattel mortgage made so near in point of time to an assignment as to be evidently a part of the purpose contemplated and a part of the same transaction, taken with knowledge of the insolvency of the mortgagor, constitutes an illegal

preference under the Michigan insolvency laws. *Heineman v. Hart*, 55 Mich. 64 (1884).

And when an insolvent, at his own instance and convenience, voluntarily gives his creditor security, it is a suspicious circumstance, and if followed in a short time by an assignment, the conclusion will be justified, in the absence of other controlling circumstances, that both were contemplated and should be deemed in law one transaction, within the prohibition of How. (Mich.) Stat. § 8739, invalidating preferences in common-law assignments. *Kellogg v. Root*, 23 Fed. Rep. 525 (1885).

But an indemnity mortgage executed by a debtor for an honest purpose the day before he makes a general assignment for the benefit of his creditors is not invalidated thereby. *Root v. Harl*, 62 Mich. 420 (1886).

And chattel mortgages made and delivered by a failing debtor to secure valid and honest debts without fraud in fact, two days in advance of an assignment for the benefit of creditors, do not constitute an illegal preference under the Michigan statute providing that all assignments for creditors shall be void unless the same shall be without preference. *Root v. Potter*, 59 Mich. 498 (1886).

The fact that a chattel mortgage was executed but a few hours previous to the making of an assignment by the mortgagor for the benefit of creditors is not conclusive evidence of fraud which will entitle the assignee to recover the property as a part of the assigned estate. *Brown v. Farmers' & M. Bkg. Co.* 36 Neb. 434 (1893).

So, payment of a debt by an insolvent debtor cannot be regarded as a forbidden preference under the national bankruptcy act, unless the debtor intended thereby to give a preference and the creditor had reasonable cause to believe him to be insolvent. *Stewart v. Hopkins*, 30 Ohio St. 502 (1876).

And in order to invalidate a conveyance under that act on the ground that it was made as a preference, it must appear that the debtor was insolvent at the time of the conveyance or that he made it in contemplation of insolvency, that he did it with a view to give a preference to a creditor, that the party taking the conveyance or to be benefited by it had, at that time, reasonable cause to believe him to be insolvent, and that the conveyance was made in fraud of the provision of the act. *Forbes v. Howe*, 102 Mass. 428, 3 Am. Rep. 475 (1869); *Rice v. Melendy*, 41 Iowa, 395 (1875); *Bauman v. Cunningham*, 48 Minn. 292 (1892); *Mays v. Fritton*, 87 U. S. 30 Wall. 414, 22 L. ed. 369 (1874).

And a mortgage made by an insolvent within two months previous to the filing of the petition in bankruptcy against him upon the urgent request of a creditor is valid, where he supposed he could go on and pay his debts and did not at any time intend to assign or expect to be proceeded against in bankruptcy. *Dow v. Sargent*, 15 N. H. 115, 41 Am. Dec. 684 (1844).

And a mortgage for an actual bona fide loan in the ordinary course of business is not avoided by Maryland act of 1890, chap. 364, prohibiting preferences by merchants who are insolvent or contemplating insolvency, saving liens for money bona fide loaned, where there is nothing to show that the mortgagee knew the mortgagor was insolvent or in contemplation of insolvency, or of any attempt on his part to hinder, delay, or defraud his creditors. *Hinkleman v. Fey*, 79 Md. 112 (1894).

upon the instrument executed by Jones & Fulton, and their title depends upon its integrity.

The different instructions given at the request of both parties, that appear in the record, but are not copied in our statement

of the case, seem to state fairly the different propositions of law to which they relate, and to be free from error.

We do not find any reversible error in the refusal of the 18th instruction asked by the plaintiffs, which directed a verdict for them.

So, a mortgage given by a debtor to a creditor, covering all of a stock of merchandise, the debtor having other property before being insolvent, is not invalidated by S. C. Gen. Stat. § 2014, invalidating a disposition of his property by a debtor so as to give a preference to one or more of his creditors, where neither the vendor nor the purchaser had any suspicion that the vendor was insolvent. *Waltz v. Potter*, 32 Fed. Rep. 888 (1887).

Nor is it invalidated by the fact that the agent in whose name the mortgaged stock of goods is carried knew of the insolvency of his principal, where neither the mortgagor nor the mortgagee had any suspicion of it. *Ibid*.

And a chattel mortgage given in consideration of an actual bona fide advance by the mortgagee without knowledge of the insolvency of the mortgagor or of any intention on his part to defeat, delay, or hinder his creditors, is not invalidated or affected by the statute. *Campbell v. Patterson*, 21 Can. S. C. 645 (1892).

And a mortgage executed by an insolvent debtor with intent to secure and prefer one creditor over others, covering a large portion of his property, is not void under the South Carolina assignment act. Gen. Stat. § 2014. *Magovern v. Richard*, 27 S. C. 272 (1886).

So, a creditor is not prevented from taking security by mortgage or otherwise from an insolvent debtor, with knowledge of his financial weakness, by How. (Mich.) Stat. § 8730, prohibiting preferences in common-law assignments, so long as the creditor has no notice or knowledge that the debtor contemplates making an assignment, but the security must be given at the instance of the creditor, be duly delivered, and he must have no notice or knowledge of any fraudulent purpose within the meaning of the statute. *Kellogg v. Root*, 23 Fed. Rep. 625 (1885).

And a mortgage given by an insolvent firm in anticipation of an assignment to certain creditors upon the firm property, which is accepted in payment or as security for just and valid debts without knowledge of such intended assignment, is not fraudulent as a preference in their favor. *Sweetzer v. Highy*, 63 Mich. 13 (1886).

And mortgages given by a failing debtor for a bona fide indebtedness to the full amount named in the respective instruments are not invalidated as illegal preferences where none of the mortgagees knew at the time they were executed that the mortgagor was insolvent or contemplated insolvency. *Field v. Fisher*, 65 Mich. 606 (1887).

So a mortgage by a debtor to a creditor intended to secure the creditor's claim will not be set aside under the Louisiana statute as giving an illegal preference where there is nothing to show that the mortgagees knew or believed that their debtor was unable to pay his debts and sought to give them an unwarrantable advantage. *Barrett v. His Creditors*, 4 Rob. (La.) 408 (1843).

And a mortgage given by a woman whose business had been mostly suspended during the time of making changes and improvements in her buildings, upon the receipt of a sum of money pursuant to a previous arrangement after which she became insolvent, does not necessarily require an inference that the conveyance was given or received with fraudulent intent within the Massachusetts statute, where at the time she expected to continue and the vendor had reason to believe that it had been

profitable, and that she would be relieved from embarrassment and able to prosecute it with the aid he had furnished. *Bridges v. Miles*, 152 Mass. 249.

The fact that a purchaser had no knowledge of the insolvency of his vendor, or that he intended to sell to him as a preference, however, cannot avail to protect him under Md. Code, art. 47, §§ 22, 32, providing that preferences shall be deemed an act of insolvency, and that upon the adjudication therein provided for, all the estate and property of the debtor shall be divested, and that any such lien or preference shall be void. *Willison v. First Nat. Bank*, 80 Md. 196 (1894).

But a mortgage not followed by a general assignment within ninety days is good as against creditors, though the debtor was insolvent at the time to the knowledge of the grantor. *Magovern v. Richard*, 27 S. C. 272 (1886).

And a conveyance by a failing debtor with a view to insolvency, to a creditor who accepted it with knowledge of the circumstances and a view of securing a preference over other creditors, is not invalid as against a levying creditor under the Connecticut insolvency act where no proceedings in insolvency were instituted within sixty days. *Sisson v. Roath*, 30 Conn. 15 (1861).

And a transfer of a promissory note, made by a debtor to a creditor, to whom he was indebted more than the amount of the note, when he knew that his failure was unavoidable, with intent to prefer the creditor, is not a fraud upon the bankruptcy laws where the debtor is not adjudged a bankrupt within three months thereafter. *Alexander v. Galt*, 9 Fed. Rep. 149 (1881).

Nor are a judgment and a levy thereunder upon the property of an insolvent debtor invalidated by the fact that the judgment creditor knew of the insolvent condition of the debtor, and the lien thereof will not be displaced by subsequent proceedings in bankruptcy though commenced within four months of the levy of the execution or rendition of the judgment. *Wilson v. City Bank*, 84 U. S. 17 Wall. 473, 21 L. ed. 723 (1883).

And so long as a corporation is a going concern engaged in the conduct of its business for which it was organized, and not known or believed to be insolvent by its officers and managers, with assets exceeding its liabilities by many thousand dollars, however, it is not in such a state of insolvency as will preclude a creditor from taking a mortgage upon its property to secure its debt, though it subsequently turns out that it was in fact unable to pay its debts and the debt was one for which the directors were security. *Sabin v. Columbia River Lumber & F. Co.* 25 Or. 15 (1893).

So, it is not enough that a creditor has some cause to suspect the insolvency of his debtor in order to invalidate a security taken for his debt, under the bankruptcy act; he must have such knowledge of such facts as would induce a reasonable belief of his debtor's insolvency. *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. ed. 971 (1877).

And a creditor has reasonable cause to believe a debtor who is a trader to be insolvent so as to render a transfer to him of a part of his property invalid as a fraud upon the bankruptcy act, when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obliga-

We see but little, if anything, in the evidence, that even tends to establish fraud; but at the same time we do not undertake to say that there is absolutely no evidence of that kind.

The 19th instruction asked by the plaintiffs should have been given. It is not a fraud for one creditor to try to keep another from finding out about a trade that he is seeking to make, for no other purpose than his own protection.

In regard to the 20th instruction asked by the appellants, and refused by the court, we deem it sufficient to say that, in our opinion, its refusal was not error of which the appellants can complain. A proper disposition of this case can be arrived at by fairly construing the acts of the parties, without stopping to discuss the legal consequences of secret motives or mere intent, not acted upon or carried out.

The 21st instruction asked by the plaintiffs, and the 9th given by the court at the request of the defendants, both relate to the effect of the statement that Jones & Fulton claim the representatives of the plaintiffs made in regard to their money in bank and their accounts. Without discussing either of these instructions in detail, we are of the opinion that the purchasers were under no obligation whatever to take the money in bank on their debts instead of the goods; nor did the future disposition of the money or accounts concern them. If their debts were bona fide, they had a right, under the law, to collect them, either in money or property, however disastrous the consequences might be to others. Although Jones & Fulton, at the time they sold to the plaintiffs, may have intended to defraud their other

creditors by appropriating to their own use the money and accounts, and although the purchasers may have known of this intention, their purchase could not be defeated on that account alone. Such was the decision of this court in *Wood v. Keith*, 60 Ark. 425. If the purchasing creditor's debt is honest, and his only object is to secure the payment of his own debt, he is not affected by any motive or design that the debtor may have or entertain as to his other creditors. But he will not be permitted to protect himself by any fraud to which he is a party. Fraud cuts down everything, and no claim or title can rest upon any such foundation. So, in this case, if the disposition of the money in bank, and the accounts, or either of them, came up for discussion while negotiations were pending, the plaintiffs or their representatives might well have said to the vendors: "We are not concerned with that property. We care nothing about it, and your disposition of it is not material to us." The law would not attach any fraud to such words, or to any expressions of similar import.

The 11th instruction given at the request of the defendants was clearly erroneous. There is nothing in any part of the record, either in the bill of sale or in the oral evidence, disclosing any feature of an assignment. When the appellants accepted the bill of sale, they were bound by its terms, and were liable to every creditor whose debt was assumed; and that liability was in no manner dependent upon the disposition of the stock of goods.

For the errors indicated, *the cause is reversed*, and remanded for a new trial.

Wood, J., being disqualified, did not sit.

tions as they mature in the ordinary course of business. *Toof v. Martin*, 80 U. S. 13 Wall. 40, 20 L. ed. 481 (1871).

But positive knowledge on the part of a creditor of the insolvency of his debtor need not be established in order to invalidate a sale by which he is given a preference. Proof of circumstances tending to produce a strong impression that he was aware of it is sufficient. *De Blanc v. Martin*, 2 Rob. (La.) 39 (1842).

So, a creditor who takes goods from his debtor in payment of a pre-existing debt, and assumes the payment of other debts to the debtor in an amount greater than his own, with the knowledge that the debtor had reserved from the stock of goods sold the amount exempt to him by law, is chargeable as matter of law with notice of the existence of other creditors of the debtor. *Chipman v. Glennon*, 98 Ala. 263 (1892).

And that the indebtedness of an insolvent to a creditor for which he makes a transfer of property was overdue, and that the creditor had been pressing him for payment without success, and that his checks drawn in their favor had been dishonored, and he was neglecting his business and running behind, to his knowledge, and that he knew of other indebtedness but did not know how much and that the sale to him was not in the regular course of business,—are sufficient to charge him with notice of the intent of the insolvent to prefer him contrary to the provisions of the insolvent act. *Holcombe v. Ehrmantraut*, 46 Minn. 397 (1891).

So, a transfer of property made by a debtor to his creditor not in the ordinary course of business

is prima facie fraudulent within the meaning of the California insolvency act, and sufficient to charge the transferee with notice of the insolvency of the vendor. *Godfrey v. Miller*, 80 Cal. 420 (1889).

And a transfer made by a debtor to his creditor on Sunday, which is accepted without exemption with knowledge that the debtor's property had been attached on the preceding day, and that another attachment was expected, is not a transfer in the ordinary course of business, and the transferee will be charged with notice of the vendor's insolvency and with an intent to hinder, delay, and defraud his other creditors. *Ibid.*

And a transfer by a debtor to a particular creditor of his book accounts, made by way of orders drawn by the debtor on his debtors, is an assignment out of the ordinary course of business within the meaning of the insolvency act, and is prima facie evidence that the transferee had reasonable cause to believe that it was made to prevent the debtor's property from coming to his assignee in insolvency. *Washburn v. Huntington*, 78 Cal. 573 (1889).

And money paid by a debtor with intent to prefer a creditor cannot be recovered by the debtor's assignee under Massachusetts statute of 1841, chap. 124, § 3, providing for the recovery by the assignee of an insolvent debtor in specified cases from a creditor of such debtor, property assigned, sold, transferred, or conveyed to the creditor with intent to give a preference for the value thereof though the creditor also purchased goods of the debtor at that time knowing him to be insolvent. *Wall v. Lakin*, 13 Met. 167 (1847).

OHIO SUPREME COURT.

PENNSYLVANIA COMPANY, *Plf. in Err.*,
v.

James McCANN.

(53 Ohio St. 127.)

***1. The general assembly of this state has authority to prescribe** the circumstances that shall constitute prima facie evidence of a fact in issue in an action on trial in the courts of this state, whether the cause of action to which it relates arose within or without the territorial limits of the state.

2. The provision of the second section of the act of April 2, 1890 (87 Ohio Laws, 149), which provide that when certain "defects shall be made to appear in the trial of any action in the courts of this state, brought by such employee or his legal representatives against any railroad corporation for damages on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation," applies to all railroad companies any part of whose line of railway extends into this state, whether the injury complained of was received within or without the state.

(January 21, 1896.)

ERROR to the Circuit Court for Mahoning County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from its negligence. *Affirmed.*

Statement by **Bradbury, J.** :

On the 7th day of May, 1890, the defendant in error, who was a brakeman in the service of the plaintiff in error, in attempting, in the state of Pennsylvania, to board one of its moving cars, put his foot in a stirrup that was suspended from the sill of the car, and used as a step in mounting the car; the stirrup, or step, yielded to the pressure of his foot, causing him to be thrown under the car, whereby a wheel of the locomotive, which was backing, ran over one of his legs, inflicting the injury of which he complained in his petition. After the evidence on behalf of the defendant in error had been introduced, the plaintiff in error moved the court of common pleas to take the case from the jury and to render a judgment in its favor, which was done. Thereupon the defendant in error carried the cause to the circuit court to reverse the judgment of the court of common pleas.

The circuit court reversed the judgment of the court of common pleas on the sole ground that the act of April 2, 1890 (87 Ohio Laws, 149), was applicable, by force of which the fact that the stirrup was defective made a prima facie case of negligence against the railroad company. The railroad company

thereupon, brought the cause to this court to reverse the judgment of the circuit court and reinstate that of the court of common pleas.

Mr. A. W. Jones for plaintiff in error.
Messrs. Cary & Boyle, George F. Arrel, W. T. Gibson, and R. B. Murray for defendant in error.

Bradbury, J., delivered the opinion of the court:

The only question arising upon the record of sufficient importance to be worthy of extended consideration is whether the act of the general assembly of this state, passed April 2, 1890 (87 Ohio Laws, 149), is applicable to the case or not, the injury complained of having been sustained beyond the limits of this state. It was contended in argument that the railroad upon which the plaintiff below was injured, lay wholly outside the state. The record, however, discloses that the railroad company, at the time and before the accident occurred, was operating a railroad running from Youngstown, in this state, to a point within the state of Pennsylvania, and in connection therewith, a branch, 4 or 5 miles long, on which the accident occurred, connecting the main line with certain coal mines from which it transported coal to the main line, and thence in different directions over the latter to market; and that in the discharge of his duties as servant of the railroad company, the defendant in error passed in and out of the state of Ohio, on the main line, as the exigencies of its business required.

The 2d section of the act in question (87 Ohio Laws, 149) prescribes the effect that shall be given to evidence which establishes a defect in the locomotives, cars, machinery, or attachments of certain railroads, in actions for injuries to its employees, caused by such defects; and declares that when such defects are made to appear the same shall be prima facie evidence of negligence.

There can be no doubt respecting the general power of a state to prescribe the rules of evidence which shall be observed by its judicial tribunals. It is a matter concerning its internal policy over which its legislative department necessarily has authority, limited only by the constitutional guaranties respecting due process of law, vested rights, and the inviolability of contracts. *Columbus, H. V. & T. R. Co. v. Erick*, 51 Ohio St. 146.

In *Templeton v. Kraver*, 24 Ohio St. 554, this court held that "under the grant of legislative power in the Constitution, the general assembly has complete control over the remedies which are to be afforded to parties in the courts of the state; and if the remedies provided do not interfere with vested rights, such effect must be given them as will carry out the intent of the law-making power."

The rules of evidence pertain to the remedy, and usually are the same whether the cause of action in which they are applied, arises within or without the state, whose tribunal

*Headnotes by the COURT.

NOTE.—For illustration of power of legislature to make rule as to prima facie evidence, see also *Wooten v. State* (Fla.) 1 L. R. A. 819.
31 L. R. A.

is investigating the facts in contention between the parties before it. Nor is it material in this respect whether the parties are residents or nonresidents of the state. The law of evidence in its ordinary operation is no more affected by one of these considerations than by the other. No extra-territorial effect is given to a statute creating a rule of evidence by the fact that the rule is applied to the trial of a cause of action arising in another state, or to the trial of an action between parties who are nonresidents. If the tribunals of a state obtain jurisdiction of the parties and the cause, it will conduct the investigation of the facts in controversy between them according to its own rules of evidence, which is, simply, to follow its own laws within its own borders. This principle was followed by the supreme court of Georgia in the case of *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, an action quite similar to the one we are now considering, the court saying: "Touching the evidence requisite to make a prima facie case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this state between the parties where the action is against a railroad company for a personal injury sustained by one of its employees in consequence of the negligence of the company. . . . This was correct although the injury sued for was sustained in the state of Alabama. The quality or degree of evidence requisite to sustain an action or to change the burden of proof is determined by the law of the forum and not by the law of the place where the cause of action arose. It belongs, not to the law of rights, but to the law of remedy." The court of appeals of New York held in 1876 that "an act declaring any circumstance or any evidence, however slight prima facie proof of a fact is valid." *Howard v. Moot*, 64 N. Y. 262. The cases that bear in some degree upon the question are so numerous that it is impracticable to cite all of them. *Hayes v. Armstrong*, 7 Ohio, pt. 1, p. 248; *Parker v. Sterling*, 10 Ohio, 357; *Levis v. McElean*, 16 Ohio, 347; *Goshorn v. Purcell*, 11 Ohio St. 641; *Mason v. Haile*, 25 U. S. 12 Wheat. 370, 6 L. ed. 660; *Vanzant v. Waddel*, 2 Yerg. 260; *United States v. Quincy*, 71 U. S. 4 Wall. 585, 18 L. ed. 403; *Long's Appeal*, 87 Pa. 114; *Rathbone v. Bradford*, 1 Ala. 312; *Holland v. Dickerson*, 41 Iowa, 367.

Doubtless it would be competent for the general assembly to limit the application of a rule of evidence, created by it to causes of action arising within the state. If, therefore, the act under consideration does so limit the rule of evidence it establishes, the courts should observe this limitation. That the act has three sections: The first section provides "that it shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate, a railroad in whole or in part within this state, to adopt or promulgate any rule," and then denounces with a penalty the violation of its provisions.

This section of the statute attempts to regulate the conduct of every railroad company or corporation that owns or operates any part

of its line within this state. The general assembly has no authority over any others, and therefore could not compel their obedience to its commandments. It did, however, extend those commandments to the extreme limits of its jurisdiction—possibly beyond them—for it may be true that although the line of a railroad may extend into this state, yet the general assembly may have no authority to inflict upon it penalties on account of acts or omissions occurring elsewhere. If this be so, the courts in construing this section, might hesitate to impute to the legislature an intent to usurp an authority it did not possess, and would not do so unless the language of the statute should be unambiguous in this respect. In terms, this section does not require the forbidden conduct to occur in this state in order to incur the penalty that it denounces therefor. The language of the section is broad enough to include acts and omissions performed or omitted in other states. This circumstance is important only in so far as it indicates a legislative purpose to extend the relief afforded by the act to the full extent of its authority.

The second section in forbidding the use of defective cars and locomotives by railroad companies, refers to them as "such corporations" manifestly including every corporation owning or operating a railroad, any part of which extends into this state. Here, again, the prohibitive language employed is broad enough to include acts or conduct occurring in other states. If it does not reach them we are forced to conclude that this result is quite as much due to want of power as to absence of purpose.

In the subsequent clause of the 2d section of the act, wherein the general assembly sought to prescribe the rule of evidence, before referred to, applicable to the trial of actions in the courts of this state, brought by employees of railroad companies on account of injuries sustained by reason of defective cars, locomotives, machinery, or attachments, it approached the question of procedure in our judicial tribunals, over which, as we have seen, the authority of the general assembly is practically supreme. This clause of the statute is purely remedial and should receive a liberal construction. The language employed by the act in this connection is consistent with a legislative purpose to extend the remedy to all actions of the character named in the act, against all railroad companies, and no sufficient reason has been assigned for limiting its operation to causes of action that arose within the state. Indeed, it would be somewhat anomalous to prescribe to the courts of the state rules of evidence depending upon the questions whether the cause of action arose within or without the state; and an intent to create this distinction should not be imputed to the legislative power unless it is fairly inferable from the language it has used.

That language is as follows: "And when the fact of such defect shall be made to appear in the trial of any action in the courts of this state brought by such employee or his legal representatives against any railroad corporation for damages on account of such in-

juries so received the same shall be prima facie evidence of negligence on the part of such corporations. This language contains nothing indicating a purpose to confine the rule of evidence it creates, to causes of action that should arise in this state. On the contrary it expressly extends the rule to "any action in the courts of this state brought by such employee . . . against any railroad corporation." In fact, the language is comprehensive enough to apply the rule to a railroad company, in this class of actions, whether any part of its line extended into Ohio or not, and if the courts of our state should acquire jurisdiction over the person of a railroad company whose line lay wholly without the state, no reason is perceived why the rule should not be applied.

Judgment affirmed.

Shauck, J., dissenting:

It is not doubted that some of the provisions of the act of April 2, 1890 (87 Ohio Laws, 149), relate to the remedy in the cases contemplated, nor that the law of the forum determines all questions relating to the remedy. The only point of difference between the courts below and between counsel here, is whether the language of the act referred to does not exclude from its operation cases in which the cause of action arose upon a railroad lying wholly within another state. If its terms do not permit its application in such cases the court of common pleas did not err in its judgment, otherwise the judgment of reversal in the circuit court should be affirmed.

The scope of the act is expressly defined in the 1st section: "That it shall be unlawful for any railroad or railway corporation or company owning and operating, or operating, or that may hereafter own or operate a railroad in whole or in part in this state to adopt," etc. The remaining provisions of the 1st section relate to the contractual relations of such companies and their employees.

The 2d section of the act creates a prima facie presumption, not according to the common law, in favor of the injured person. By the terms of the section it affects only "such corporation," that is, a railroad corporation operating "a railroad in whole or in part in this state." The duty enjoined by the section, and the presumption raised do not concern railroad corporations generally, but, by express restriction, only those described in the 1st section.

The general purpose of the act is to afford citizens of the state the protection of its provisions. Some of its provisions would be void if an attempt were made to apply them to roads lying in other states, and that would be true even if the general assembly had attempted to make them so applicable.

To hold that these remedial provisions are applicable to a case of this character is to ignore the general purpose of the act and to deny effect to the language by which its operation is expressly restricted.

Doubtless it would be the duty of the court to enforce the act with the limitations thus clearly indicated, even if the reasons for such

limitation did not appear. Those reasons, however, are apparent. They are illustrated by the circumstances of this case. The general policy of the state has looked to the relief of suitors from the long and vexatious delays which all recognize. It would be quite remarkable if that policy had been interrupted by a statute creating a presumption in favor of plaintiffs not afforded elsewhere, and inviting the citizens of all the states to enter the courts of Ohio to secure its benefits, without any conditions except those which are imposed by the requirements of the Code as to service of summons.

Whether attention be directed to the general purposes of the act, to the circumstances under which it was enacted, or to its express provisions, it appears that the general assembly was concerned only for citizens of the state and that it has taken care to avert consequences which this judgment of affirmance invites.

Burket, J., dissents and concurs in the foregoing.

Spear, J., did not sit in the case.

CINCINNATI, HAMILTON, & DAYTON
RAILROAD COMPANY, *Plff. in Err.*,

v.

METROPOLITAN NATIONAL BANK.

(53 Ohio St. 117.)

***An action cannot be maintained against a bank by the holder of a check** for refusal to pay it, unless the check has been accepted, although there stands to the credit of the drawer on the books of the bank a sum more than sufficient to meet the check.

(January 21, 1896.)

ERROR to the Superior Court of Cincinnati to review a judgment in favor of defendant in an action brought to enforce payment of a check. *Affirmed.*

Statement by **Spear, J.**:

The action below was by the plaintiff in error against defendant in error to recover on a bank check. The petition was in words and figures following:

"The plaintiff is a corporation duly organized and existing under the laws of the state of Ohio. The defendant is a corporation duly organized and existing under the laws of the United States. There is due to the plaintiff from the defendant upon the check, a copy of which, there being no credits nor indorsements thereon, is hereto attached, made part hereof, and marked 'Exhibit A,' the sum of

*Headnote by the COURT.

NOTE.—The conflict of authorities upon the question of the effect of a check to give the holder a right of action against the drawee bank is clearly presented in the above case. For other cases on this subject, see also *Bank of Antigo v. Union Trust Co.* (Ill.) 23 L. R. A. 611; *Akin v. Jones* (Tenn.) 25 L. R. A. 523.

\$338.31, with interest from May 11, 1886. The plaintiff is the owner and holder of said check, and on May 11, 1886, presented it for payment to the defendant, who at that time, and at the time of the drawing of said check, had funds of said J. E. Ash on deposit, more than sufficient to pay the same, but the defendant refused to pay said check. Wherefore the plaintiff prays judgment against the defendant for said sum of \$338.31, with interest from May 11, 1886, for its costs, and all other relief to which it may be entitled."

Exhibit A.

Cincinnati, May 10, 1886.

Metropolitan National Bank: Pay to the order of C. H. & D. R. R. Co. three hundred and thirty-eight $\frac{1}{10}$ dollars. \$338.31.

[Signed] J. E. Ash.

A general demurrer was interposed by the bank, and the holding of the superior court at general term was, in effect, to sustain the demurrer. Judgment for the bank followed, to reverse which the present proceeding is prosecuted.

Messrs. Ramsey, Maxwell, & Ramsey, for plaintiff in error:

A check is drawn upon an existing fund, and is an absolute transfer or appropriation by the holder of so much money in the hands of the drawee.

Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 682; *Stewart v. Smith*, 17 Ohio St. 82; *Kahn v. Walton*, 46 Ohio St. 195.

In Ohio the objection of want of privity cannot prevail, for a third person for whose benefit a contract is made may maintain an action at law upon it.

Thompson v. Thompson, 4 Ohio St. 338; *Bagaley v. Waters*, 7 Ohio St. 367; *Trimble v. Strother*, 25 Ohio St. 881; *Breuer v. Maurer*, 38 Ohio St. 548, 43 Am. Rep. 486; *Enmitt v. Brophy*, 42 Ohio St. 82.

The payee may maintain an action against the bank upon the check.

Munn v. Burch, 25 Ill. 35 (1860); *Chicago Marine & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270 (1862); *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185 (1875); *Roberts v. Corbin*, 26 Iowa, 815; *Lester v. Given*, 8 Bush, 358 (1871); *Gordon v. Muchler*, 34 La. Ann. 608 (1882); *Fonner v. Smith*, 31 Neb. 107, 11 L. R. A. 528 (1891); *Fogarties v. State Bank*, 12 Rich. L. 518, 78 Am. Dec. 468 (1860); 2 Dan. Neg. Inst. § 1638.

Messrs. Pogue, Pottinger, & Pogue, for defendant in error:

The payee of a check cannot maintain an action on it against the drawee, the bank, when the bank refuses to accept it.

Nearly every court of last resort in the United States and England which has passed upon this question for the first time since the decision in *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897 (1869), has said that the payee has no right to sue the drawee on failure to accept either at law or in equity.

There can scarcely be a clearer expression than that used by our supreme court in *Covert v. Rhodes*, 48 Ohio St. 66 (1891), that it has es-

tablished this same doctrine in this state in harmony with the views of courts of last resort, whose integrity, thoroughness, and intellectual strength are recognized everywhere, when it says: "A bank check or draft for a part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn."

An ordinary bill of exchange or draft drawn generally and not upon any particular fund, whether accepted or not by the drawee, does not operate as an equitable assignment.

Pom. Eq. Jur. § 1284; *Metropolitan Bank v. Cincinnati, H. & D. R. Co.* 27 Ohio L. J. 105.

A payee of a check cannot sue the bank, the drawee, which has refused to accept a check, even though it may have funds of the drawer sufficient to pay it when presented.

National Bank of the Republic v. Millard, 77 U. S. 10 Wall. 152, 19 L. ed. 897 (1869); *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229 (1876); *Laclede Bank v. Schuler*, 120 U. S. 514, 30 L. ed. 705 (1887); *Florence Min. Co. v. Brown*, 124 U. S. 391, 31 L. ed. 427 (1888); *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 195; *Dykens v. Leather Mfrs. Bank*, 11 Paige, 616 (1844); *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 814 (1871); *Atty. Gen. v. Continental L. Ins. Co.* 71 N. Y. 325, 27 Am. Rep. 55 (1877); *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421 (1891); *Bullard v. Randall*, 1 Gray, 605, 61 Am. Dec. 433 (1854); *Carr v. National Security Bank*, 107 Mass. 48, 9 Am. Rep. 6 (1871); *Jermyn v. Moffitt*, 75 Pa. 399 (1874); *Saylor v. Bushong*, 100 Pa. 23 (1882); *Kuhn v. Warren Sav. Bank*, 20 W. N. C. 230 (1887); *First Nat. Bank v. Shoemaker*, 117 Pa. 94 (1887); *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417 (1884); *Moses v. Franklin Bank*, 34 Md. 580 (1871); *Purcell v. Allemon*, 22 Gratt. 742 (1872); *Harrison v. Wright*, 100 Ind. 538, 58 Am. Rep. 805 (1884); *Second Nat. Bank v. Williams*, 13 Mich. 282 (1865); *Grammel v. Carner*, 55 Mich. 201, 54 Am. Rep. 868 (1884); *Brennan v. Merchants' & Mfrs. Nat. Bank*, 62 Mich. 343 (1886); *Merchants' Nat. Bank v. Coates*, 79 Mo. 168, 17 Rep. 17 (1883); *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310 (1880); *Planters' Bank v. Merritt*, 7 Heisk. 177 (1874); *Pickle v. Muse*, 88 Tenn. 380, 7 L. R. A. 93 (1889); *Cushman v. Harrison*, 90 Cal. 297 (1891); *Buttcher v. Colorado Nat. Bank*, 15 Colo. 16 (1890); *Satterwhite v. Melzer* (Ariz.) 24 Pac. 184 (1890); *Hopkinson v. Forster*, L. R. 19 Eq. 74 (1874).

This is on the principle that there can be no foundation for an action on the part of the holder unless there is a privity of contract between him and the bank.

National Bank of the Republic v. Millard, 77 U. S. 10 Wall. 155, 19 L. ed. 899; *Florence Min. Co. v. Brown*, 124 U. S. 391, 31 L. ed. 427.

There is neither a legal nor an equitable interest in the payee which entitles him to sue the bank.

Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *First Nat. Bank v. Shoemaker*, 117 Pa. 94; *Carr v. National Security Bank*, 107 Mass. 48; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Brennan v.*

Merchants' & Mfrs. Nat. Bank, 62 Mich. 348; *Merchants' Nat. Bank v. Coates*, *supra*; *Harrison v. Wright*, 100 Ind. 539, 58 Am. Rep. 805; *Pickle v. Muse*, 88 Tenn. 380, 7 L. R. A. 93; 2 Ames, Bills & Notes, 735.

States which deny the right of a payee of a check to sue the drawee of a check on his refusal to accept the check do not deny the right of a third party, for whose benefit a contract is made, to maintain an action upon it.

Lawrence v. Fox, 20 N. Y. 268 (1859); *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327 (1861); *Campbell v. Smith*, 71 N. Y. 28, 27 Am. Rep. 5 (1877); *Coster v. Albany*, 43 N. Y. 411 (1871); *Pike v. Brown*, 7 Cush. 133 (1851); *Mellen v. Whipple*, 1 Gray, 317 (1854); *Carr v. National Security Bank*, *supra*; *Crawford v. Edwards*, 33 Mich. 354 (1875); *Miller v. Thompson*, 34 Mich. 10 (1876); *Merriman v. Moore*, 90 Pa. 80 (1879); *Huyler v. Atwood*, 26 N. J. Eq. 504 (1875); *Heim v. Vogel*, 69 Mo. 529 (1879); *Fitzgerald v. Barker*, 70 Mo. 635 (1879); *Bassett v. Bradley*, 48 Conn. 225 (1880); *Harrison v. Wright*, *supra*; *Day v. Patterson*, 18 Ind. 114; *Devot v. McIntosh*, 23 Ind. 529; *Cross v. Truesdale*, 28 Ind. 45 (1867); *Brice v. King*, 1 Head, 153 (1858); *Moore v. Stocall*, 2 Lea, 543; *Thompson v. Thompson*, 3 Lea, 127; *O'Neal v. Washington County School Comrs.* 27 Md. 227 (1867); *Green v. Morrison*, 5 Colo. 18; *Hutchinson v. Simon*, 57 Miss. 628.

Spear, J., delivered the opinion of the court:

The question presented is whether or not a payee of a bank check can maintain an action against the bank where the latter, on presentation, refuses to pay it, the drawer having, at the time, a credit on the books of the bank more than sufficient to meet the check. Questions bearing some relation to this have been considered by this court, but the precise question has not heretofore been determined. Authority is found supporting the affirmative of this proposition. The grounds urged are not identical in all cases, nor is the reasoning wholly consistent, but the following is believed to be a fair *résumé* of the conclusions: Because of the universal usage of banks to cash the checks drawn by a depositor where he has sufficient unencumbered balance standing to his credit, a duty is implied on the part of the bank to so pay, and the holder takes the check relying upon this usage. Serious injury may result to the holder by the bank's refusal to pay, for, while he may have an action against the drawer that would prove delusive in the frequent instance of the drawer's insolvency, the bank's wrongful action would be the real cause of the loss. The law therefore implies a contract on the part of the bank with its depositors to pay their checks as presented so long as the fund is sufficient, and should, for like reasons, imply a contract with whoever may become the holder of such check to pay on presentation. The check is treated as an equitable assignment *pro tanto* of the fund in the hands of the bank, and by the act of presentation the check holder is brought in privity with the bank, his right to sue completed, and he may sue the drawer and the bank in one action, the former as drawer and the latter as an implied acceptor. 81 L. R. A.

He may also sue the drawer on the check's dishonor, or the bank for money had and received. Forcible and ingenious arguments in support of the right to maintain the action are presented by Mr. Morse in his valuable work on Banking; by Mr. Daniel in his treatise on Negotiable Instruments (vol. 2, § 1638), where the arguments pro and con are stated, and ably reviewed; and by a number of decisions, some of which are the following: *Munn v. Burch*, 25 Ill. 35; *Chicago Marine & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185, (but see opinion in *Essex County Nat. Bank v. Bank of Montreal*, 7 Biss. 195, Fed. Cas. No. 4,532); *Roberts v. Corbin*, 26 Iowa, 315; *Lester v. Given*, 8 Bush, 357; *Fogarties v. State Bank*, 12 Rich. L. 518, 78 Am. Dec. 468; *Gordon v. Muchler*, 34 La. Ann. 608; *Fonner v. Smith*, 31 Neb. 107, 11 L. R. A. 528. The contrary doctrine is maintained by many text-writers and decisions. Following are some of the authorities: 2 Randolph, Com. Paper, p. 280; Pom. Eq. Jur. § 1234; Van Schaack, Bank Checks, 212; *National Bank of the Republic v. Millard*, 77 U. S. 10 Wall. 152, 19 L. ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 843, 24 L. ed. 229; *Laclede Bank v. Schuler*, 120 U. S. 514, 30 L. ed. 705; *Florence Min. Co. v. Brown*, 124 U. S. 391, 31 L. ed. 427; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Atty. Gen. v. Continental L. Ins. Co.* 71 N. Y. 325, 27 Am. Rep. 55; *Bullard v. Randall*, 1 Gray, 605, 61 Am. Dec. 433; *Carr v. National Security Bank*, 107 Mass. 48, 9 Am. Rep. 6; *Saylor v. Bushong*, 100 Pa. 23; *Kuhn v. Warren Sav. Bank*, 20 W. N. C. 230; *First Nat. Bank v. Shoemaker*, 117 Pa. 94; *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417; *Moses v. Franklin Bank*, 84 Md. 580; *Purcell v. Allemon*, 22 Gratt. 742; *Harrison v. Wright*, 100 Ind. 538, 58 Am. Rep. 805; *Grammel v. Carner*, 55 Mich. 201, 54 Am. Rep. 363; *Brennan v. Merchants' & Mfrs. Nat. Bank*, 62 Mich. 342; *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310; *Planters' Bank v. Merritt*, 7 Heisk. 177; *Pickle v. Muse*, 88 Tenn. 380, 7 L. R. A. 93; *Cushman v. Harrison*, 90 Cal. 297; *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16; *Satterwhite v. Melcer* (Ariz.) 24 Pac. 184; *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Wald's Pollock*, Cont. 190, 204; 2 Ames, Bills & Notes, 735.

It is not doubted that, as a general proposition, there can be no cause of action upon a contract unless there is privity of contract between the obligor and the party complaining. But it is urged in argument here that, while the want of privity is a good objection to the action in those states which deny the right of a third party for whose benefit a contract is made to maintain an action upon it, in Ohio the objection of want of privity cannot prevail for the reason, as held by this court in a number of cases, that an agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name, and that the third person is not named does not affect the right to enforce it. The most recent case involving this principle is that of *Emmitt v. Brophy*, 43 Ohio St. 82. The action was upon a bond.

given by Emmitt to the county commissioners in the sale of a bridge by the Scioto Bridge Company, in which Emmitt obligated himself "to pay off and liquidate all claims and demands, whether in judgment or otherwise, existing against said bridge, so that the full use of said bridge may inure to the public without let or hindrance." Brophy at the time was a judgment creditor, and the owner of all of the claims enumerated in the bond. Owen, J., in the opinion, after reciting the facts, observes: "These facts are strongly suggestive that it entered into the contemplation of the parties to this bond, at the time of its execution, that this particular lien of the plaintiffs upon the bridge was to be discharged by Emmitt. Its existence was known to them and they seem to have left nothing to conjecture. Indeed, if Brophy and Potter had been expressly named as the lienholders, it is difficult to see how this would have added to the definiteness of the bond, or made more certain the intention of the parties. This seems to be a conclusive answer to the suggestion that there is a want of privity." No one of the cases cited carries the doctrine farther than the foregoing. In no one of them is it held that a right to sue in a stranger can be raised by mere implication. Nowhere is it held that the obligation will attach in favor of future creditors not named and not known, and as to amounts not specified, or then ascertainable, to the extent of giving to such creditors a right of action on the contract. It must be apparent, even on brief reflection, that it does not follow from these decisions that there is privity between checkholder and bank before acceptance; and that, in order to cover the case at bar a marked extension of the doctrine must be made. Reasons urged for such extension, however plausible, do not seem sufficient. On the contrary, strong reasons against the proposition may be adduced; among others, this: The transaction of giving the check does not, as will be shown further on, substitute the checkholder for the drawer. The latter may maintain an action for the breach of the contract to honor his check, and, if the holder has a similar right, the result is that two persons may maintain separate actions upon the same instrument at the same time to recover against the same defendant as a principal debtor. The inference that the right to recover by the checkholder is denied only in the states where a right of recovery is refused to one for whose benefit a contract is made by another arises from a misapprehension of the authorities. In many states where the right of a checkholder to sue the bank is not assented to the right of one for whose benefit a contract is made to recover upon it is recognized. See *Lawrence v. For*, 20 N. Y. 268; *Burr v. Beers*, 24 N. Y. 178, 80 Am. Dec. 327; *Coster v. Albany*, 43 N. Y. 399; *Merriman v. Moore*, 90 Pa. 78; *Huyler v. Atwood*, 26 N. J. Eq. 504; *O'Neal v. Washington County School Comrs*, 27 Md. 240; *Crawford v. Edwards*, 33 Mich. 354; *Miller v. Thompson*, 34 Mich. 10; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Mo. 685; *Cross v. Truesdale*, 28 Ind. 44; *Brice v. King*, 1 Head, 152; *Green v. Morrison*, 5 Colo. 18.

31 L. R. A.

It is insisted that the case should not turn alone on the legal idea of privity, for under our system of procedure it is immaterial whether the interest of the payee against the bank is legal or equitable, and that the action here may be maintained on equitable grounds. In a well-considered case (*Covert v. Rhodes*, 48 Ohio St. 66), this court held that "a bank check or draft for a part of the sum due the drawer does not, before acceptance by the drawee, constitute an equitable assignment of the amount for which it is drawn." The conclusion is amply sustained by the reasoning of the opinion, and no discussion of the subject is necessary. If there is no equitable assignment of the debt *pro tanto*, how can equitable considerations avail? The proceeding is not an equitable one; and, if it were, we do not understand that equity has different rules from those of law with respect to the rights and obligations of parties to negotiable paper. As applicable to such case we believe that reason and the great preponderance of authority establish the following conclusions: The relation of bank and general depositor is simply the ordinary one of debtor and creditor, not of agent and principal, or trustee and *cestui que trust*. The bank agrees with its depositor to receive his deposits, to account with him for the amount, to repay him on demand, and to honor his checks to the amount of his credit when the checks are presented; and for any breach of that agreement the bank is liable to an action by him. The deposits become the absolute property of the bank, impressed with no trust, and the bank's right to use the money for its own benefit is immediate and continuous, which right constitutes the consideration for the bank's promise to the depositor. The bank's agreement with the depositor involves or implies no agreement with the holder of a check. The giving of a check is not an assignment of so much of the creditor's claim. It passes no title, legal or equitable, to the holder in the moneys previously deposited; nor does it create a lien on the fund, for there is no special fund out of which the check can be paid, nor does it transfer any money to the credit of the holder. It is simply an order which may be countermanded and payment forbidden by the drawer any time before it is actually cashed or accepted. If accepted, then the agreement is to pay according to the terms of the check or acceptance; but until then the payee looks exclusively to the drawer. He can maintain no action against the bank, for the bank owes to the payee no legal duty, and an action at law cannot be maintained unless there is shown to have been a failure in the performance of legal duty. Being liable to the drawer to account with him for failure to honor his check, the bank cannot, either on legal or equitable considerations, be held at the same time liable to the holder of the check.

Tested by these rules, the plaintiff could have no cause of action against the bank, and the superior court committed no error in the judgment rendered.

Judgment affirmed.

SNYDER MANUFACTURING COMPANY, *Plff. in Err.*,
v.

Andrew G. SNYDER *et al.*

(.....Ohio.....)

*1. Upon the dissolution of a trading copartnership, its assets, including the good will of the business, may be sold as a whole, either by the partners directly, or through a receiver under an order of the court in a case to which they are parties; and a purchaser thereof, under either method of sale, is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose.

2. Where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business in the same manner, under a corporate name including the name which had been used by the firm.

(January 21, 1896.)

ERROR to the Circuit Court for Ashtabula County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to enjoin the use of a name. *Reversed.*

The facts are stated in the opinion.

Messrs. Burke & Ingersolls and A. A. Thayer, for plaintiff in error.

The Snyners had no right in law to enjoin the use of that name.

Brass & I. Works Co. v. Payne, 50 Ohio St. 115, 19 L. R. A. 82; *Kerr*, Inj. 457; *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79; *Rogers v. Taintor*, 97 Mass. 291; *Caswell v. Hazard*, 121 N. Y. 485; *Banks v. Gibson*, 84 Beav. 566.

Messrs. Theodore Hall and Dickey, Carr, & Goff, for defendants in error:

Said partnership had expired by limitation, and there was no good will to sell.

Holmes, B. & H. v. Holmes, B. & A. Mfg. Co. 37 Conn. 287, 9 Am. Rep. 324; *Mussetman's Appeal*, 66 Pa. 81, 1 Am. Rep. 382; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. Rep. 816; *Hove v. Searing*, 10 Abb. Pr. 264.

The plaintiff in error admits that its object in using the term "Snyder Manufacturing Company" and the word "Snyder" is to gain any benefit that may be derived from the good reputation that name has acquired in the trade; and avers at the same time that there is no person by the name of Snyder connected with the corporation. This is practising such a deception upon the public as courts of equity will not countenance.

Morgan v. Schuyler, 79 N. Y. 490, 35 Am. Rep. 543; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Buckland v. Rice*, 40 Ohio St. 526.

Williams, J., delivered the opinion of the court:

The action below was brought by Andrew

*Headnotes by the COURT.

NOTE.—For name as part of good will of a business, see note to *Vonderbank v. Schmitt* (La.) 15 L. R. A. 462.

81 L. R. A.

G. Snyder and William A. Snyder, against the Snyder Manufacturing Company, to enjoin the use, by the defendant, of the name "Snyder Manufacturing Company," and especially the use of the word "Snyder" in that name. Certain averments of the petition are denied by the answer, and some allegations of the answer are controverted by reply; but the issues thus raised seem unimportant in the light of the facts admitted by the pleadings, which are, in substance, as follows: The plaintiffs, who are now, and for several years past have been, engaged in business as manufacturers of certain kinds of goods at the city of Piqua, in this state, for many years before carried on the same kind of a business at Ashtabula, also in this state, and by their skill and attention to business established a valuable reputation in their business, which was carried on under the name of Snyder & Son. Then, on the 7th day of September, 1887, they and two other persons formed a copartnership with W. H. Bradley, who was the owner of a manufactory at Ashtabula, employed in the manufacture of goods similar to those made by the plaintiffs, for the purpose of combining the business of the parties and thereafter continuing the same as one concern. By the terms of the partnership agreement, Bradley was to, and did, contribute one half of the capital, and, in addition thereto, furnish the use of his manufactory without charge and expend at least \$3,000 in putting the same in repair; as an offset to which the plaintiffs were to, and did, put in the good will of their business, and they and their two associates were to, and did, contribute the other half of the capital and devote their time and skill to the manufacture of goods and the general management of the business of the partnership; Bradley not being required to give any time or attention thereto. This copartnership which carried on its business under the firm name of "Snyder Manufacturing Company" continued for a period of three years acquiring under that name an extensive and profitable business and a good reputation; and at its termination the parties being unable to effect a satisfactory settlement, the plaintiffs, to obtain a settlement of its affairs, commenced an action, in which a receiver was appointed at their instance, who took possession of the partnership effects, and afterwards, under an order of the court so directing him, sold the same, with the good will of the firm, at public sale. The order of sale contained an express provision that the purchaser should have the right to carry on the business as the successor of the firm, and was so made without objection from any of the partners, all of whom were parties to the action. The plaintiffs and Bradley were competing bidders at the sale, when the latter bidding more than his competitors for the assets and good will of the firm and being the highest bidder therefor, became the purchaser. The sale was duly confirmed by the court and the property transferred to Bradley, who shortly thereafter, with other persons organized a corporation under the laws of this state, with the name of "the Snyder Manufacturing Company," for the purpose of continuing the business at the manufactory which had been operated by the

firm, and the partnership effects and good will that Bradley had purchased were transferred with the manufacturing plant to the corporation, which has since in its corporate name been doing a business of like character to that formerly done by the copartnership, and claiming to be its successor. That manner of conducting its business by the corporation was enjoined by the judgment which it is sought here to have reversed; and whether there should be a reversal, or not, it is conceded depends on the effect of Bradley's purchase of the assets including the good will of the partnership, and their transfer by him to the defendant corporation. Did the defendant in that way acquire the right to carry on a business in the name adopted by it, like that which had been done by the previously existing partnership, and as its successor? Without attempting an accurate or exhaustive definition of the good will of the business, it may be said that it practically consists of that favorable disposition or inclination of persons to extend their patronage to the business on account of the reputation it has established; and, as the business is always associated with the name under which it is conducted, the name becomes a part, and often an important part, of its good will. The good will of a copartnership is regarded in law as property, constituting a part of its assets, and having a salable value in connection with its tangible property, sometimes exceeding all its other assets, because of the advantages afforded a purchaser of retaining an established custom, and enlarging it. As a general rule, when it becomes necessary to sell the partnership effects the good will should be valued and sold with, and as a part of them, and ordinarily it passes by a sale of them though not expressly mentioned.

It is well settled that when a partner sells his interest in the business to a copartner without a reservation or exception of the good will, the purchaser is entitled, not only to continue the business in the name of the firm and as its successor, but he may prevent the selling partner or other person from carrying on business in that way; and no good reason is apparent why the same result should not attend a purchase of the entire assets and good will of the firm by one of the partners at a sale thereof made under an order of court in a proceeding to which the partners were parties; especially, if the sale be so made at their instance and for their benefit. Indeed the authorities appear to go further and maintain that upon the dissolution of a copartnership there being no agreement between its members to the contrary, the court having the parties before it may order the good will to be sold or disposed of as may be deemed most advantageous to the partners; and that the purchaser at such sale, though a stranger to the firm, may lawfully continue the use of the firm name in carrying on the business thereafter. And that seems but the logical result of the rule that the rights mentioned belong to a partner who becomes a purchaser at such sale; for, in order to insure a fair sale, all bidders should stand upon an equality, which would not be so if the rights acquired at the sale were to be varied or made to depend upon the relation which the purchaser had sustained to

the partnership, or other individual circumstance. The salable value of the good will is whatever it is worth in the market when open to untrammelled competition; and when brought to that test for the benefit of the partners, it is not for them to assert that the purchaser obtained less than they authorized to be sold, or induced him to believe he was buying.

It is contended that Bradley did not become the owner of the good will of the late firm of which he was a member, by his purchase at the receiver's sale, because, (1) the good will of the plaintiffs was put into the firm as an offset to the use of Bradley's manufactory, and only for the period agreed upon for the duration of the partnership, and therefore at the expiration of that period the plaintiffs were reinvested with their good will, as was Bradley with the possession of his property; (2) the order of the court under which the sale was made expressly excludes any right on the part of the purchaser to make use of the firm name; and, (3) the good will ceased upon the termination of the partnership, and consequently, could not be sold.

1. With respect to the first of these propositions, it may be observed that what the order of the court directed to be sold, and what the receiver under its authority in fact sold, was not the good will or property of the plaintiffs, but those belonging to the firm. The plaintiffs' business and its good will as they existed at the formation of the partnership, were absorbed and merged in those of the firm, and went to make up its assets, and, in so far as they did so, became the property of the firm, subject to sale under the order with its other effects, and with them vested in the purchaser. Conceding, however, that the plaintiffs, at the expiration of the partnership into which they had entered with Bradley, were restored to the good will which belonged to their business when the partnership was formed, and were entitled to resume that business under the name they had formerly used, it is not perceived how that could operate to vest in them any part of the good will of the firm, or prevent its vesting in Bradley under the receiver's sale.

2. The order under which the sale was made, directs the receiver to sell all the property of the firm "as a whole, including the good will," and provides that "the purchaser shall have the right to carry on the business as successor to the Snyder Manufacturing Company;" but states, that "the court does not pass upon or make any order whatever as to what name said purchaser would have the right to use in carrying on said business." The last clause of the order is relied upon as excluding any right on the part of the purchaser under it to employ the name of the firm in any business he might choose to carry on after the purchase, and as further excluding any authority to do such business as the successor of the firm. But it is obvious the clause has not that operation. Instead of being an adjudication abridging the rights of the purchaser with regard to the use of the firm name, its design was to leave the determination of those rights, in any controversy that might thereafter arise concerning them, unaffected by the order. And, as a partner who purchases the property and good will of

the copartnership becomes entitled to the use of the firm name in the absence of a stipulation forbidding it, an express provision in the sale, or the order of the court under which it was made, that the purchaser should have that right, was unnecessary.

3. The proposition mainly urged in support of the judgment below is, that the good will of a copartnership can exist only so long as it is a going concern, and, ceasing upon the termination of the partnership, is not thereafter a subject of sale. It may be that when a firm is dissolved, its effects distributed, or sold in parcels to purchasers not wishing to embark in a similar business, and its affairs are wound up, its good will is dissipated and lost; but that results from the acts of the partners themselves in making such a disposition of the assets as renders the good will unavailable as a salable article, for it is not a distinctive article of property which may be sold separate from the tangible effects of the partnership, and in that sense it may be said to cease when the partnership is so wound up. That, in substance, is the scope and purport of the rule declared in cases cited in the brief of the defendant in error. In neither of the cases was the question here presented involved. But the doctrine maintained both in England and this country, where the copartnership is wound up in the manner indicated, is that the good will remains the undivided property of the members of the firm, either or any of whom may thereafter lawfully use the firm name if they desire to continue in business, although the name of the partner so using it does not appear in that of the firm. *Banks v. Gibson*, 34 Beav. 566; *Bradbury v. Dickens*, 27 Beav. 53; *Casrell v. Hazard*, 121 N. Y. 484; *Dougherty v. Van Nostrand*, Hoffm. Ch. 58.

The proposition contended for, if sustained, would practically destroy the value of the good will as an asset of the partnership, and entail upon its members, in many instances, serious loss. As partnerships rest upon the agreement of the parties, express or implied, a dissolution occurs and a new partnership is formed whenever a partner retires, or a new one is admitted, and if, when that occurs, the good will of the dissolved firm should cease, and could neither be acquired by the new firm, nor transferred by any sale made by the members of the old one though expressly included in the sale of its effects, its value as an asset of the firm would disappear; yet, it is commonly known that the good will constitutes an important, and sometimes a controlling part of the consideration for the purchase, and it has long been the settled law that, in cases of the kind mentioned the purchaser obtains the good will, including the right to the use of the firm name in the continued prosecution of the business. In so holding the courts give effect to the intention of the parties as disclosed by the transaction. Where the partners themselves make a sale of the firm effects, including the good will, the intention and understanding are manifest that the purchaser shall acquire and enjoy every advantage and benefit which the firm had, so far as the parties are capable of transferring the same; and when a sale is made under an order of court in a proceeding to which the partners are parties that intention is not less plainly inferable. The object to be ac-

31 L. R. A.

complished in making the sale, in either mode, of the good will with the other partnership effects, is to enhance the value of the assets by inducing persons to bid more for them than they otherwise would, under the belief that the purchaser will obtain all the benefits of the good will; and when the sale is made and consummated on that basis, it would be neither just nor equitable to permit the vendors to deprive the purchaser of anything they undertook to sell, and for which they have been paid. The good will being thus sold as a thing of value, and paid for by the purchaser as such, to deny him the benefit of it would operate as a fraud which the law will not sanction.

We are not reluctant, therefore, in holding that upon the dissolution of a trading copartnership its assets, including the good will of the business, may be sold as a whole, either by the partners directly, or through a receiver under an order made by a court in a case to which they are parties; and that a purchaser thereof under either method of sale is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose. And, further, that where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business in the same manner under a corporate name including the name which had been used by the firm. *Brass & I. Works Co. v. Payne*, 50 Ohio St. 115, 19 L. R. A. 82.

If it is desired to limit the right of the purchaser or his vendee in the use of the firm name, or exclude such right altogether, it should be done by stipulation in the contract when the sale is made by the partners, or by a provision to that effect in the order, when the sale is made through the court.

In the case of *Horton Mfg. Co. v. Horton Mfg. Co.* 18 Fed. Rep. 816, cited by counsel for the defendant in error, a copartnership without any consideration obtained the consent of a person not a member to use his name in and as part of the firm name. That consent, the court held, amounted to a mere license, revocable at pleasure, and the partnership so obtaining it could not, without consent of such person, transfer the right to another company or corporation to make a like use of the name. But that case cannot be regarded as an authority against the claim made by the plaintiff in error in this case; for, where the partners themselves make a sale of their firm's good will, which carries with it the right to use the firm name, or authorize such sale to be made, it cannot be said that the use of the name either by the purchaser, or those succeeding to the business, is without their consent. As said by the court in the case just cited, on page 819: "If one has made of his own name a trademark, and then transfers to another his business, in which his name has been so used, the right to continue such use of the name will doubtless follow the business as often as it may be transferred."

Upon the facts admitted by the pleadings the judgment of the Circuit Court must be reversed, and judgment rendered for the plaintiff in error.

STATE of Ohio
v.
Omar N. GARDNER.

(53 Ohio St. 145.)

*The official acts of public officers, in an office created by an unconstitutional statute of this state, performed before the statute has been declared unconstitutional by an authoritative decision of the courts of the state, cannot be collaterally attacked.

(January 21, 1896.)

EXCEPTIONS by the State to rulings of the Court of Common Pleas for Summit County made during the trial of an indictment for offering a bribe which resulted in an acquittal. *Exceptions sustained.*

The facts are stated in the opinion.

Messrs. Samuel G. Rogers, Prosecuting Attorney, and *Henry K. Sauder*, for plaintiff in error:

The constitutionality of the act cannot be considered in this proceeding.

It is purely a collateral question, inasmuch as the officer bribed is not a party to the action, neither is any other officer in any city whose government is affected by the act of a party or in any manner connected with the cause, and they certainly have a right to be heard before they are declared by solemn judicial decision to be usurpers.

Molitor v. State, 6 Ohio C. C. 263; *Mechem*, Pub. Off. § 330; *State v. Alling*, 12 Ohio, 16; *Ehrman v. Union Cent. L. Ins. Co.* 35 Ohio St. 324; *Chamberlain v. Painsville & H. R. Co.* 15 Ohio St. 225; *Presbyterian Soc. v. Smithers*, 12 Ohio St. 248; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374.

It would be manifestly contrary to public policy to allow such an issue to be raised upon an indictment. It would put it in the power of every one charged with crime to question the judicial authority of the court trying him before any finding is made ousting the court from its jurisdiction.

Stuart v. School Dist. No. 1, 30 Mich. 69; *People v. Maynard*, 15 Mich. 470; *Fractional School Dist. No. 1 v. Joint Bd. of School Inspectors*, 27 Mich. 3; *Bird v. Perkins*, 33 Mich. 28; *Mendota v. Thompson*, 20 Ill. 197; *Kettering v. Jacksonville*, 50 Ill. 39; *People v. Weber*, 86 Ill. 283.

The authority of officers claiming title under color of law can only be questioned by the state by proceedings in quo warranto.

Coyle v. Com. 104 Pa. 117; *Com. v. Burrell*, 7 Pa. 34; *Clark v. Com.* 29 Pa. 129; *Campbell v. Com.* 96 Pa. 344; *Fraser v. Freelon*, 53 Cal. 644; *Burt v. Winona & St. P. R. Co.* 31 Minn. 472.

If Joseph Hugill had been indicted for accepting a bribe he would have been estopped, beyond question, from setting up the unconstitutionality of the act under which he claimed to be serving.

1 Bishop, New Crim. L. §§ 462-464; 2 Bishop, New Crim. L. §§ 892, 393.

*Headnote by the COURT.

NOTE.—For *de facto* officers under unconstitutional statute, see also note to *King v. Philadelphia Co.* (Pa.) 21 L. R. A. 141.

L. R. A.

In like manner a person offering a bribe, and thus recognizing him as an officer under the act, would be estopped from denying his official authority.

There was a *de facto* office and Joseph Hugill was a *de facto* officer.

Where an office is established by legislative act apparently valid, and the office is filled and exercised under the act, it is a *de facto* office.

Smith v. Lynch, 29 Ohio St. 261; *Leach v. People*, 122 Ill. 420; *Burt v. Winona & St. P. R. Co. supra*; *Mechem*, Pub. Off. §§ 318, 327; *Donough v. Dewey*, 82 Mich. 309; *Van Fleet*, Collateral Attack, § 21, p. 33.

Mr. Charles Baird, contra:

The demurrer to the indictment puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record, and although the demurrer admits the facts demurred to and refers to their legal sufficiency to the court, it does not admit allegations of the legal effect of the facts pleaded, nor does it admit any facts that are not well pleaded.

Whart. Crim. Pl. & Pr. §§ 402, 403; *Com. v. Trimmer*, 84 Pa. 65.

The question raised by the demurrer is whether under the law there is the office of city commissioner of the city of Akron, and whether under the law Joseph Hugill, the person named in the indictment, held or could hold the office of city commissioner.

The act in review confers corporate powers upon Akron and Youngstown (*State v. Brewster*, 44 Ohio St. 249), through the board of city commissioners, and organizes these two cities upon a basis of a special grade for purposes of municipal government; suspends the operation of general laws as to them, while these suspended statutes must remain in full force as to the other cities of the state of the same class and grade, or throw the laws regulating the organization of municipal corporations into inextricable confusion.

State v. Ellet, 47 Ohio St. 90, *Costello v. Wyoming*, 49 Ohio St. 202; *State v. Schwab*, Id. 229; *Hamilton County Comrs. v. State*, 50 Ohio St. 653; *Curr v. West Carrollton*, 8 Ohio C. C. 1; *Kenton v. State*, 32 Ohio L. J. 394; *State v. Bargas*, 34 Ohio L. J. 71; *Pittsburgh, Ft. W. & C. R. Co. v. Martin*, Id. 232.

In order that there may be a *de facto* officer, there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law; and therefore a person cannot claim to be a *de facto* officer of a municipal corporation when the corporation or people have in law no power, in any event, to elect or appoint such an officer.

Dill. Mun. Corp. § 276; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Gorman v. People*, 17 Colo. 597; *Ex parte Roundtree*, 51 Ala. 42; *Hildredth v. McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61; *Decorah v. Bullis*, 25 Iowa, 12.

Bradbury, J., delivered the opinion of the court:

At the September term of the Court of Common Pleas of Summit county, Omar N. Gardner was indicted for offering a bribe to

Joseph Hugill, a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office, was unconstitutional and void. The demurrer was sustained and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and, by virtue of the provisions of sections 7305-7308 of the Revised Statutes, has brought the question to this court for review. Two questions are presented by the record: First, whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not; and, second, if unconstitutional whether its constitutionality may be assailed in the collateral way, undertaken by the accused. The first question which logically arises is the latter of the two; for if the accused should not be allowed to raise the question, in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked, is a question of the utmost importance in the practical administration of governmental affairs. Different courts have decided the question differently. *Leach v. People*, 122 Ill. 420; *Burt v. Winona & St. P. R. Co.* 81 Minn. 472; *Coyle v. Com.* 104 Pa. 117; *Mechem, Pub. Off.* §§ 318, 327; *Van Fleet, Collateral Attack*, § 21, p. 33; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Hildreth v. McIntire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61.

It is now before this court for the first time, and while we are not insensible to the consideration justly due to the high standing of those courts and authors we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason; and that best comports with an enlightened public policy and the maintenance of public order.

If the official acts of officers acting in an office created by an unconstitutional statute should be regarded as falling within the principle that sustains the act of *de facto* officers until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no *de facto* officer unless there is a *de jure* office. That is a simple and summary way to dispose of this grave question. That there can be no *de jure* officer without a *de jure* office is a proposition to which all minds will, of course, assent. But that there can be a *de facto* officer without a *de jure* office is disputable if the phrase "*de facto* officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every

one. While in such occupancy innumerable official acts affecting both public and private rights may have been actually performed by them, the duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893. It superseded an act passed in the year 1891 for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown also rests upon the act now assailed; while that of the city of Springfield depends upon an act, at least as vulnerable to the same attack as the act under consideration. The constitutionality of the governments of the cities of Springfield and Youngstown has not been assailed, even collaterally, and may continue unchallenged for many years. The officers who in these cities occupy offices created by the acts upon which the city government rests are daily discharging duties affecting the rights of the city, and the private rights of individuals. These officers are either usurpers and trespassers, or *de facto* officers: if the latter, the rights of the public, or of individuals who have submitted to their authority, or acquiesced in its exercise, would be unaffected by a subsequent authoritative judicial declaration that the statute was unconstitutional; if they were usurpers merely every official act would be a nullity, and interminable confusion possibly follow such a decision. Were such results to follow, the courts might well pause, before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to *de facto* officers had its origin in England. It was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence; whatever office parliament chose to create was a *de jure* office. In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute, regularly enacted by the legislative branch thereof may, in express terms, create a public office, or it may authorize a municipal corporation to create one; an incumbent may be appointed in the mode prescribed by the statute. He may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely, possibly for many years, during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred, the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of

persons, and of the public, that accrued before the law was declared void.

We think that principle of public policy, declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." They actually performed official acts authorized by a statute solemnly enacted by the law making department of the government. Such a statute is presumed to be constitutional. *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77. The unbroken current of authority supports this proposition.

Courts in the practical administration of justice should regard the substance of things and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office, created under the provisions of a statute regularly enacted by that branch of the government to which the power to make law has been delegated by the Constitution; there is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them *de facto* officers; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that therefore the question of the constitutionality of the statute in question was not before the court of common pleas.

Exceptions sustained.

Spear, J., concurring:

It is always well to start with a clear conception of the real question at issue. In his investigation of the case the judge of the common pleas reached the conclusion that the defendant was in a position to raise the question of the constitutionality of the statute establishing a government for the city of Akron, and then, being of opinion that the act is unconstitutional, he sustained the demurrer to the indictment. Courts uniformly decline to consider the alleged unconstitutionality of an act of the general assembly unless it becomes necessary to a disposition of the case before them. The first inquiry is, therefore, as to the right of the defendant to make the question of the constitutionality of the statute under review. If he cannot be heard to raise that question then the issue of constitutionality is not before us; meantime it is neither conceded to be unconstitutional, nor contended that it is not. Can he make the question? This inquiry will be answered when it has been determined whether or not the city commissioner of Akron

is an officer. If he is, within the meaning of our law, an officer, the exact extent or character of his title will, it is believed, prove of but little consequence, for the charge is that of attempting to bribe an officer.

The high estimate I entertain of the learning and ability of the trial judge, as well as the importance of the principle involved, has caused me to hesitate long before assenting to a conclusion contrary to the holding below, and it is only after careful examination of many authorities, and much reflection, that I have been satisfied to rest upon the conclusions announced in the majority opinion; and for the above-mentioned reason I have preferred to express my own views on the subject. A reference to some of those authorities will prove instructive.

McKim v. Somers, 1 Penr. & W. 297, involved the admissibility of a deposition taken before a justice whom the objecting party alleged and sought to prove had, prior to the taking of the deposition, moved from the county and thereby vacated his office. The court held the evidence not competent on the ground that whenever a person has color of authority, and acts under a commission from the appointing power, but which it may be alleged has been forfeited, the validity of the commission cannot be examined in a suit in which he is not a party. "If a person," observed the court, "usurp an authority to which he has no title, or color of title, his acts would be simply void; but a colorable title to an office can be examined only in a mode in which the officer is a party and before the proper tribunal."

People v. Bangs, 24 Ill. 184, was a quo warranto to test the title of the defendant to the office of circuit judge. The Constitution gave authority to the general assembly to increase the number of circuits, and in such case the number of judges, but the assembly undertook to provide for an additional judge without creating an additional circuit, and Judge Bangs was elected, commissioned, and entered upon his duties as judge. Judgment of ouster was entered, the court holding that the portion of the law which provided for the election of a circuit judge was not authorized by the Constitution and the election itself was void, but it gave the judge color of office, and his acts were as valid as if the law had been constitutional. The syllabus reads: "Though a judge elected under a law not authorized by the Constitution shall be ousted because he is not an officer *de jure*, yet his acts *colore officii* will be valid."

People v. Weber, 86 Ill. 283, was a petition for a writ of mandamus by one Sullivan, claiming to be a city treasurer, to compel a collector of taxes to pay to him taxes collected belonging to the municipality. Sullivan's title rested upon an alleged appointment by the mayor. This the court held to be invalid, and the writ was refused. It is held in the syllabus: When one claims rights as an officer by virtue of his office he must show that he is legally entitled to act,—that he is an officer *de jure* as well as *de facto*. The acts of an officer *de jure* are valid and effectual everywhere when within the limits of his authority; but the acts of a *de facto* officer are valid only so far as the rights of the pub-

lic, and of third persons having an interest in such acts, are involved. . . . The title of a *de facto* officer cannot be inquired into in a collateral way between third parties, but it may be inquired into where he is suing in his own right as an officer.

In *Leach v. People*, 123 Ill. 420, one paragraph of the syllabus is as follows: "The legislature passed an act which proved to be in violation of the Constitution, whereby the management of the affairs of a county acting under township organization was attempted to be taken from the supervisors of the several towns, and vested in a board of supervisors consisting of only five members, instead of fifteen, as before, to be elected in five districts, and hold their offices for four years. Supposing the act to be a valid enactment, such board of five were elected, and for a time acted without question, as the legally constituted tribunal having charge of the county affairs: Held, that their acts were valid and binding as those of *de facto* officers under color of office."

Brown v. O'Connell, 36 Conn. 432, 4 Am. Rep. 89, was an action of debt on a recognizance given in the police court of Hartford. The Constitution provided that all judicial officers should be appointed by the general assembly. That body, by a statute, undertook to authorize the appointment of a judge of the police court by the common council. The supreme court held the appointment void, but that the appointee "was a judge *de facto*, and that a recognizance entered into before him in the police court for the appearance of a prisoner was valid and binding."

Judge Van Fleet, in his work on Collateral Attack, p. 33, remarks: "If it is necessary, in order to guard the rights of the public, to hold the acts of an actual although unlawful incumbent of a judicial office valid, as being done by an officer *de facto*, then *a fortiori* it is necessary to hold an actual judicial tribunal, erected under the forms of law, sustained by the power of the state, and settling rights and titles, a tribunal *de facto*."

And, as conclusion from divers authorities cited, the same learned author observes on page 51: "The *de facto* character of the officer is not impaired because he was appointed by virtue of a void statute. Thus, a judge appointed by the governor, or a city council, or transferred to another district; or a probate clerk, or district attorney, appointed by authority of an unconstitutional statute; and county officers elected in a new county before the law organizing it could take effect, are all officers *de facto*." See also *Burt v. Winona & St. P. R. Co.* 81 Minn. 472; *Morris v. People*, 3 Denio, 381; *State v. Choate*, 11 Ohio, 511; *State v. Alling*, 12 Ohio, 16; *Taylor v. Skrine*, 2 Treadway, Const. 696; *Case v. State*, 5 Ind. 1; *Creighton v. Piper*, 14 Ind. 182; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

Smith v. Lynch, 29 Ohio St. 261, was an action to restrain the collection of a tax assessed by the board of health of the village of West Cleveland upon the land of plaintiff for the expense of removing a nuisance therefrom. The plaintiff claimed that the board was not a lawful board because the ordinance

of council creating it was not read on three several days, nor were the yeas and nays, of those voting recorded, nor did a majority of members vote for suspension of rules as required by statute; that they acted without authority, and the tax was therefore illegal. The persons claiming to be such board were the only persons claiming to be acting as such, and they were generally and publicly known and acknowledged as such at the time of the transaction. The court held that the requirements of the statute as to the manner of passing the ordinance were mandatory. Nevertheless the board was a board *de facto* and whether it was a board *de jure* was immaterial. It was claimed in argument that the case was one where there was no office to be filled. But the court held that "the statute (66 Ohio Laws, 200) creates the office. It authorizes the council to establish the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law, and provided for by law. . . . It is enough

that the office is one provided for by law, and that the parties have the color of appointment, assume to be and act as such officers, and that they are accepted and acknowledged by the public as such to the exclusion of all others. Such was the case here. There were both the color and fact of office."

Turning to the statute referred to we find that it simply provides for the composition of a board of health, and defines its powers, duties, etc., "whenever the council of any city or incorporated village shall establish a board of health." No such board can exist until it is so established. Direct authority to establish such board is given by § 1622, Rev. Stat. ¶ 24. When, therefore, the court says that such board is "an office, known to the law, and provided for by law," no more is meant than that provision has been made by law for the establishment of such an office. No one would pretend that the statute created the particular board in question.

And, in the same sense, is not the office of city commissioner one which the law has provided may be established? Is the "potentiality" lodged in the general assembly by the Constitution by the general grant (art. 2, § 1), and by art. 13, § 6, in the words: "The general assembly shall provide for the organization of cities and incorporated villages," etc., any less potent in the constituting of municipal offices generally than is the "potentiality" lodged in the council by act of the general assembly to create a particular office? And where the council, attempting to act under such authority, violates the fundamental law in such way as to fail to clothe its appointee with a good title to the office, and yet, because it possessed power to do the thing lawfully, and because its appointee has entered upon and is performing its duties to the exclusion of all others and to the acceptance of the public, this court says there being both color of office and fact of office, that the appointee is an officer *de facto*. Shall we now say in this case, where is the most abundant authority in the general assembly to create the office, and an attempt

to do it, and the officer has entered upon and is performing the duties to the exclusion of all others and to the acceptance of the public, yet because of a failure to observe the fundamental law by the general assembly, if there be such failure, there is no color, and no fact, and hence no *de facto* officer, but he is simply an intruder and a usurper?

No question is made as to the regularity of the proceedings by which the board of city commissioners was appointed. Every legal formality was observed. The objection urged is that there was no power in the officers who appointed to make the appointment in any manner, however regular. This is sufficiently answered, we submit, if there was color of authority.

As before stated, the ground upon which acts of *de facto* officers are sustained is that of public policy. But it is insisted that this is a criminal case and hence a different public policy should prevail. Many courts have thought differently.

In *State v. Carroll*, 38 Conn. 499, 9 Am. Rep. 409, the prisoner had been found guilty of libel and breach of the peace in the city court of New Haven. Carroll's complaint was that the person acting as judge was not such, having been called in to take the place of the judge by the clerk acting under an unconstitutional statute. The court, applying the general rules as to the effect of color and of fact, in an opinion of marked ability and learning, by Butler, Ch. J., held that "the acts of an officer appointed by and acting under and pursuant to an unconstitutional law, performed before the unconstitutionality of the law has been judicially determined, are valid as respects the public and third persons, as the acts of an officer *de facto*."

In *Mapes v. People*, 69 Ill. 523, in a liquor prosecution, objection was made by defendant that the jury was an illegal body because drawn by an unauthorized person, one Lee, who, although authorized to perform other duties as clerk was not empowered to draw juries. The court held that whether Lee was an officer *de jure* was not material. He was an officer *de facto*, in possession of the office, performing its duties, and until he was in some direct way adjudged to be without authority, his official acts must be regarded as valid.

In *Clark v. Com.* 29 Pa. 129, the prisoner had been convicted of murder in a court, the judge of which was exercising functions in a county attached to his district subsequent to his election, and the contention of the prisoner was that the act of the legislature by which such addition was attempted to be made was unconstitutional. But the court held that the question could not be raised collaterally; that the judge was a judge *de facto* and, as against all but the commonwealth, a judge *de jure*. The murderer was hanged.

In *Campbell v. Com.* 96 Pa. 344, the prisoners had been convicted in Fayette county of arson in burning a dwelling house and other buildings. Two associate judges, not learned in the law, but who had been elected the people of the county and commissioned, sat with the president judge and par-

ticipated in the trial and sentence. The validity of their title to the office, and hence of the composition of the court, was questioned on the ground that, under the Constitution of 1874, and subsequent legislation, the people had no power to elect associate judges in Fayette county. It was held "that they were judges *de facto*, and as against all parties but the commonwealth they were judges *de jure*, and having at least a colorable title to these offices their title thereto could not be questioned in any other form than by quo warranto at the suit of the commonwealth." And the burners of dwelling houses went to the penitentiary for eight years. At a subsequent term, in an action in quo warranto, brought by the attorney general, the associate judges were ousted.

Of like import was the holding in *Coyle v. Com.* 104 Pa. 117, and the murderer was executed.

In *State v. Brooks*, 39 La. Ann. 817, the defendant had been convicted of manslaughter. The person killed was one Allen, an acting constable, who, armed with a warrant was in the act of seizing Brooks' property at the time of the homicide. The defendant sought to prove that Allen had not been legally appointed and was not a legal constable. This proof was rejected. This ruling was affirmed. The court quotes with approval language of the court in an earlier case, that "we do not desire to be understood, however, as intimating that a party charged with crime can be heard to raise an issue that the ministerial and other officers of court, actually and *de facto* acting as such, have no right to such offices. We should never get a criminal tried at that rate. We would commence with a kind of collateral quo warranto as to the judge and then go on down through the official roster of the court." The manslaughter went to the penitentiary for fifteen years. See also, *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374, and cases there cited; *State v. Bloom*, 17 Wis. 521; *Re Ah Lee*, 5 Fed. Rep. 899; *Smurr v. State*, 105 Ind. 125; Ang. & A. Priv. Corp. p. 53, note.

Regarding the respect which is to be paid to officers *de facto*, Mr Bishop, in his *New Criminal Law*, vol. 1, p. 284, observes: "The criminal law will not justify a person in resisting an arrest by an officer *de facto* on the ground that he is not such *de jure*. Other methods of testing the right are open. Indeed, it would be little less than a breach of the peace by the court itself to permit men to try, *in pais*, the titles of constables and sheriffs, by beating them over the head and raising a riot."

And by Prof. Wharton, in his work on Criminal Law, vol. 2, § 1572d, it is observed: "It has been already seen that on an indictment for resisting an officer his title is not at issue when it appears that, at the time in question, he was a *de facto* officer, i. e. the recognized official representative of the government actually in power. This is what is called color of title."

Ex parte Strang, 21 Ohio St. 610, was a proceeding in habeas corpus in the probate court reviewed in this court. Strang had

been convicted in the police court of Cincinnati and was held by the chief of police under a mittimus requiring his conveyance to the workhouse. His ground of release was that he had been tried and convicted before one Carter, who was not the police judge, but an appointee of the mayor under an unconstitutional statute, the police judge being at the time ill and absent from his post. This court affirmed the judgment, holding: "That assuming (but without deciding the question) the power of appointment thus conferred on the mayor to be unauthorized by the Constitution, yet the person acting under such appointment, would be a judge *de facto*," and that "the acts of an officer *de facto*, when questioned collaterally, are as binding as those of an officer *de jure*. To constitute an officer *de facto* of a legally existing office it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office. It is sufficient if he derives his appointment from one having colorable authority to appoint; and an act of the general assembly, though not warranted by the Constitution, will give such authority."

In the consideration of the case the police court is treated as one of the courts inferior to the supreme court, which, by the Constitution, the general assembly is authorized to establish, the judges of which are to be elected by the people, and the acting police judge was regarded as appointed to hold the police court, and to exercise all the jurisdiction pertaining thereto. So that the inquiry was not into the jurisdiction of the court, but an inquiry into the right of Carter to hold the office.

The case illustrates the proposition that color of authority to appoint is sufficient to clothe the appointee with color of title to office. And if this be so, will not an act of the general assembly which purports to authorize an inferior body to appoint to office give color of authority for such appointment where the power of the general assembly over the subject is unquestioned, and the only criticism is in the manner of its exercise? The Constitution recognizes municipal corporations, and authorizes the general assembly to organize them and adopt methods by which they may be provided with officers for their government. The office in question in the case at bar is one which may be so provided; in effect, therefore, the Constitution creates the office,—not this particular board, but boards generally, and such boards may become as essentially a part of the city government as is the police court, or any other instrumentality. It will be noted that the holding is in square contradiction of the maxim, often repeated in the text-books and by judges, that where there is an officer *de jure* in the office there is no room for an officer *de facto*; that both cannot exist at the same time. Judge Straub had not vacated the office; he was still in occupancy of it, drawing the salary, and armed with all the power; notwithstanding which the decision holds Carter to be a judge *de facto*. We emphasize this because it shows that maxims of text-books are not to be implicitly relied

upon, and because it shows to what length the court was inclined to go in order to maintain the acts of one in the exercise of functions of an office authorized by statute.

It is not here assumed that there is not disagreement among the authorities. There is. Perhaps *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, is most relied on as sustaining the contrary doctrine. In that case the legislature of Tennessee had undertaken, by statute, to constitute for the county of Shelby a board of commissioners to be appointed by the governor, and clothe it with all the powers and duties then possessed by the quarterly court of the county, composed of the justices of the peace who had been elected by the people. This county court was one of the institutions of the state, recognized in the Constitution. County commissions were wholly unknown to the Constitution, and theretofore to the laws. There was no acquiescence by the justices or the people; on the contrary, there was immediate and continued public opposition, by suit and otherwise, on the part of the justices and others until the final disposition of the case. Meantime, in the face of the opposition and the litigation, the board subscribed to stock and issued railroad bonds of the county to the amount of about \$29,000, and the liability of the county on these bonds was the subject of the suit. It must be apparent at a glance that we have before us no such case. In that case there was, according to the holding of the supreme court of Tennessee, no power in the legislature to authorize the appointment of county commissioners with such powers, by any form of statute, while in our case the power to create a board of city commissioners for Akron is unquestioned, and, if the proper classification has been prescribed no one doubts that it is a board *de jure*. As against protest and objection from the start in the Tennessee case, we have, in our case, universal assent and acquiescence on the part of everybody for years. But it is insisted that the declarations of law given out by the court, irrespective of the judgment rendered, control this case. Do they? It is there said: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." It is not necessary to question the aptness of this language as applied to the Tennessee case, but when it is sought to apply it to the situation in this state, and to our case, we think it opposed by the better authorities and the better reason. All legislative authority is vested in our general assembly. That body enacts the laws. It is just as much its duty to observe the Constitution as it is the duty of any other branch of the government. The presumption is, as declared in *Cincinnati, W. & Z. R. Co. v. Clinton County Comrs.* 1 Ohio St. 77, and nowhere disputed, that in the enactment of laws they heed that duty. To say, then, that a statute which, by all presumptions, is valid and constitutional until set aside as invalid by judicial authority, cannot, in the meantime, confer any right, impose any duty, afford any protec-

tion, but is as inoperative as though it had never been passed, is at least startling. To say that a statute which purports to create a constitutional office, duly enacted by our general assembly, and duly promulgated, enjoins no duty of respect or obedience by the people, and affords no corresponding right or protection, and that all who undertake to enforce its demands do so at their peril, and at the risk of being deemed trespassers and usurpers, in case it shall be finally decided to be unconstitutional, by a bare majority, perhaps, of the court of last resort, no matter what public necessities existed for its enforcement, nor what public approval and acquiescence there may have been, nor for how long a term of years, and no matter how many holdings of intermediate courts there may have been sustaining its constitutionality, is to invite riot, turmoil, and chaos. It is not the law in Ohio.

If the people may reasonably be expected to have sufficient knowledge of the Constitution so that when called upon to deal with one exercising the functions of an office they may intelligently inquire far enough to ascertain whether the office be one which the Constitution creates, or gives authority to the general assembly to create, it certainly is not reasonable to expect the people to be wise enough to determine for themselves, and at their peril, whether the general assembly, in its effort to establish an office which it has the most unquestioned right to establish, has observed all the requirements of the Constitution.

It is sought to dispose of this case by use of the phrase that there can be no officer *de facto* unless there is an office to fill. The proposition begs the question. The obvious answer is that there is an office to fill whenever our law-making power, exercising its authority to create a constitutional office, by a duly enacted and promulgated statute, ordains there shall be such office, and it remains an office until the act is repealed or held unconstitutional by a court of competent authority, in a proceeding to which the one holding the office is a party, who, in the meantime, his election or appointment being regular, and the public acquiescing in his discharge of the duties, is an officer whose title can be questioned only by the state itself.

Staight v. State, 39 Ohio St. 496, has not been overlooked. The holding of the court, given in the syllabus, is in substance this: Perjury cannot be assigned of an oath taken before one acting as a deputy clerk of the probate court, holding, without new appointment, during the second term of the judge appointing him, for the reason that the oath is not administered by lawful authority.

The position of deputy clerk is not, in the constitutional sense, an office. At common law the officer and his deputy filled but a single office. By statute the probate judge is *ex officio* clerk of his own court; the deputy is appointed by him, and can be neither appointed nor removed by any one else, and the acts of the deputy are the acts of the principal. *Warwick v. State*, 25 Ohio St. 21. Petit, the one acting as deputy when

the oath was administered to Staight, had received no appointment under the judge's second term, and had taken no oath. Even had there been an office to fill, he lacked color of office, and in no aspect could he be regarded an officer *de facto*. It would appear that the case has no important bearing upon the present contention.

But it is insisted that the title of the officer is an essential ingredient of the crime, and that an unconstitutional act cannot create a material element of a crime. This begs the question by assuming as though proved, first, that an act of our general assembly, duly enacted, purporting to establish an office which the assembly has power to establish, may be treated as a nullity before it has been declared invalid by a court of competent jurisdiction in a proper case; and, second, that the question of constitutionality can be raised in the manner attempted by this defendant.

We have already undertaken to give some reasons why these propositions are not tenable. It may be added that considerations of justice, the uniformity of administration of law, and public policy alike forbid assent to them. In the old days when persons accused of crime could have no compulsory process for witnesses, could have no counsel, could not testify in their own behalf, and were subject to other disabilities, it was usual for courts to resort to technicalities, and sometimes trivialities, to aid the prisoner. But that condition has passed away and courts are not now so willing to favor shifts invented to get guilty men off, and the substance of things is more regarded. By statute it is made the duty of our courts to disregard defects and imperfections in indictments which do not tend to the prejudice of the substantial rights of the defendant upon the merits. How is the corruption, the guilt of one who attempts to pollute the fountains of justice by bribing its acting officers, and thus cheat his neighbors and the community, any the less substantial, or the state's case against him any the less meritorious, because it may turn out that the officer's title would not stand the test of a quo warranto? Such strictness is not observed in some other branches of criminal law. As against the thief or the burglar, a possessory title is good. The state isn't required to prove absolute ownership, or a fee simple. Would a manslayer be heard to defend that his victim had been born into the world lacking some quality of manhood, mental or physical? If the acting commissioner be good enough officer to be bribed ought he not to be held good enough officer to answer the designation of the statute in order to punish the briber? It is insisted that to convict the defendant in this case would override the maxim that an element of a crime cannot be supplied by estoppel. Let us see. Could the commissioner, had he accepted the bribe, be heard to say he was not an officer? Surely not. Wherein lies the difference? Why should there be a difference? Why should the venal scoundrel who, dealing with the other as an officer, invents the wickedness and tempts him, be let off by a mere technicality? The statute which prescribes punishment for accepting a

bribe also prescribes punishment for giving it. What a travesty on justice would be presented by the judgment of a court, acting on the same facts, and applying the same criminal statute, which says to the tempted officer, you will go to the penitentiary, and to the wily Fowler who spread the net, and gathered in his grasp the ill-gotten gain, you may go free. Or, suppose a defendant convicted in the police court before a judge *de facto*, as in the *Strang Case*, is sentenced to a fine and a term in the work house. He cannot be heard to defend that the law providing for the appointment of the acting judge is unconstitutional. But, according to the theory of the defense in this case, if the prosecuting witness has sworn falsely in order to effect a conviction, and is prosecuted, he may raise the question, and perchance on that ground escape punishment for his perjury. If such failures of justice are a necessity under our jurisprudence is it any wonder that inconsiderate people sometimes show their contempt for its administration by trying to take the law into their own hands?

It is suggested that the general assembly might have provided that an attempt to bribe an acting officer should be a crime, but that it has failed to do so. But is not that exactly what has been done? The same authority which provides punishment for attempting to bribe an officer in one act has said in another act that a city commissioner is an officer. Treating the acts as *in pari materia*, and construing them together, what is lacking?

It seems to be conceded that, on grounds of public policy, one occupying an existing *de jure* office should be regarded an officer *de facto*, although his appointment thereto is pursuant to an unconstitutional statute. Does any reason exist why the same public policy will not require that one occupying, with general acceptance, an office which the general assembly has power to create, should likewise be adjudged an officer *de facto*, although in the exercise of the power by the assembly, constitutional requirements have not been observed? If any such reason does exist certain it is that none has been adduced; but instead the maxim that there can be no *de facto* officer unless there be a *de jure* office is invoked. Summed up in brief, the substantial ground of objection urged against the state's position is that it antagonizes well-known maxims of the law, and is illogical. Maxims, like definitions, have their uses; but it is not wise to rely absolutely on them, for they are often inexact. A discriminating writer has said: "Maxims are attractive because they seem to offer the conclusions of wisdom in a portable form, but legal principles are not capable of definition after the fashion of the exact sciences, because the law is not a science in the scientific sense, and the attempt to express its principles in rules of mathematical precision misleads oftener than it enlightens." It may be added that maxims and aphorisms are among the tritest, not to say cheapest, weapons of legal contests. If one may annihilate an opponent's position by attacking it with

a maxim, or a phrase, the conquest is easy, for the legal quiver is full of them. It is equally easy to assume, as proved, contested propositions, and from them advance with confidence to desired conclusions. This is logic, perhaps, but there are times when logic fails. The law is intended for practical use. By the act in question local governments are erected in the cities coming within the description, and the necessary officers are provided to carry on the government in those localities. On certain officers named is imposed the duty to put the law in operation by appointing the commissioners. As before stated, the law is presumed to be constitutional. Should those officers be expected to go into an inquiry to demonstrate that they have no power to do what the statute directs them to do? At all events, they raise no question but proceed with the duty, and fully equipped city governments result, which the community recognizes, and the property rights of the people, and public order as well, depend upon the acts of such commissioners in the performance of duties imposed by statute. And yet we are told that these proceedings, whenever questioned collaterally, are to be adjudged void, because the statute "creates no office, imposes no duty, confers no right, affords no protection, and is as inoperative as though it had never been passed." The mischiefs and troubles which would follow such a result are against reason, and are so apparent that no enumeration of them is needed.

It would seem plain that the proceeding to challenge such a legislative act should be a direct one to which the officer is a party, so that the judgment of the court may have the direct effect of settling the question permanently, and for the whole world, in such manner as that it could not afterward be made the subject of judicial investigation.

Justice to the judge of the common pleas makes it proper to add that (as appears by his opinion reported in vol. 3, Ohio Legal News, p. 34), he was disposed to adopt, as matter of personal judgment, the view "that the office so created, as long as acquiesced in, could not be impeached by persons recognizing its existence for their benefit until the same had been declared invalid by competent authority," but, inasmuch as the matter would be brought to this court however decided in the common pleas, he thought it more expedient to sustain the demurrer, following the doctrine of *Norton v. Shelby County*, *supra*, as in that event, if concurred in by the reviewing court, that determination would end the case, while if held otherwise by this court the case would go back for correction of errors; which latter inference, it is here suggested, the learned judge would not have drawn had his attention been called to *State v. Granville*, 45 Ohio St. 264. Where it is held that the effect of sustaining exceptions is not to reverse the judgment below, but simply to determine the law to govern similar cases.

Shauck, J., dissenting:

The question considered assumes that the act of March 5, 1891 (88 Ohio Laws, 77), by

which the legislature attempted to create the office of city commissioner of Akron, is unconstitutional.

The substance of the indictment is that Gardner "unlawfully, fraudulently, and corruptly did offer and promise to one Joseph Hugill, he, the said Joseph Hugill, being then and there an officer of the city of Akron . . . to wit, a city commissioner of said city duly appointed, qualified, and acting, . . . a large sum of money, etc."

The crime created by the statute under which the indictment was found is corruptly giving, promising, or offering to an officer anything of value, etc.

Since there are no common-law crimes in this state, we must look to the statutes for their exclusive definition. If it were not averred in this indictment that Hugill is an officer, no one would question the correctness of the ruling below. Notwithstanding that averment, the indictment is fatally defective if, in view of the provisions of the Constitution and the statutes, the averment is, as a matter of law, false. From the assumption that the statute in question is unconstitutional, it results that there is no such legal office as city commissioner of Akron. But the indictment avers that Hugill was acting as such commissioner; and the question presented is whether there can be a *de facto* incumbent of an office that has no legal existence. The decision of this question is required by the demurrer to the indictment, since, if it should be answered in the negative, there is wanting an essential element of the crime defined by the statute.

There are well-considered cases in which it is held that parties to civil actions have become so related to the subject of an unconstitutional enactment that, upon principles of equity, they are estopped to assert its invalidity. But an element of a crime cannot be introduced or established by estoppel.

There are also cases in which it is held that considerations of public policy will not permit one to question the legal existence or right composition of the court before which he is brought to trial. It is not of present importance that the authority of these cases is seriously impaired, for in this case the accused, admitting the existence, composition, and jurisdiction of the court, challenges only the existence of the office whose existence is indispensable to the crime defined by the statute and charged in the indictment.

In numerous cases for reasons entirely consistent with the general rule, it is held that, the office being legally created, its incumbent is an officer *de facto*, although the statute providing for his appointment is unconstitutional. Such a case is *Ex parte Strang*, 21 Ohio St. 610.

Recently by divided courts, and in some cases for reasons which obviously invited dissent, there have been holdings supposed to introduce exceptions to the established rule that there can be no *de facto* officer unless there is a legal office. They are cases of acts ineffectual to establish the office because of an insufficient legislative vote, the invalidity of the acts not appearing from the 31 L. R. A.

repugnancy of their provisions to those of the Constitution, but alone from the legislative journals, and unconstitutional acts to increase the numerical membership of official boards that had been legally constituted. All such holdings disappear from the present view when it is remembered that the Akron act attempted to create an office which did not previously exist, and that the act was ineffectual because it involved the exercise of power which was withheld from the general assembly by the express terms of the Constitution.

The case is therefore within the doctrine of *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, where it is held that there can be no officer *de facto* unless there is a legal office. That case was decided in 1886. The report shows that it was decided after the most careful analysis of previous cases and full consideration of the legal reasons involved in its determination. An examination of the numerous cases cited by counsel in that case will vindicate the language of Mr. Justice Field in the opinion: "Numerous cases are cited in which expressions are used which, read apart from the facts of the cases, seemingly give support to the position of counsel. But, when read in connection with the facts, they will be seen to apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* officer. When an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts is concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. As said by Mr. Justice Manning, of the supreme court of Michigan, in *Carleton v. People*, 10 Mich. 259, 'where there is no office there can be no officer *de facto*, for the reason that there can be none *de jure*.'"

In that case the nothingness of an act which the legislature is denied the power to pass is comprehensively and accurately described: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

This case is referred to by considerate writers as determining the law. Mechem, Pub. Off. §§ 324-327, and Dill, Mun. Corp. § 276. This question is not affected by any local consideration, and a refusal to follow *Norton v. Shelby County* must imply that it was wrongly decided. That conclusion should not be hastily adopted with reference to a unanimous decision of a court so distinguished for learning and ability, even if it did not seem to be supported by satisfactory reasons. But looking to the legal considerations involved, it is difficult to see how any other conclusion could have been reached.

Every view of the substance of things of this character goes beyond the mere form of

an act and considers the constitutional provisions and the power of the general assembly with reference to the subject. The Constitution is not only a part, but the controlling part, of the law which all are presumed to know. It is implied, though not stated, in the view of the majority, that courts possess more than judicial power. For, until they have power not only to declare the law, but to make it, their judgments can neither add to nor detract from the virtue of a legislative act. If a judgment were rendered against Hugill in quo warranto, it would not be because of any defect in his appointment, but because there is no such office as that which he assumes to fill. The judgment would not create that condition. It would only declare a condition which previously existed because of the invalidity of the act. The characterization is admirable because of its accuracy: "The notion that there can be a *de facto* officer without a legally constituted office is a political solecism." This view is in accord with the doctrine of *State v. O'Brien*, 47 Ohio St. 464.

May be the general assembly has power to

make it a felony to attempt to bribe one assuming to exercise the imaginary duties of an office that does not exist, but such case is not within the present statute. The right of an accused person to invoke the provisions of the Constitution to shield him from unlawful punishment cannot be less clear than that so frequently exercised by citizens to protect their property from unlawful taxation.

The misuse of words and phrases is effective to mislead. One who invokes the provisions of the fundamental law for his protection against acts in conflict with it is not subject to any of the doctrines of collateral attack. An unconstitutional act is not a statute. The law-making department authorizes no official acts which the Constitution forbids it to authorize. An act of the general assembly in excess of its power is invested with no solemnity. Law-making power that has been withheld has not been delegated. In a consideration which assumes that an act is unconstitutional, there is no place for the presumption that it is constitutional.

TEXAS SUPREME COURT.

CLARENDON LAND INVESTMENT, & AGENCY COMPANY, Limited, *Plff. in Err.*,

v.

McCLELLAND BROTHERS.

(.....Tex.....)

1. **Failure of instruction to explain** the meaning of a word which might mislead the jury is not ground for reversal if a proper charge upon the subject was not requested.
2. **Knowledge of the owner of cattle that the fence of another person was insufficient** cannot make the former liable for trespass by his cattle passing through such imperfect fence.
3. **Knowledge that cattle are liable to break fences** is necessary in order to make the owner liable in Texas for permitting them to run at large.
4. **The liability of cattle to communicate a disease** cannot be assumed as a matter of law on account of the fact that they came from a particular locality.
5. **The burden** of showing that plaintiff's fence was defective when entered by defendant's cattle cannot be cast upon the defendant in an action of trespass.
6. **A land owner's failure to comply with his duty** to enclose his lands with a fence sufficient to exclude cattle of all sizes and kinds of ordinary disposition as to breaking fences will prevent his recovering any damages resulting therefrom by trespassing cattle.
7. **The owner of cattle is liable** for their communicating a disease to others if he knew or

had good reason to believe that they could communicate it and still let them run at large.

8. **Knowledge of the owner that cattle were breachy**, but without knowledge or good reason to believe that they were liable to communicate disease, will not make him responsible for the effect of such disease actually imparted to the cattle of another person in consequence of their breaking a fence.

9. **Cattle known to be diseased** may be placed by the owner in his own pasture without making him liable for communicating the disease unless he was negligent in the manner of keeping them.

(February 10, 1896.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Donley County in favor of plaintiffs in an action brought to recover the value of certain cattle which were alleged to have been injured and killed by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. W. R. Butler and Matlock & Peacock, for plaintiff in error:

The keeping of cattle upon one's own premises that are liable to impart an infectious disease to the cattle of another upon an adjoining pasture is not unlawful, nor will it give the owner of such adjoining premises a cause of action for damages sustained in consequence of the disease being communicated to his cattle by the entry of such cattle upon his enclosure and mixing and mingling with his cattle, unless the party owning such cattle liable to com-

NOTE.—The liability of the owner of cattle for their trespassing is the subject of a note to Bulpitt v. Matthews (Ill.) 22 L. R. A. 55.

As to the sufficiency of fences to exclude or restrain cattle, see note in 22 L. R. A. 105, to the present 31 L. R. A.

ent case of Clarendon Land, I. & A. Co. v. McClelland Bros. as decided on a former appeal.

For statutory regulations as to infected animals, see note to Grimes v. Eddy (Mo.) 28 L. R. A. 638.

municate such disease knew the fact that they were liable to communicate such disease, and was guilty of negligence in the manner of handling them, and knew at the time that said cattle were so placed in his inclosure that they could pass through the adjoining inclosure and mix with the cattle therein.

Fisher v. Clark, 41 Barb. 329; *Mills v. New York & H. R. Co.* 2 Robt. 326, 41 N. Y. 619; *Walker v. Herron*, 22 Tex. 55; *Gibbs v. Cockendall*, 39 Hun, 141.

A person is not liable for turning ordinary cattle on the range or in his own enclosure, and a person desiring to protect his premises other than such as are protected by Tex. Rev. Stat. arts. 2481, 4609a, from trespass from such cattle must make a fence sufficient to exclude them.

Clarendon Land, I. & A. Co. v. McClelland Bros. 86 Tex. 179, 22 L. R. A. 105.

Messrs. Browning & Madden for defendants in error.

Brown, J., delivered the opinion of the court:

McClelland Bros., the defendants in error, owned a pasture in Donley county, consisting of about 2,000 acres of land, which was inclosed by a wire fence on cedar posts. The fence, however, was not a lawful fence, under the law of this state as applicable to cultivated lands. In the pasture they had cattle of the Shorthorn, Jersey, and Holstein breeds, consisting of full bloods and grades of those breeds. The plaintiff in error, a corporation organized under the laws of Great Britain, owned lands in the same county, which entirely surrounded that of McClelland Bros., and which lands the plaintiff in error inclosed for the purpose of pasturing cattle thereon. In the year 1889 the corporation bought about 4,000 head of yearlings, called by the witnesses "dogies," in Tarrant and other counties east of that, which were placed in the pasture of the corporation. Some of the yearlings passed out of the pasture of the plaintiff in error into that of the defendants in error at different times during that year. After the yearlings were in the pasture of the defendants in error, a number of their fine cattle died from a disease called "Texas fever;" but it does not appear, from the evidence, that the yearlings had the disease at the time. McClelland Bros. sued the corporation for the value of the cattle that died, and for damages to others that had the fever, but did not die, charging that the yearlings of the plaintiff in error were of a breachy character, and that they were liable to communicate the Texas fever to the cattle of the plaintiffs, all of which was alleged to be known to the said corporation or its agents. The corporation answered by general denial, and by special plea to the effect that the plaintiffs' fence was insufficient to turn the cattle of the said corporation, and that the plaintiffs therein were guilty of negligence in not keeping their fence in proper repair. It also denied that the said cattle were breachy in character, or liable to communicate any disease to the plaintiffs' cattle; but, if such were the fact, then it alleged that it did not know of such fact. Trial was had before a

31 L. R. A.

jury, which resulted in a verdict and judgment for the plaintiffs, McClelland Bros., for \$1,748.36, which judgment was affirmed by the court of civil appeals. 31 S. W. 1088.

This case was before this court on writ of error granted to a judgment rendered by the court of civil appeals (21 S. W. 170) affirming a judgment of the district court at a former trial. The report of the case, as decided in this court, will be found in 86 Tex., on page 179, 22 L. R. A. 105. By the opinion of the court, by Justice Gaines, these propositions of law are clearly announced: (1) That the common-law rule, which required every man to restrain his cattle either by tethering or by inclosure, is not in force in this state, and that every owner of land in this state, who desires to exclude therefrom cattle running at large, or in an adjoining pasture, situated as these pastures were, must throw around his own land an inclosure sufficient to exclude all animals, of the class intended to be excluded, of ordinary disposition as to breaking fences or inclosures. (2) It is the right of every owner of domestic animals, which are not known to him to be vicious, mischievous, or diseased, to allow them to run at large, or to occupy his own inclosed lands when adjoining those of another. (3) If the owners of land have around it a fence sufficient to turn cattle of all sizes and kinds, of ordinary disposition as to breaking fences, and the inclosure is entered by cattle which are known to the owners to be vicious, in the sense that they have the habit of breaking into inclosures when the same class of cattle would not ordinarily do so, the owner of such cattle would be liable for such damages, thereby occasioned, as would ordinarily result from such trespass; and if, in addition to the known habits of fence breaking, the owner knows, or has reason to believe, that such cattle would be liable to communicate an infectious disease to others upon coming in contact with them, the owner would be liable, in case of trespass by such cattle by breaking such fence, for the damage occasioned by the communication of such infectious or contagious disease to the cattle belonging to the owner of the inclosure so broken.

Upon the second trial of this case in the district court, the judge gave charges which are deemed to be in conflict with the rules of law announced in the former opinion, of which charges plaintiff in error complains, in its application for writ of error herein. We think the use of the word "ordinary," in its connection with other language in the third charge, as given by the court, was calculated to mislead the jury; yet, if the defendant desired it explained, it should have asked a proper charge upon the subject. The second special charge requested by the defendant, and refused by the court, was properly refused, because it assumed that the plaintiffs' fence was defective, and no other charge was asked which tended to explain the word "ordinary" as used in the third paragraph of the charge of the court. The second charge given by the trial court reads as follows: "You are instructed, under the law applicable to this case, that if the cattle of

one person wander from the owner's range or pasture upon the uninclosed or imperfectly inclosed lands of another, they are not trespassers; and the owner is not liable for any damage they may inflict, unless such owner knew that the cattle could pass through such inclosure, and that they were likely to communicate disease to the cattle of the person whose inclosure they might enter." The same proposition is announced in the fifth and sixth charges of the court, which make an application of the principle announced in the second charge to the particular facts of the case. The effect of these charges was to instruct the jury that if the plaintiffs' lands were imperfectly inclosed,—that is, if the fence around them was not sufficient to keep out cattle of ordinary disposition as to fence breaking,—and if the owner of the cattle knew that the fence was imperfectly constructed, then the owner of such cattle would be liable for damages which might be occasioned to the plaintiffs' cattle by reason of their passing through the imperfect fence of the plaintiffs. In other words, a man who owns land, and has around it a fence which is insufficient to exclude from his premises the cattle of his neighbors, can by giving notice, to such neighbors of the imperfect condition of his own fence, cast upon them the burden of restraining their stock from running at large upon the range, or, as in this case, from permitting the cattle to occupy the pasture lands of the defendant, and to render the defendant in this case liable for damages which might have been committed upon the plaintiffs' land by reason of the defective condition of the plaintiffs' fence, because of the fact that the owner of the cattle had notice of the defects in the fence. If such a proposition were correct, as a matter of law, then it would change the rule as announced in the opinion of this court, which is well sustained by authorities in this state, to the effect that the owner of cattle may permit them to run at large without restraint, and that it devolved upon the owner of other land to exclude them by a sufficient fence thrown around such lands. Under this rule, thus announced by the court below, the plaintiffs might be permitted to avoid the consequences of their own negligence in failing to erect a proper fence, and visit the consequences of that negligence upon the defendant, simply because it had notice of the bad condition of their fence. The proposition does not admit of argument. It is too plainly contrary to the law to require argument to refute it.

The third charge, as given by the trial court, reads as follows: "The owner, however, of a pasture which has an inclosure sufficient to prevent the entry of all ordinary animals of the class intended to be excluded, is entitled to recover damages from the owner of stock running at large upon the adjacent range or pasture that forcibly break through such inclosure, if such stock are of the class intended to be excluded, and the entry would not have been made but for the vicious, breachy, or fence-breaking character of such animals, or when such stock, by their entry, communicated disease, or otherwise damaged

stock of the owner of the inclosure; and in such case the owner of the inclosure would be entitled to recover the damages so sustained by him, notwithstanding the owner of the stock so trespassing may not have known of the breachy or fence-breaking character of the stock, and their liability to communicate disease." This charge is in substance repeated in the seventh charge given by the court, and is therein applied to the facts of this case. In effect, the court charges the jury that, if the plaintiffs had a fence around their pasture sufficient to turn or exclude therefrom cattle of the kind owned by the defendant, of ordinary disposition as to fence-breaking, and if the defendant's cattle were vicious and breachy, or fence-breaking in character, and by reason of such character entered the inclosure of the plaintiffs, and thereby communicated disease to the plaintiffs' cattle, the defendant would be liable for such damages, although it neither knew of the disposition of its cattle to break the fences, or their liability to communicate disease to the plaintiffs' cattle. This proposition is in direct conflict with the former opinion of this court, in which it was said: "It is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or breachy, to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. For these reasons, we think there was error in the charge complained of, for which the judgment must be reversed." We cannot conceive of language which would more definitely express a proposition of law at variance with the charge as given by the court than that quoted above. If the owner, of the stock in this case had permitted them to run at large upon his lands, and such lands had been uninclosed instead of being inclosed, as they were, then, under the proposition stated in the opinion as quoted above, in order to render it liable for damages on account of their breaking through the inclosure of the plaintiffs, it would be necessary for the plaintiffs to show that the defendant knew, or had reason to believe, that such cattle were vicious or breachy, and were liable to communicate the disease to plaintiffs' cattle. Under the charge given by the court, all that was necessary for the plaintiffs to prove, in order to establish their right, was that they had a fence sufficient to turn cattle of the kind owned by the defendant, if they were of ordinary disposition, and that defendant's cattle were breachy, which would cast upon the defendant liability for the result of such breaking, whether it knew of such habits or the existence of the disease communicated or not.

In the fifth charge, the court, in effect, instructed the jury that, if the defendant had reason to believe that its cattle were liable to communicate disease to the plaintiffs' cattle from the fact that they were driven from a certain locality, then the defendant would be liable for the result of their communicating such disease. At the time of this transaction there was no law which forbade persons to drive cattle from one portion of the state to another, and we do not believe that

it can be assumed, as a matter of law, that the cattle driven from one section of the state to another are liable to communicate any disease to cattle in the section to which they are driven. This would be a matter of proof, and the question as to whether the locality from which they were driven would operate as notice to the persons buying and driving them of their liability to communicate such disease would depend upon the evidence as to whether or not the facts known to defendant were such as to have the effect of notice, or whether it was known, as a fact, by the persons so purchasing and driving them. This part of the charge, we think, was upon the weight of the evidence and should not have been given.

The eighth charge given by the court is not complained of in this court; but, in view of the fact that this case must be reversed, we deem it proper to call attention thereto, in order that it may not be again repeated, and furnish ground for complaint in the future. It is as follows: "If you find, from the evidence, that the cattle of the defendant company did enter the inclosure of the plaintiffs and did communicate the disease to plaintiffs' cattle, in order to excuse the defendant on account of the negligence or carelessness of the plaintiffs in permitting their inclosure to remain in a defective condition, or their gates to be left open, it is incumbent upon the defendant, upon this issue, to establish such negligence on the part of the plaintiffs by a preponderance of the testimony upon said issue, and show that said negligence on the part of the plaintiffs was the cause of the damage, if any, resulting to the plaintiffs." This cast upon the defendant the burden of showing that the fence of the plaintiffs was in a defective condition when entered by the defendant's cattle; whereas, the plaintiffs' right of action depends upon the fact that they had a fence sufficient to turn cattle of ordinary disposition, and that the defendant's cattle were of a vicious or breachy character, and so known to be by the defendant. The burden of proof was upon the plaintiffs to establish their case throughout, and did not shift to the defendant under any circumstances; and the above charge, which has the effect to cast the burden upon the defendant, was improperly given by the court.

It was the duty of the plaintiffs, under the facts of this case, to inclose their lands with a fence sufficient to exclude therefrom cattle of all sizes and kinds, of ordinary disposition as to breaking fences; and, if they did not have such a fence, they cannot recover for any damages occasioned by the entry of defendant's cattle upon their land, because the entry and the damages would be the result of their own negligence. *Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814. If the plaintiffs' fence was sufficient to turn cattle of ordinary disposition, and defendant's cattle were, to an extent more than usual with such stock, disposed to break through fences, if this was known to the defendant or its servants, and by reason of that disposition the cattle broke into plaintiffs' inclosure, defendant would be liable for such damages as would usually

arise from such trespass; and if the defendant's cattle, so entering, were liable to impart to others a disease, by contact and association with them, and defendant knew this, or had good reason to believe it to be true, then it would be liable for the effects of such disease, if communicated by its cattle entering the plaintiffs' pasture under the circumstances stated. If, however, the defendant did not know of the vicious or fence-breaking character of its cattle, and had no knowledge of circumstances sufficient to charge it with notice thereof, it would not be liable for damages occasioned by such an entry into the plaintiffs' land. *Vrooman v. Lawyer*, 13 Johns. 339; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Rep. 346. If the defendant knew that its cattle were unusually disposed to break fences, but did not know, and had no good reason to believe, that they were liable to communicate disease to others, it would not be responsible for the effect of such disease actually imparted to the plaintiffs' cattle by such a breaking of their fence. *Cooley, Torts*, p. 403; *Coyle v. Conway*, 35 Mo. App. 490; *Patee v. Adams*, 37 Kan. 133.

Mr. Cooley, in his work on Torts, in treating of this subject, says: "But there are other mischiefs which may be committed by domestic animals that one is under no obligation to anticipate and guard against, because they are not the result of a general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. Thus, though every horse will roam into neighboring fields if not restrained from doing so, it is only in rare and exceptional cases that a horse will attack and injure those who come near him. Therefore, while the owner should anticipate and protect against trespasses on lands by his horses, he is under no moral obligation to anticipate that a horse in which no such disposition has been discovered will suddenly make an assault upon and kick and bite some passer-by who chances to come within his reach. For this reason the keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him, and which it would not be negligence in the keeper to fail to guard against." We are aware that Mr. Thompson, in his work on Negligence (vol. 1, p. 206, § 21), and Shearman & Redfield in their work on the same subject (§ 639), assert the contrary doctrine as to diseased stock, and there are cases in the reports of some states to the same effect; but we believe that the doctrine announced by Mr. Cooley is supported by the better reason. The cases of *Coyle v. Conway*, and *Patee v. Adams*, cited above, bear more directly upon this question, involving the liability of the owner for the communication of the same character of disease as in this case.

It was lawful for defendant to place its cattle in its own pasture, even if known to be diseased, and it would not be liable unless negligent in the manner of keeping them. *Fisher v. Clark*, 41 Barb. 829; *Walker v. Herron*, 22 Tex. 55; 1 Am. & Eng. Enc. Law, p. 585. We can see no reason why the owner

of stock afflicted with an unknown latent disease should be liable for its communication to others, any more than if the same animal had an unknown vicious habit which caused an injury. The ground of liability is that the party to be charged has been guilty of negligence in permitting the animal diseased or of vicious habits to go upon the land of another party, and there to inflict an injury, because the care to be exercised must be commensurate with the danger. If there be no knowledge of the existence of a disease, how could there be negligence in reference thereto? If the negligence of permitting the horse to stray upon the land of another unlawfully will not render the owner liable for an injury inflicted by it while thus trespassing, because of the fact that the vicious habits from which the injury arose are unknown to the owner, then how can it be said that

the owner of the diseased animal which commits a like trespass is to be held liable for the damages arising from its diseased condition, when he knew nothing of that condition, and was guilty of no negligence in reference thereto? We think the rule laid down by Mr. Cooley is applicable to both classes of cases, and should govern in this case. The district court erred in giving the charges as hereinbefore indicated, and the court of civil appeals erred in not sustaining the assignments of error thereto, and reversing the judgment; for which reason *the judgments of both the said courts are hereby reversed*, and this cause is remanded for further trial, in accordance with this and the former opinion of this court.

Rehearing denied.

INDIANA SUPREME COURT.

James L. EVANS, Guardian, etc., of Frederick L. Evans, *Appt.*

v.

CONSUMERS' GAS TRUST COMPANY.

(.....Ind.)

I. A provision in an oil and gas lease that it shall be null and void on failure of the

lessee to perform his agreement is no defense to him for breach of his agreement, but merely gives the lessor an option to declare it void for that reason.

2. An agreement to furnish pipes, fixtures, and plumbing for supplying the lessor's house, included in a lease for oil and gas purposes, and to leave the pipes and fixtures if the well ceases to be a paying one, must be

NOTE.—Forfeiture of oil and gas lease.

Most of the leases for prospecting for oil and gas contain clauses for forfeiture in case work is not prosecuted with diligence.

In one case it was held that to enable a lessor to declare and enforce a forfeiture the right to do so must be distinctly reserved. *Thompson v. Christie*, 138 Pa. 230, 11 L. R. A. 236.

But in *Ohio Oil Co. v. Harris*, 1 Ohio Dec. 157, it is held that the lessee in an oil lease must fully and reasonably develop the territory leased and also protect the same from wells on adjoining lands, and in case the lessee fails to do so a court of equity will take jurisdiction and to the extent of the lands on which there are no wells will declare the lease forfeited and permit the lessor to enter and drill thereon. And it has also been held that although the lease does not provide for any forfeiture if the lessee neglects to proceed for an unreasonable time, it may amount to an abandonment of his rights. *Barnhart v. Lockwood*, 152 Pa. 82.

Manner of enforcing forfeiture clause.

The party entitled to enforce the forfeiture must exercise the right promptly and the result of enforcing the forfeiture must not be unconscionable. *Thompson v. Christie*, 138 Pa. 230, 11 L. R. A. 236.

If the lease contains a clause of forfeiture but no clause of re-entry for such forfeiture, demand and re-entry are not the only mode by which the landlord may enforce the forfeiture. *Guffey v. Hukill*, 34 W. Va. 49, 8 L. R. A. 750.

In case the lease provides that if a well is not sunk within a specified time the lease will become void, if the lessor remains in possession for the purpose of cultivating the land, it is not necessary for him to enter in order to enforce the forfeiture, but he may do so by executing a lease to a third person. *Alleghany Oil Co. v. Bradford Oil Co.* 21 Hun. 26, Affirmed 86 N. Y. 638.

31 L. R. A.

A notice by a lessor in possession to the lessee, that the lease is forfeited, is substantially a declaration that he will refuse to give lessee possession of the land. *Carnegie Nat. Gas Co. v. Philadelphia Co.* 158 Pa. 317.

If, after the time has expired on the first lease and a second lease has been given to a third person and expired, the first lessee takes possession with the consent of the lessor, and at great expense produces oil in paying quantities, the holders of the second lease cannot maintain an action under their lease for possession of the premises. *Thomas v. Hukill*, 34 W. Va. 385.

Waiver.

The right of a lessor in an oil lease to insist upon a forfeiture by reason of a failure to put down the first well within the stipulated time is waived by his acquiescence in the failure to put down two or three of the preceding wells within the times stipulated in the lease. *Duffield v. Hue*, 129 Pa. 94.

A waiver of the time within which operations shall commence is not necessarily a waiver of the time for completion. *Cleminger v. Baden Gas Co.* 150 Pa. 16.

So, in that case it was held that if the lessee covenants to commence operations or forfeit the lease within sixty days, and to complete a well in five months, the lessor may forfeit the lease after the expiration of five months if a well has not been completed within that time, although the commencement of the well within the sixty days was not insisted upon.

Estoppel.

If oil has been found in paying quantities and the lessee has expended large sums of money with the knowledge of the lessor, the latter will not be permitted to forfeit the lease for an inadvertent failure to pay the rent for six days after it becomes due. *Lynch v. Versailles Fuel Gas Co.* 165 Pa. 518.

construed to apply only if gas is obtained by the lessee.

(December 18, 1891.)*

APPEAL by plaintiff from a judgment of the Circuit Court for Hamilton County in favor of defendant in an action brought to enforce payment of the amount alleged to be due under certain oil and gas leases. *Reversed.*

The facts are stated in the opinion.

Messrs. Shirts & Vestal for appellant.

Messrs. R. N. Lamb, Ralph Hill, and Robert Graham, with *Messrs. W. P. Fishback and W. P. Kappes*, for appellee:

If the court declines to hold the instruments to be of the nature of licenses or options it should undoubtedly hold that for the period of ninety days there was an estate for years—not from year to year.

Washb. Real Prop. 5th ed. p. 465; *Brown v. Bragg*, 22 Ind. 122; 6 Am. & Eng. Enc. Law, p. 884, note 2, p. 985; *Shaw v. Hoffman*, 25 Mich. 162.

Where one person holds lands or tenements under a demise from another, and no certain term has been mentioned, but an annual rent has been reserved, it constitutes a tenancy from year to year. It is a general letting without limitation as to time.

12 Am. & Eng. Enc. Law, p. 675.

*A petition for rehearing was filed in this case but before final judgment upon it the case was settled and by stipulation of counsel was dismissed from the docket [Ed.]

How forfeiture clause regarded.

Forfeiture for nondevelopment is essential to private and public interests. Although equity abhors a forfeiture it does not do so where it works equity and protects a land owner from the laches of a lessee whose lease is of no value until developed. *Munroe v. Armstrong*, 96 Pa. 307.

Forfeitures are to be strictly construed. Where a lease provides that it shall be forfeited if any of the payments provided for are not made, a whole payment is meant and not a balance on a running account. *Westmoreland & C. Nat. Gas Co. v. DeWitt*, 180 Pa. 235, 5 L. R. A. 731.

If the lease provides for prosecution to success or abandonment with due diligence, and for a forfeiture in case oil is not excavated in paying quantities on or before a certain day, the mere striking of oil will not avoid the forfeiture in case it is not brought to the surface so as to be made available. *Kennedy v. Crawford*, 138 Pa. 561.

Inability to secure workmen because of the extreme cold weather, and consequent failure to complete the well within the time specified, are not sufficient to prevent a forfeiture. *Cryan v. Riddelsperger*, 7 Pa. Co. Ct. 473.

If the lessee covenants to commence operations so as to complete the first well within six months or thereafter within sixty days remove all machinery and buildings from the premises, and that the lease shall be declared null and void unless further prosecuted after the first well is drilled, the lease will be void if after the first well is drilled no further operations for mining purposes are prosecuted on the land during several years. *Heintz v. Shortt*, 149 Pa. 286.

If the place of the location of the well is fixed, the timbers provided, the contract let, and the machinery ordered within the time, the mere fact that the impassable condition of the roads prevents the hauling of the machinery to the place where it is to be used until after the expiration of the time 31 L. R. A.

The statute providing for estates from year to year contemplates only cases where the premises are actually occupied by the tenant.

Rev. Stat. 1881, § 5208.

Where a demise is for a term of years at an annual rental, and the tenant holds over, paying the agreed rate, he is a tenant from year to year.

12 Am. & Eng. Enc. Law, p. 676; *Ross v. Schneider*, 30 Ind. 423; *Bright v. McQuat*, 40 Ind. 521; *Thiebaut v. First Nat. Bank*, 42 Ind. 212; *Burbank v. Dyer*, 54 Ind. 392; *Tolle v. Orth*, 75 Ind. 298, 39 Am. Rep. 147; *Montgomery v. Hamilton County Comrs.* 76 Ind. 362, 40 Am. Rep. 250; *Coomler v. Hefner*, 86 Ind. 103.

The provision for payment or obligation to pay was in effect a description as to how the lessee might procure a longer time. It was a privilege of which lessee might only avail itself by an affirmative act or by holding over.

The stipulation "first parties (the plaintiff) to locate all wells," is a condition precedent to be performed by the plaintiff before he has any right of action.

5 Am. & Eng. Enc. Law, pp. 527, 528; *Shirley v. Shirley*, 7 Blackf. 455; *Stewart v. Ludwick*, 29 Ind. 232; *Huff v. Laylor*, 45 Ind. 80; *Summers v. Sleeth*, Id. 598; *Vankirk v. Talbot*, 4 Blackf. 367; *Wilson v. Dale*, 16 Ind. 399; *Benjamin, Sales*, § 756.

McBride, J., delivered the opinion of the court:

The complaint in this case is in eight para-

limited for the commencement of the operation will not justify a forfeiture. *Fleming Oil & Gas Co. v. South Penn Oil Co.* 37 W. Va. 645.

In case the lease is forfeited for failure to procure oil the lessees are not entitled to be compensated for the cost of the well although gas is obtained in paying quantities. *Palmer v. Truby*, 138 Pa. 556.

Relief from the forfeiture will not be given in equity upon tender of the monthly rental which is not paid if the principal thing was the neglect to sink the well which cannot be compensated for in damages. *Hukill v. Guffey*, 37 W. Va. 425.

Absence of obligation clause.

If the lease contains no covenant on the part of the lessee to pay rent or develop the mines, but merely provides that the lease shall become null and void and all rights cease unless a well shall be completed on the premises within a specified time or unless the lessee shall pay rent at a certain rate a month in advance, the failure to explore for oil or gas will merely forfeit the lease and not impose any liability on the lessee. *Glasgow v. Chartiers Oil Co.* 152 Pa. 48, *Affirming Glasgow v. Griffith*, 22 Pittsb. L. J. N. S. 181.

Effect of alternative provision for rent.

An alternative provision for payment of rent in case operations are not begun within the specified time does not abrogate the provision for forfeiture, but such provision may be enforced at the lessor's option in case the operations are not begun and the rent not paid. *Brown v. Vandergrift*, 80 Pa. 142.

Who may set up forfeiture.

EVANS V. CONSUMERS' GAS TRUST CO. announces the general rule that the lessee cannot take advantage of his own default. This rule had been settled in cases of ordinary mining leases before it was applied to oil and gas leases.

graphs, each based on a separate written contract, which is made a part of the pleading. The several contracts, except the first, are alike, save as to the time within which they are to be performed. The circuit court sustained a separate demurrer to each paragraph, on the ground that it did not state facts sufficient to constitute a cause of action, and this ruling is assigned as error. Its correctness depends upon the construction to be placed upon the contracts which are the foundation of the action.

The contract counted upon in the second paragraph, and which, as above stated, is precisely like those set out in all but the first paragraph, except as to the time of performance, is as follows:

"This agreement, made and entered into this 1st day of December, A. D. 1887, by and between J. L. Evans, guardian of Frederick L. Evans, of the county of Hamilton and the state of Indiana, of the first part, and Consumers' Gas Trust Company, Indianapolis, Indiana, parties of the second part, witnesseth, that the said parties of the first part for the consideration of the covenants and agreements hereinafter mentioned have granted, demised, and let unto the parties of the second part, their heirs or assigns, for the purpose and with the exclusive right of drilling and operating for petroleum and gas, all that certain tract of land situate in Noblesville township, Hamilton county and state of Indiana, bounded and described as follows, to wit:

"Being the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 25, T. 19, R. 4 E. containing 20 acres, be the same more or less, together with the

right of using sufficient water therefrom necessary to the operation thereof, the right of way over said premises, the right to lay pipes to convey oil and gas produced on this territory, and the right to remove any machinery or fixtures placed on said premises by the party of the second part.

"The parties of the first part are to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said mining purposes.

"The party of the second part, his heirs or assigns, are to have and to hold the said premises for and during the term of ninety days from the date hereof, and as much longer as oil or gas is produced or found in paying quantities thereon.

"In consideration of said grant and demise, the said parties of the second part agree to give or pay to the said parties of the first part the full equal one-eighth part of all the petroleum or rock oil produced or found on the said premises, and to deliver the same, free of expense, into tanks or pipe lines to the credit of the first parties. And should gas be found in sufficient quantities to justify marketing the same, the consideration in full to the parties of the first part shall be \$250 per annum for the gas from each well so long as it shall be sold therefrom. It is further agreed that the parties of the second part shall complete a well on the above described premises within ninety days from the date hereof, and in case of failure to complete such well within such time, the parties of the second part agree to pay to the parties of the first part for such delay a yearly rental of \$250 on the premises herein leased

A lease of a coal mine providing for a forfeiture in case the lessee ceased to work the mines for a certain length of time does not make such cesser work an absolute forfeiture but only at the option of the lessor, and he may recover the rent until he declares the forfeiture. *Doe, Bryan, v. Bancks*, 4 Barn. & Ald. 401.

If a mining lease provides that in case the mines should not be worked the lease will be void, the word "void" means voidable at the election of the lessor, and it will be necessary for him to do some act evincing an intention to avoid the lease in order to have it determined. *Roberts v. Davey*, 4 Barn. & Ad. 684, 1 Nev. & M. 443.

If the lease provides that the lessee shall begin work within a specified time or pay the lessor a certain sum per day "then all the provisions of this lease shall be accorded" to the lessee during the payment of such sum, the mere failure to pay the amount on the first day it becomes due does not forfeit the lease in favor of the lessee. *Sbettler v. Hartman*, 1 Pennyp. 279.

A clause providing for a forfeiture in the event of a default is not self-operating so as to make the forfeiture take place *ipso facto* upon the occurrence of the default. *Westmoreland & C. Nat. Gas Co. v. DeWitt*, 180 Pa. 235, 5 L. R. A. 731.

In case the lease provides for the development of a well within a certain time or in case of failure the payment of a certain amount within a designated time thereafter and in default of either the lease shall be void, the neglect of both will not absolve the lessee from his obligation, but merely gives the lessor power to nullify the lease and sue for the compensation provided for failure to develop the well. *Galey Bros. v. Kellerman*, 123 Pa. 491; *Ray v. Western Pennsylvania Nat. Gas Co.* 138 Pa. 576, 12 L. R. A. 290; *Springer v. Citizens' Nat. 31 L. R. A.*

Gas Co. 145 Pa. 430; *Cochran v. Pew*, 150 Pa. 184; *Liggett v. Shira*, Id. 350; *Smiley v. Western Pennsylvania Nat. Gas Co.* 27 W. N. C. 238.

And that result is not changed by the fact that after the words making the lease void for failure to carry out its provisions the lease continues, "and can only be renewed by mutual consent." *Jones v. Western Pennsylvania Nat. Gas Co.* 146 Pa. 204.

Nor by the addition of the clause "and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained." The court held that the words "after such failure" referred to the continued failure to make the payment after it became due, and that the right of action to recover it was therefore not affected. *Leatherman v. Oliver*, 151 Pa. 646; *Conger v. National Transp. Co.* 165 Pa. 561.

But in *Van Voorhis v. Oliver*, 22 Pittsb. L. J. N. S. 114, a clause that "no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained" was held to give the lessee the option to put down the well or not as he thought best without liability for failure to do so.

The lease gives the lessor the option either to declare the forfeiture or to affirm the continuance of the contract, and if he does not choose to avail himself of the forfeiture it cannot be set up by the lessee as a defense to the action on the lease by the lessor. *Wills v. Manufacturers' Nat. Gas Co.* 130 Pa. 222, 5 L. R. A. 603; *Ogden v. Hatry*, 145 Pa. 640; *Phillips v. Vandergrif*, 146 Pa. 357.

Following the forfeiture clause by the words the lessee "having the option to drill the well or not or pay said rental or not as he may elect" does not give him the option to refuse to do both. *McMillan v. Philadelphia Co.* 159 Pa. 142. H. P. F.

from the time for completing such well as above specified until such well shall be completed. The said yearly rental amounting to \$250 shall be deposited to the credit of the parties of the first part in the Citizens' Bank of Noblesville, or paid direct to said first parties. And a failure to complete such well or to make such deposit or payment as above or hereinafter mentioned, shall render this lease null and void and to remain without effect between the parties hereto.

"It is also provided that no wells shall be drilled upon — acres surrounding the present buildings on said premises, and that the parties of the first part may have gas to heat and light said buildings when there is a surplus of gas on said premises after enough to run machinery of second party.

"It is further agreed that the second parties shall pay all damages done to growing crops, or otherwise, by reason of said operations; the well to be tested and accepted or rejected within ten days after the completion of the same, and if accepted to be paid for annually in advance as above provided; first parties to locate all wells. Should second party forfeit this lease the county recorder is authorized, upon demand of the first parties, to release the same from record. All pipes and pipe lines to be laid below plow depth, so as not to interfere with tiling.

"It is understood between the parties to this agreement that all the conditions between the parties hereunto shall extend to their heirs, executors, and assigns. In witness whereof," etc.

The construction given to the contract by the appellee, and which seems to have been adopted by the court below, is thus stated by counsel.

"Appellee contends that a proper construction of the leases gives it the option to avail itself of the benefits of the contract or not, as it pleases; if it fails to avail itself according to the terms of the contract and within the time limited, the right to do so expires and the contract becomes a nullity." Also, that the contracts are not properly leases, but "merely contracts between the parties for the doing of certain things and the payment of certain sums of money," with the remarkable and peculiar feature of a contract that the entire failure of one party to perform not only forfeits his rights under it, but relieves him of liability. This is the effect, the appellee insists, of the provisions of the contract that a failure to complete such well or to make the deposit or payment as stipulated, should render the lease null and void, and to remain without effect between the parties."

We cannot approve of this construction. In our opinion the instrument is a lease, and creates a tenancy from year to year. 1 Washb. Real Prop. 5th ed. p. 33 (marg. note p. 382); Rev. Stat. 1881, § 5208.

It is, however, not material whether it be regarded as a lease or not. Whether it be regarded as a lease, a license, or a mere option, that construction is unsound. By its terms the absolute and exclusive right of entry and possession is given for the period of ninety days for the purpose of drilling and operating for 81 L. R. A.

petroleum and natural gas, with the power to continue the same indefinitely.

While the lessor is privileged to "use and enjoy" the premises for the purposes of tillage, such use and enjoyment are subordinated to the necessities of the "mining purposes" of drilling and operating for petroleum or natural gas and of the right of way over the premises. The consideration for the exclusive rights thus given is expressed in the clear and unequivocal agreement that the lessee shall drill and complete a well on the premises within ninety days, or in case of failure so to do shall pay a yearly rental of \$250 from the expiration of the ninety days until such well shall be completed.

No time is fixed for the payment of the annual rent except when a well is completed and accepted. It would, therefore, not be due where the lessee failed to drill and complete a well until the end of the year. *Watson v. Penn*, 108 Ind. 21; *Elmer v. Sand Creek Trp.* 38 Ind. 56; *Raymond v. Thomas*, 24 Ind. 476.

It could not be known, until the expiration of that time, whether or not the lessee would make default. Therefore the failure to drill a well within the time limited would of itself operate to continue their rights a year longer. For a year and three months the lessee would possess the rights enumerated in the contract, and then by a mere failure or refusal to perform would not only deprive himself of the further enjoyment of these rights, but at the same time and in the same manner absolve himself from the alternative liability of paying the rental.

It is, of course, our duty to construe and give effect to the contract actually made by the parties, and not to make a contract for them. In construing it, however, it is also our duty to give effect to all of its provisions if possible, and to consider it as mutually binding upon the parties. Such construction as that contended for by the appellee destroys utterly its mutuality.

The supreme court of Pennsylvania has had occasion to construe leases or contracts of a similar character, and has reached a conclusion in which we fully concur, holding that the stipulation that the failure of the lessee to perform shall render the lease void is inserted wholly for the benefit and protection of the lessor, and that it is optional with him to avail himself of it. *Wills v. Manufacturers' Nat. Gas Co.* 190 Pa. 222, 5 L. R. A. 603; *Galey Bros. v. Kellerman*, 123 Pa. 491.

In *Galey Bros. v. Kellerman*, *supra*, it is said: "The lessees had the right to enter at any time during the eight months and either drill a well, or make the stipulated payment. If they did neither, within the time limited, their right of entry was extinguished and the contract itself was at an end. But the acts that forfeited their rights did not also forfeit those of the lessor. Their liabilities growing out of their nonperformance are to be distinguished from their rights under the contract. The latter they could forfeit, but the former belonged to the lessor, and could be lost only by his act. The lessees promised to complete one well within a given time. This was for the benefit of the lessor. If this was not done he was to be compensated in money. If the money

was not paid he was at liberty to rid himself of his tenants and resume the possession of his land. But the construction contended for by the plaintiffs in error transfers the punishment for the breach of the contract from him on whose default "it arises to the innocent injured party."

The contract upon which the first paragraph counts is in many particulars substantially like the others, but in some material matters it differs from them. We quote those portions in which material differences exist.

"It is further agreed that the parties of the second part shall complete a well on the above-described premises within fifty days from the date thereof. And a failure to complete such well or to make such deposit or payment as above or hereinafter mentioned shall render this lease null and void, and to remain without effect between the parties hereto.

"It is also provided that no wells shall be drilled upon 5 acres surrounding the present buildings on said premises, and that the party of the first part may have gas to heat and light said buildings, and what is needed for farm purposes, including lawn burners. It is further agreed that second parties shall pay all damages done to growing crops or otherwise by reason of said operations, the well to be tested and accepted or rejected within ten days after the completion of the same, and if accepted to be paid for then and annually thereafter in advance, to be deposited to the credit of the first parties in the Citizens' Bank at Noblesville, or to be paid direct to said first parties. Second parties to furnish all pipes and fixtures to plumb first parties' house, first parties to locate all wells.

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns. Should this well cease to be a paying well, the parties of the second part agree to leave all pipes and fixtures free of cost for the use of first parties. Should second parties forfeit this lease the county recorder is authorized, upon demand of the first parties, to release the same from record. All pipes and pipe lines to be laid below plow depth so as not to interfere with tiling."

It will be observed that this contract contains no agreement for the payment of rent during the period of delay in drilling a well, while it contains substantially the same stipulation that a failure to complete the well or to make payment shall render the lease "null and void." Unlike the other contracts, also, the stipulation in this that the lessor shall have gas to heat and light the buildings is not qualified by the proviso that there is a surplus of gas on

the premises after enough is used to run the machinery, but is apparently an absolute, unconditional agreement to furnish gas for such purposes as well as for farm purposes, including lawn burners. It also contains an agreement that the lessee shall furnish all pipes and fixtures to plumb the lessor's house, and that if the well ceases to be a paying well, the pipes and fixtures shall be left for the use of the lessor, without cost. The appellant construes this as an absolute agreement to furnish gas in any event whether gas is found on the premises or not, and also as an equally absolute promise to furnish pipes and fixtures and plumb the house. In this he is mistaken. A fair and just construction of the contract requires that all of its provisions be construed together and with reference to each other. Thus construed, we think the lessees only undertook to furnish gas and pipe and fixtures for plumbing in case they discovered and obtained gas from the well to be drilled.

This paragraph is not for the recovery of rent, but seeks to recover damages for failure of the appellee to drill a well.

The complaint alleges that the land leased "is situated in the midst of the paying gas field of said county, a number of the best producing wells in said county having been drilled in the vicinity thereof, and that, had the defendant drilled the well on said premises, as provided for in said lease, the same would have been a paying well, worth at said contract price \$250 per annum. But the plaintiff alleges that although the defendant accepted said lease and retained said property until long after the expiration of said term, it has failed and refused to drill the well on said premises as required by said lease, has failed and refused to furnish gas for said premises, pipe and fixtures to plumb the residence thereon, which said pipe, fixtures and plumbing are of the value of \$100, and the said gas privilege of the value of \$50 per annum," etc.

What we have said of the provision in the other contract, that the failure of the lessee to perform should render it void, applies equally to this contract. It is averred as a fact that if the lessee had drilled a well gas would have been found, and it would have been a "paying well." The fact thus averred may not be susceptible of proof, but if so it is not within the scope of judicial knowledge to so declare. Even if it cannot be proved, we think the other facts averred are sufficient to entitle the appellant to nominal damages at least.

The court erred in sustaining each of the several demurrers.

Judgment reversed, at the costs of the appellee.

SOUTH CAROLINA SUPREME COURT.

Ex parte KEELER.

(.....S. C.....)

1. **Release from imprisonment for contempt of court cannot be obtained by habeas corpus unless the proceedings in which the person was adjudged guilty of contempt are null and void, in whole or in part.**
2. **A summary proceeding for a restraining order against carrying on a business declared by the legislature to be a common nuisance is not a case within the scope of the constitutional guaranty of the right of trial by jury.**
3. **A fine of not less than \$200 nor more than \$1,000, and imprisonment for not less than ninety days nor more than one year, for violation of a restraining order under the dispensary act of 1891, § 22, is not within the constitutional provision against excessive fines or cruel and unusual punishments.**
4. **Appearing and answering as to the merits on a charge of contempt will prevent any attack for lack of jurisdiction of the person on a decision that the party is in contempt.**

(January 30, 1896.)

PETITION for a writ of habeas corpus to obtain the release of petitioner from the South Carolina penitentiary to which he had been committed for violation of the liquor law. *Dismissed.*

The section of the law upon which the conviction depended is as follows:

"Sec. 22. All places where alcoholic liquors are sold, bartered, or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking alcoholic liquors as a beverage, or where alcoholic liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances; and any person may go before any trial justice in the county and swear out an arrest warrant on personal knowledge or on information and belief, charging said nuisance, giving the names of witnesses against the keeper or manager of such place and his aids and assistants, if any; and such trial justice shall direct such arrest warrant either to the sheriff of the county or to any special constable commanding said defendant to be arrested and brought before him to be dealt with according to law, and at the same time shall issue a search warrant in which the premises in question shall be particularly described, commanding such sheriff or constable to thoroughly search the premises in question and to seize all alcoholic liquors found thereon, and dispose of them as provided in § 33, and to seize all vessels, bar fixtures, screens, bottles, glasses, and appurtenances apparently used or suitable for use in retailing liquors, to make a complete inventory thereof, and deposit the same with the sheriff.

NOTE.—For compulsory reference as a denial of the constitutional right to a jury, see *note to Steck v. Colorado Fuel & I. Co.* (N. Y.) 25 L. R. A. 67.

For right to jury in quo warranto, see *note to Buckman v. State, Spencer* (Fla.) 24 L. R. A. 806.

L. R. A.

That under the arrest warrant the defendant shall be arrested and brought before such trial justice, and the case shall be disposed of as in case of other crimes beyond his jurisdiction, except that when he commits or binds over the parties for trial to the next term of court of general sessions for the county, he shall make out every paper in the case in duplicate and file one with the clerk of the court for the county, and immediately transmit the other to the solicitor of the circuit, whereupon said solicitor shall at once apply to the circuit judge at chambers within that circuit for an order restraining the defendants, their servants or agents, from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. Such circuit judge is hereby authorized, empowered, and required to grant the said restraining order without requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor; and any violation of said restraining order before the trial of the case shall be deemed a contempt of court and punished as such by said judge or court, or any other circuit judge, as for the violation of an order of injunction. Upon conviction of said defendants of maintaining said nuisance at the trial, they or any of them shall be deemed guilty of a misdemeanor, punishable by imprisonment in the state penitentiary for a term of not less than three months, or a fine of not less than \$200 or by both, in the discretion of the court, and the restraining order shall be made perpetual. The articles covered by the inventory, which were retained by the sheriff, shall be forfeited to the state and sold and the net proceeds sent to the state commissioner, and the sheriff shall forthwith proceed to dispose of the alcoholic liquors covered by said inventory as provided for in this act as when other liquors are seized. The finding of such alcoholic liquors on such premises, with satisfactory evidence that the same was being disposed of contrary to this act, shall be prima facie evidence of the nuisance complained of. Liquors seized as hereinbefore provided, and the vessels containing them, shall not be taken from the custody of the officers in possession of the same by any writ of replevin or other process while the proceedings herein provided are pending. No suit shall lie for damages alleged to arise by seizure and detention of liquors under this act. Any person violating the terms of any restraining order granted in such proceedings shall be punished for contempt by a fine of not less than \$200 nor more than \$1,000 and by imprisonment in the state penitentiary not less than ninety days nor more than one year. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the court, or, in vacation, the judge thereof, shall have power to try summarily and punish the party or parties guilty, as required by law. The affidavits upon which the attachment for contempt issues shall make

a prima facie case for the state. The accused may plead in the same manner as to an indictment in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both. The defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers. The clerk of the court shall, upon the application of either party, issue subpoenas for witnesses, and except as above set forth the practice in such contempt proceedings shall conform as nearly as may be to the practice in the court of common pleas,—that when any solicitor neglects or refuses to perform any duty or to take any steps required of him by any of the provisions of the preceding section or by any of the provisions of this act, the attorney general on his own motion, or by the request of the governor, shall in person or by his assistant proceed to the locality and perform such neglected duty and take such steps as are necessary in the place and stead of such solicitor, and at his discretion to cause a prosecution to be instituted, not only in the matter so neglected, but also a prosecution against the solicitor for malfeasance or misfeasance in office, or for official misconduct, or for other charges justified by facts, and to pursue the prosecution to the extent of a conviction and dismissal from office of any such solicitor. And in such event the attorney general shall be, and is hereby, authorized and empowered to appoint one or more additional assistants, who shall each have while actually employed the same compensation, to be paid from the litigation fund of the attorney general."

Mr. James E. Davis for petitioner.

Mr. Will A. Barber, Attorney General, for the State.

Gary, J., delivered the opinion of the court:

This is a proceeding in habeas corpus, in which Martin Keeler petitions this court to be discharged from imprisonment in the state penitentiary. He was arrested under a warrant charging him with violation of what is called the "Dispensary Act." He waived preliminary examination, and gave bond for his appearance at court. A search warrant was issued against the said Martin Keeler, and certain intoxicating liquors were found, whereupon Mr. Solicitor Bellinger made application in writing for a restraining order against said Martin Keeler, which was granted by his honor, Judge Watts. Thereafter a rule was issued against said defendant, to show cause why he should not be attached for contempt of court in violating said restraining order, but this rule was discharged by this honor, Judge Watts. Subsequently, however, his honor Judge Buchanan, after hearing affidavits and argument of counsel for the state and the defendant, adjudged the said defendant guilty of contempt of court, in violating the restraining order aforesaid, and sentenced the defendant to pay a fine of \$200 and to imprisonment in the state penitentiary for ninety days. The proceedings under which the defendant was fined and imprisoned arose under § 22 of the 31 L. R. A.

dispensary act, which section will be set out in the report of the case.

The defendant, in his petition, presents to this court several grounds for his discharge from imprisonment, some of which the court has not the power to consider in habeas corpus proceedings. The defendant has been adjudged guilty of contempt of court and imprisoned therefor. This court will, therefore, not release the defendant from imprisonment unless the proceedings in which he was adjudged guilty of contempt of court are null and void, in whole or in part. The proceeding by habeas corpus is not a substitute for the right of appeal, and there are questions which, although they could properly be reviewed on appeal, cannot be considered in habeas corpus proceedings. This limitation upon the power of the court in habeas corpus proceedings is clearly expressed by Mr. Justice Harlan in *Andrews v. Swartz*, 156 U. S. 272, 39 L. ed. 422, where he speaks of the well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus, unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void,—citing *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Wood v. Brush*, 140 U. S. 287, 35 L. ed. 509; *Jugiro v. Brush*, 140 U. S. 297, 35 L. ed. 513; *Pepke v. Cronan*, 155 U. S. 100, 39 L. ed. 84. We will now consider the question whether the proceedings under which the petitioner was imprisoned are null and void, either in whole or in part. The authorities sustain the following propositions of law: First. That the legislature has the power to declare places where liquor is sold contrary to law to be common nuisances, and to provide for their abatement. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385. Second. That the legislature has the right to provide remedies, summary in their nature, to prevent and abate such nuisances. Third. That these summary remedies are not rendered unconstitutional by reason of the fact that they deprive the defendant of these rights, under the Constitution, to which, ordinarily, he is entitled. Fourth. That, to justify such summary proceedings, it must appear, (1) that the interests of the public generally require these stringent remedies; and (2) that they are reasonably necessary to accomplish the purposes for which they were enacted. Fifth. That, in determining that such remedies are reasonable, the court will consider the value and nature of the property involved in the nuisance, and the difficulty of its suppression.

The granting of a restraining order to prevent the defendant from carrying on a business which the legislature has declared to be a common nuisance is a part of the summary proceeding provided by the legislature against such nuisances. The defendant is, therefore, not entitled to invoke the provisions of the Constitution as to the right of trial by jury in a case of this nature. In the case of *Eilenbecker v. Plymouth County Dist.*, Ct. 134 U. S. 31, 33 L. ed. 801, Mr. Justice

Miles, for the court, says: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body, for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly, it seems to us to be quite as wise to use the processes of the law and the powers of the court to prevent the evil, as to punish the offense as a crime, after it has been committed. We think it was within the power of the court of Plymouth county to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court." Mr. Justice Brown, speaking for the court in *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, says: "It [the police power] is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order . . . the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346. To justify the state in thus interposing its authority in behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Again: "While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed,"—citing numerous authorities. Again: "The object of the law is undoubtedly a beneficent one, and the state ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to

31 L. R. A.

be given by publication, and regular judicial proceedings to be instituted for its condemnation. There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet, from time immemorial, the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may, in this way, be deprived of his liberty without the intervention of a jury. *Calian v. Wilson*, 127 U. S. 540, 32 L. ed. 223, and cases cited. So the summary abatement of nuisances, without judicial process or proceeding, was well known to the common law, long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard. Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the supreme court in New Jersey in a similar case (*American Print Works v. Lawrence*, 21 N. J. L. 248-259): "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not therefore necessarily unconstitutional." The dispensary act is not violative of any of the requirements herebefore mentioned.

It is also contended that the sentence is obnoxious to § 88, article 1, of the Constitution of 1868. The punishment provided in § 22 of the dispensary act for violation of the restraining order therein mentioned is a fine of not less than \$200 nor more than \$1,000, and by imprisonment in the state penitentiary not less than ninety days nor more than one year. Section 38, art. 1, of the Constitution of 1868 provides that "excessive fines shall not be imposed, nor cruel and unusual punishment inflicted," etc. In our opinion, the fine imposed on the defendant was not excessive, nor the punishment inflicted cruel and unusual.

It is the judgment of this court that the petition be dismissed.

Pope, J., concurring:

The facts underlying the application of the petitioner to this court for release from his confinement in the state penitentiary are so clearly and abundantly set forth in the opinion of Mr. Justice Gary and the dissenting opinion of Mr. Chief Justice McIVER that they need not be repeated here. I have thought the gravity of the questions here presented, together with the fact that the two justices already named have pursued divergent lines of thought in reaching a conclu-

sion, demanded an expression of my own views. Mr. Justice Gary in the main treats of the constitutional questions raised by the petitioner, while the Chief Justice devotes his attention wholly to the preliminary questions of jurisdiction, having reached a conclusion, satisfactory to himself, that the judges below were without jurisdiction to pass the orders made by them, respectively. If the judges below were without jurisdiction to pass the order now in review, of course, no constitutional questions are of any practical effect in determining whether the petitioner is illegally restrained of his liberty. It is thus manifest that the question of jurisdiction must first be determined. Jurisdiction involves power of these circuit judges over the person and the subject-matter. As to the latter, I do not understand that any difficulty exists. If the question of the constitutional power in the general assembly of this state to pass, as law, the different provisions in § 22 of the dispensary act is for the time admitted, it is very certain that the jurisdiction of the subject-matter is given these circuit judges to pass, not only the order of jurisdiction, but also to punish any disobedience thereof by the petitioner, as a wilful contempt of court, by an imprisonment in the state penitentiary. The theory of the government in this matter is simply this: The sale of intoxicants by individuals without a license therefor is not only illegal, but the continuous sale of such intoxicants by an individual without a license therefor is a nuisance; that, upon certain steps being taken, a circuit judge may grant an order of injunction, whereby such individual, who is continuously selling intoxicants contrary to law, is forbidden so to break the law. Therefore, if such individual wilfully disobeys the order of injunction against him, he is punished for a contempt of court. In all these matters, as I before remarked, there is no contest here. Therefore the two questions are left: First. Did the circuit judge who passed the order in November last have jurisdiction of the person of the petitioner when he passed his order directing his imprisonment for contempt of court? Second. Are the provisions of the 22d section of the dispensary act obnoxious to the provisions of the state Constitution, as complained of by the petitioner?

First. It is admitted that every order passed by a judge who has no jurisdiction of the person, so far as such individual is concerned, is void. Power or jurisdiction of the person, so far as courts are concerned, is secured by the service of some process, and is regulated by law. Thus, if a judgment on the civil side of the court is desired against an individual, a summons is issued and served upon him; and, if a judgment on the criminal side of the court is desired against an individual, a warrant for his arrest is issued, and he is taken in custody thereunder. But it sometimes happens that an individual against whom a judgment on the civil side of the court is desired, although service of the summons has not been made upon him, appears voluntarily in court, and contests the right of a judgment against him on the merits.

In such an event the court is said to have acquired jurisdiction of his person, although no summons was served upon him, or, it may be, could not have been served upon him.

This is not a new doctrine, but has been upheld by repeated adjudications of this and other courts. In *Graveley v. Graveley*, 20 S. C. 104, it was said: "For it seems to us that, by answering to the merits, she [the defendant] properly submitted herself to the jurisdiction of the court, and the matter stands as if she accepted service or authorized her attorney to do so for her." To the same effect are the decisions of *Oliver v. Fowler*, 22 S. C. 540; *Chafee v. Postal Teleg. Co.* 35 S. C. 378; *Meinhard v. Youngblood*, 37 S. C. 231, and 239. A like doctrine is maintained by the Supreme Court of the United States in *Toland v. Sprague*, 37 U. S. 12 Pet. 330, 9 L. ed. 1093.

Not only is this doctrine persistently and continuously held in actions in the court of common pleas, but also in the court of general sessions. Two cases are cited: *State v. Hatcher*, 11 Rich. L. 525: At the fall term, 1835, of the court of general sessions for Edgefield district one Hatcher had been indicted for keeping a riotous and disorderly house, and a true bill was found. At the spring term, 1837, a verdict of guilty was rendered, and a sentence indorsed on the indictment by his honor, Judge O'Neill. There was an affidavit, and also a warrant to arrest, but no entry or indorsement which showed that the defendant had been arrested, or that he had entered into recognizance to appear. In 1844 a *scire facias quare executio non* was served on the defendant, to which he made default, and an order for execution to issue was passed. In 1857 the defendant moved, before his honor, Judge Wardlaw, at Edgefield, that all the proceedings subsequent to the finding of the grand jury be set aside, and as the basis of his motion presented his own affidavit, which recited that he had never been arrested under the warrant; that he had never entered into recognizance to appear; that he was absent from the state from the fall of 1836 until December, 1838; and that he had no knowledge that the proceedings were pending against him until long after the trial and conviction. On appeal, before a full court, the defendant's motion was denied. In the opinion of the court it is said: "The sentence in this case appears to have been pronounced more than twenty years ago. . . . After such a lapse of time, it is in vain to say that neither the warrant, etc., can be found. The law presumes '*omnia esse rite acta*.' But, in addition to this, the defendant has been served with a *scire facias quare executio non*, made default, and thereupon execution issued for the collection of the fine. This would be enough to prevent his present motion from receiving any favor from the court." *State v. Sarratt*, 14 Rich. L. 29: The defendant was charged with bastardy. A warrant of arrest had been issued, and the officer made a return of *non est inventus*. Thereafter, May 12, 1859, a bench warrant was issued from the court of sessions for Union district, not under the provisions of the bastardy act, but requiring the

defendant to enter into recognizance to appear and answer to a bill of indictment. A true bill was found at fall term, 1859, to which he appeared, pleaded not guilty, and traversed the case. At his trial at the fall term in 1860, defendant insisted that all these proceedings to make him a party in court were wholly irregular and void for want of conformity to the provisions of the bastardy act of 1839. After conviction he appealed to this court on these questions. This court (dismissed) the appeal, and affirmed the judgment, holding, in the opinion of the court, as announced by Wardlaw, J.: "The defendant, it is said, was never arrested, and it vehemently urged that injustice was done to him by the holding that his *appearance and pleading effected* a waiver of objection to the irregularity of proceedings by which he was brought in. *He appeared, he made his defense*, he recognized the advocacy of his counsel on the circuit, and through them he has been heard here. . . . But by voluntary appearance, no more than by compulsory attendance, was the defendant deprived of any ground of defense; and to any departure from a course prescribed by law he was at liberty to object under the general issue. His objection is that the bill of indictment against him was not found before a bench warrant was issued. Suppose this to be so; and, further, suppose that, for this and other reasons, the bench was irregular and void; it would follow that his arrest under that warrant was unlawful, that his recognizance, if he gave one, might be impeached for duress, and that his counsel might have moved for his discharge from arrest and recognizance. *But his counsel appeared and pleaded, and he was present and made defense. Nothing which preceded could destroy the effect of this acknowledgment of the jurisdiction of the court over his person and his case*; and, when urged as matters of technical objection on the trial, the supposed irregularities must have been wholly unavailing" (italics ours).

Applying these principles to the facts as developed in the case at bar, it will be readily seen that the petitioner here cannot successfully contend there was no jurisdiction of the person acquired by the court below. He distinctly and deliberately appeared before Judge Watts in August last, and contested on the merits his violation of the order of injunction. In the hearing before us he relies upon, as a part of his case, the decision of Judge Watts that the evidence heard by him did not establish a wilful disregard of the order of injunction. When he was brought before Judge Buchanan to answer a second charge of disobedience of the order of injunction, he answered fully as to the merits, and it was as to the proofs of such charge, on both sides of the controversy, that Judge Buchanan decided that he was in contempt. No appeal was taken from this order of Judge Buchanan. I am compelled to differ from the chief justice in his conclusions on this branch of the case.

It now remains for me to consider the second branch of the case, to wit, the constitutional questions presented. But, before

entering upon the consideration of the second question, I have thought that a few words may be addressed to the question involved in so much of the appeal as relates to the distinction between "action" and "application." The general assembly has used the latter in the section under consideration. It was in the power of the general assembly to direct and prescribe the form of pleading. This it has done. When we remember that the object of the act is to suppress a nuisance, it is easily seen that the very design of the law might be defeated if delay was allowed. In the cases cited in the opinion of Mr. Justice Gary it will be noticed that the adoption by the legislature of summary proceedings is allowed in suppressing nuisances. I content myself with such citations of authorities. I therefore see no difficulty in such suggestion. But, be that as it may, the petitioner, by answering the merits, waived any such objection even if it was sound. I am entirely satisfied with reasoning and citations employed by Mr. Justice Gary, in his opinion in this case, in disposing of all the questions suggested by the petitioner as to the constitutionality of § 22 of the dispensary act. I shall content myself, therefore, with a concurrence therein. It follows that the petitioner must be denied the relief prayed for.

McIver, Ch. J., dissenting:

This was an application, originally addressed to the chief justice of this court, for the purpose of obtaining a discharge of the petition from what he claimed to be an illegal confinement of his person in the state penitentiary. In the notice of the motion, which was duly served upon the solicitor of the second circuit, in which the case originated, it is stated that the motion would "be made upon the injunction papers issued by his honor, Judge R. C. Watts, of date June 20, 1895, and the rule and affidavit issued and made therein, together with the order discharging said rule; also, the subsequent rule issued by his honor, Judge O. W. Buchanan, and the affidavits made therein, the return thereof [thereto], and the affidavits submitted by defendant, and the order adjudging him in contempt,—all of which are on file in the office of the clerk of the circuit court for the aforesaid county." Accordingly, when the writ of habeas corpus was granted, an order was passed requiring the clerk of the circuit court for the said county (Barnwell) to send up a certified copy of all the proceedings below which finally culminated in the order of Judge Buchanan committing the prisoner to the custody of the superintendent of the state penitentiary for a contempt in disobeying the restraining order of Judge Watts above referred to. The superintendent of the state penitentiary having made his return to the writ of habeas corpus, which need not be set out or further referred to here, as it contains nothing which throws any light upon the question to be considered, and the clerk of the circuit court for Barnwell county having sent up a certified copy of the proceedings below, as required by the order above referred to, an order was passed trans-

ferring the case to a hearing before the full court, as the questions involved were of a very grave and important character. It is conceded that these proceedings were taken under the provisions of the 22d section of an act entitled "An Act to further Declare the Law in Reference to, and further Regulate the Use, Sale, Consumption, Transportation, and Disposition of Alcoholic Liquids or Liquors within the State of South Carolina, and to Police the Same," approved January 2, 1895. As this section is very long, it will not be inserted here, especially as Mr. Justice Gary, in his opinion, has very properly directed that the section shall be set out in full in the report of this case. Inasmuch as it is too well settled to require the citation of any authority that a writ of habeas corpus cannot be used as a substitute for a writ of error or for an appeal, the only inquiry is whether the court or judge below had any jurisdiction to grant the order committing the prisoner to the custody of the superintendent of the state penitentiary, for a contempt in disobeying the restraining order of Judge Watts above referred to. This inquiry involves two general questions: (1) Whether the proper steps were taken by which his honor, Judge Watts, could acquire jurisdiction to grant the restraining order, under the provisions of the 22d section of the act above referred to, which, for convenience, may be designated as the "Dispensary Act." (2) Whether said section is unconstitutional. For, in this case, no question was raised (if indeed, it could be successfully raised) as to the power of Judge Watts, who is the judge of the fourth, and not of the second, judicial circuit, to grant such restraining order, inasmuch as it is conceded that Judge Watts, by lawful authority, was at the time holding a court within the second circuit.

The first question above stated renders it necessary that a careful analysis of the provisions of the 22d section of the dispensary act should be made. Without undertaking to state in detail all the provisions of that section, some of which are not pertinent to the present inquiry, it will be sufficient to say that, according to my understanding of that section, its scheme is that certain steps are required to be taken, in the order therein prescribed, before either the court or a judge thereof can acquire jurisdiction to issue an order restraining any person "from keeping, receiving, bartering, selling, or giving away any alcoholic liquors," to wit: (1) That some person "may go before any trial justice . . . and swear out an arrest warrant . . . charging said nuisance," and the person so charged shall be brought before the trial justice to be dealt with according to law. (2) The trial justice shall at the same time issue a search warrant, requiring the officer to whom it is directed to search the premises charged to be a nuisance, and seize all alcoholic liquors found thereon. (3) That, when the defendant is brought before the trial justice "under the arrest warrant," the case shall be disposed of as in other cases beyond his jurisdiction, except that, when he binds over the party for trial at the

next term of the court of sessions, the trial justice "shall make out every paper in the case in duplicate" and file one with the clerk of the court and transmit the other to the solicitor of the circuit. (4) The solicitor is then required to apply, at once, to the circuit judge within that circuit for an order restraining the defendant from keeping, receiving, bartering, selling or giving away any alcoholic liquors until the further order of the court. Such circuit judge is empowered and required to grant the restraining order without "requiring a bond or undertaking upon the hearing or receipt by him of said papers from the court of the said trial justice by the hands of the solicitor, and any violation of said restraining order before the trial of the case shall be deemed a contempt of court, and punishment of such by said judge or court, or any other circuit judge, as for the violation of an order of injunction." (5) The act next provides that, upon the conviction of the defendant of maintaining said nuisance, at the trial, he shall suffer the punishment prescribed, "and the restraining order shall be made perpetual." (6) The act again provides that a person violating the restraining order may be punished for a contempt, and prescribes the punishment that may be imposed. The act then proceeds to declare that, in such contempt proceedings, "the court, or, in vacation the judge thereof, shall have power to try summarily and punish the party or parties guilty as required by law," and, after making some provisions as to the mode of pleading and adducing evidence and securing the attendance of witnesses, declared that "the practice in such contempt proceeding shall conform as nearly as may to the practice in the court of common pleas."

From this brief review of the provisions of the 22d section of the dispensary act, it is very obvious that the unusually stringent remedy therein provided cannot be successfully resorted to unless the several conditions prescribed are strictly complied with. Even in cases involving mere property rights, the rule is well settled that a person is not entitled to the stringent remedy of attachment and seizure of his alleged debtor's property without strictly complying with the conditions prescribed upon which such remedy may be resorted to. As was said in *Augusta Sav. Bank v. Stelling*, 31 S. C., at page 369: "As the remedy by attachment is a summary and somewhat harsh proceeding, whereby a person may be deprived of the possession or control of his property before the claim upon which it was based has been adjudicated, the rule is well settled that one who seeks to avail himself of such a remedy must be careful to comply strictly with the conditions upon which it is allowed." To the same effect see *Wagner v. Booker*, 31 S. C. 375, and *Booker v. Smith*, 38 S. C. 228. Now, if this be the settled rule in reference to cases involving merely rights of property, with how much greater force should it apply to cases involving the liberty of the citizen.

Guided by this well-settled rule, let us examine the various steps taken in this case, as disclosed by the certified copy of the record

which has been sent up by the clerk of the circuit court, now before us. Without going into unnecessary details, that record discloses the following facts: (1) A search warrant was issued by a trial justice on the 25th of April, 1895, reciting that, upon information of J. B. Ross that "contraband intoxicating liquors are now unlawfully in the possession, storage, and keeping of, and on the premises occupied by, Martin Keeler," in the town of Blackville, and directing the officer to whom such warrant was directed to search for and seize such contraband liquors. There is no return indorsed upon this warrant, and nothing to show whether any, and, if so, what, action was taken under it. (2) Next we find an affidavit of J. B. Ross, bearing date the 26th of April, 1895, stating that Martin Keeler, on the 25th of April, 1895, and at other times, "did violate the laws and statutes of the state by selling, without permission or license, whiskey and other intoxicating liquors," to which is appended an order, signed by the trial justice, dated April 26, 1895, to "arrest and bring before me Martin Keeler, charged with violating the dispensary law." (3) A recognizance of Martin Keeler to appear before the court of general sessions on the 2d Monday in November, 1895, "to answer to a bill of indictment to be preferred against the said Martin Keeler,"—for what offense is not stated. This recognizance bears date April 27, 1895. (4) A search warrant, issued by a trial justice on the 1st of June, 1895, requiring the officer to whom it was directed to search the premises of Martin Keeler and seize any contraband liquors found thereon. This warrant is based upon the affidavit of J. B. Ross, bearing date June 1, 1895, that he is informed by his own observations, and verily believes, from such information and his own observation, "that in the house of Martin Keeler there is now deposited, stored, and kept contraband liquors, in violation of law, to wit, whiskey and other intoxicating [liquors], and that said intoxicating and contraband liquors are there kept, stored, and deposited by Martin Keeler, his aids and abettors, without a permit, in violation of the laws of the state." Upon this search warrant there is no return, and nothing to show whether any action, and, if so, what, was taken under it. (5) Next comes the application of the solicitor, without date, for the restraining order, which was made out on a printed blank, and which, after the blanks were filled, as appears in the record, reads as follows: "South Carolina, Barnwell county. And now comes G. Duncan Bellinger, solicitor for the second circuit, in which has been obtained an arrest and search warrant against Martin Keeler, issued by trial justice A. P. Woodward, of the county and state above named, and upon the return of which search warrant certain contraband and intoxicating liquors were found, being so kept without a permit. as by a reference to the trial justice's papers, hereto attached, will more fully appear, and shows to this honorable court that, the circumstances and conditions contemplated by the dispensary act having arisen in the enforcement of the provisions of the same, and

1 L. R. A.

the papers hereto attached charging as a nuisance the place therein mentioned, it becomes my duty to pray the issuance of an order restraining the said Martin Keeler, his agents, servants, and employees from keeping, receiving, bartering, selling or giving away any alcoholic liquors until the further order of the court." Appended to this application is the order of Judge Watts, bearing date June 26, 1895, restraining the said Martin Keeler from keeping, receiving, bartering, selling, or giving away any alcoholic liquors until the further order of the court. (6) An order of Judge Watts, bearing date the 19th of August, 1895, requiring Martin Keeler to show cause before him, on the 21st of August, 1895, why he should not be attached for a contempt in disobeying the restraining order of June 20, 1895. This rule to show cause was based upon an affidavit, dated the 16th of August, 1895, stating that said Keeler sold liquors on the 3d of August, 1895, and on divers other days before and after that date, and subsequent to the date of the restraining order. Upon the return to this rule, and after hearing the affidavits submitted, his honor, Judge Watts, granted an order (without date) discharging said rule. (7) On the 9th of November, 1895, the trial justice issued a warrant reciting, "whereas, complaint has been made unto me by H. J. Croft that Martin Keeler has unlawfully violated the dispensary act in keeping, selling, or storing contraband intoxicating liquors, and without any permit, certificate, or state license, these are therefore to command you to apprehend the said Martin Keeler, and bring him before me to be dealt with according to the law." Upon this warrant the following indorsement appears: "The defendant was arrested and brought up for a preliminary hearing. The evidence being deemed sufficient, he was bound over to appear for trial at the court of general sessions on the 2d Monday in November, 1895,"—signed by the trial justice. Accordingly, we find in the record the recognizance of the said Martin Keeler to appear and answer to a bill of indictment "for a violation of dispensary act," bearing date the 9th of November, 1895. (8) Next we find an order of his honor, Judge Buchanan, bearing date November 12, 1895, requiring Martin Keeler to show cause before him on the 16th of November, 1895, "why he should not be adjudged guilty of contempt for violating the restraining order made herein by Hon. R. C. Watts, presiding judge in the Second circuit, on the 20th day of June, 1895." This rule to show cause was based upon affidavits stating that said Keeler had sold whiskey to a negro on the night of the 8th of November, 1895. (9) Upon hearing the returns to said rule, with the affidavits submitted, Judge Buchanan, on the 25th of November, 1895, granted an order adjudging the said Martin Keeler guilty of contempt in disobeying the restraining order of Judge Watts, hereinbefore referred to, and sentenced him to pay a fine of \$200, and to be confined to the state penitentiary for ninety days.

From this statement of the proceeding which culminated in the order of Judge

Buchanan, adjudging the petitioner in contempt in disobeying the restraining order of Judge Watts, and imprisoning him in the state penitentiary as a punishment for such contempt, it seems to me clear that such proceedings are fundamentally defective in at least two respects, and, hence, neither the court nor any judge thereof ever acquired jurisdiction either to grant the restraining order or the order punishing the petitioner for a contempt in disobeying such restraining order. In the first place, the very first step required by the statute to be taken in order to initiate proceedings for contempt does not appear to have been taken. The first provision in the section is that some person shall obtain from a trial justice a warrant charging the person accused with committing the nuisance created by that section, and the record will be searched in vain for any evidence that any such warrant was ever obtained or applied for. As we have seen from the abstract of the record above set forth, the first step which was taken was procuring a search warrant,—not an “arrest warrant,” as it is termed in the statute,—which was obtained on the 25th of April, 1895. And the warrant for the arrest of the petitioner, issued on the next day,—the 26th of April, 1895,—so far from charging the petitioner with keeping or maintaining the nuisances denounced by the statute, simply charged the petitioner in the most general terms, with “violating the dispensary law,” without stating, or even intimating, what provision of the dispensary law he had violated. And it is very obvious that the dispensary act creates several distinct and different offenses, with distinct and different penalties attached. And, if we turn to the affidavit upon which this warrant was based, we find that it is there stated that the petitioner “did violate the laws and statutes of the state by selling, without permit or license, whiskey and other intoxicating liquors.” It is clear, therefore, that this warrant did not charge the offense of keeping and maintaining a nuisance, denounced by the 22d section of the dispensary act; but, on the contrary, did charge an offense denounced by another section of that act. So, also, the warrant issued on the 1st of June, 1895, was a search warrant, and not an “arrest warrant;” and neither that warrant, nor the affidavit upon which it was based, contains any charge of nuisance. While it is true that the recitals contained in the application of the solicitor for the restraining order do seem to imply that the petitioner was charged with keeping and maintaining a nuisance, and the returns on the search warrant showed that “certain contraband and intoxicating liquors” were found on the premises of the petitioner, yet these recitals are based, expressly, upon the several papers issued by the trial justice; and, as we have seen, these papers utterly fail to sustain such recitals, and do not show that there ever was any return made upon either of the search warrants, nor do they show that any intoxicating liquors were found upon the premises of the petitioner, and do not show that any action whatever was taken under either of the search warrants. So that it is plain that the record before us fails to

show that the necessary steps prescribed by the statute were ever taken in order to confer jurisdiction to issue the restraining order; and, if so, then it necessarily follows that the proceedings for contempt of an order issued without jurisdiction are also void for want of jurisdiction. If it should be said that the admission, signed by the attorney for petitioner and the assistant attorney general, “that all the proceedings taken by Solicitor Bellinger before Judge Buchanan were regular, so far as petition, affidavits, etc., are concerned,” concluded the question of jurisdiction, the answer would be that consent cannot confer jurisdiction; and, if the consent of the parties themselves cannot confer jurisdiction, surely no admissions of their attorneys have that effect, when, as we have seen, the record before the court shows a lack of jurisdiction. Besides, there is no admission that the proceedings before Judge Watts to obtain the restraining order “were regular,” and this constitutes the fundamental jurisdictional objection. It is scarcely necessary to notice the warrant issued by the trial justice on the 9th of November, 1895, for neither that warrant nor the affidavit upon which it is based purports to charge the petitioner with keeping or maintaining a nuisance as forbidden by the 22d section of the dispensary act; and, on the contrary, the offense then charged was under another section of the dispensary act. Besides, Judge Buchanan did not, and could not, base his order, for a rule to show cause, and his final order adjudging the petitioner to be guilty of contempt, upon that prosecution, for the obvious reason that it was not followed up by any application for a restraining order. On the contrary, his action was based entirely upon the original prosecution, followed up by the restraining order of Judge Watts, granted on the 20th of June, 1895. I may add here that there is nothing in the position, taken by counsel for petitioner, that Judge Watts had previously discharged a rule to show cause why the petitioner should not be adjudged guilty of a contempt in disobeying the restraining order of 20th of June, 1895, and, therefore, that the matter was *res judicata*; for the papers show that the proceedings for contempt before Judge Watts were based upon the charge of selling liquor on or about the 3d of August, 1895, while the similar proceeding before Judge Buchanan was based upon a charge of selling liquor on the 8th of November, 1895, some time afterwards. And, while it might have been entirely true that the evidence was not sufficient to sustain the charge of selling liquor on the 3d of August, 1895, as, no doubt, was the fact, yet that did not even tend to show that the charge of selling liquor on the 8th of November, 1895, was not sustained by the evidence.

In the second place, it does not appear, from the record before us, that any action was ever instituted against the petitioner under which an application was made for a restraining order, or for an injunction, as it is indifferently spoken of in the act. While it is true that there is no provision in the 22d section of the dispensary act requiring

that the application for a restraining order must be made by an action instituted for that purpose, yet it is equally true that there is no provision in that section, or any other section, of the dispensary act, providing for any other mode by which an application for an injunction or a restraining order may be made; and hence, in the absence of any such provision, it follows, necessarily, that the only mode provided by the general law for obtaining an injunction, to wit, by an action, must be pursued. The provision in the section that the solicitor shall, upon the papers furnished him by the trial justice, apply to the circuit judge for a restraining order, certainly does not prescribe any mode of proceeding by which such an application shall be made. It simply provides the basis or evidence upon which the application may be made. Besides all this it seems to me, from an attentive and careful examination of the provisions of § 22 of the dispensary act, that it is more than doubtful, to say the least of it, whether the legislature ever intended that a citizen should be deprived of his liberty and subjected to the degrading punishment of confinement in the penitentiary for disobeying an order forbidding him to keep or maintain an alleged nuisance, before it had been ascertained by the verdict of a jury that he had ever kept or maintained a nuisance. Otherwise, whence the necessity of requiring, as the very first step in the proceedings, that a warrant shall be issued charging the accused with keeping and maintaining a nuisance, under which he shall be arrested and bound over to answer, in the court of sessions, to a bill of indictment for such offense, where, of course he would be entitled to a trial by jury. On the contrary, it seems to me that the more reasonable construction of

the section is that the intention of the legislature was that the person charged with keeping and maintaining the nuisance created by the section in question should be indicted and tried in the regular way; and, for the purpose of preventing the continuance of the alleged nuisance, pending the prosecution, an order may be granted enjoining and restraining the accused from continuing such nuisance, for disobedience of which, as in any other case of injunction, he may be punished for a contempt, after the fact of nuisance has been judicially ascertained by the verdict of the jury. Suppose it should be ascertained, judicially, upon the trial of an indictment for nuisance, that the accused had never been guilty of keeping or maintaining a nuisance; then if, in the meantime, he shall be punished for a contempt in disobeying an order restraining him from keeping and maintaining a nuisance, under summary proceedings for contempt, he will have been punished by confinement in the penitentiary for doing an act which it has been judicially ascertained, by the verdict of the jury, he never did do. Surely, the legislature never intended any such result, and I would be very unwilling to attribute to them any such intention unless it was plainly expressed in much more explicit terms than those found in § 22 of the dispensary act. Under this view, the second general question, as to the constitutionality of the 22d section of the dispensary act, does not necessarily arise, and, therefore, under well-settled principles, should not be considered. I am therefore of the opinion that the petitioner, Martin Keeler, has been deprived of his liberty without due warrant of law, and is therefore entitled to a discharge.

NEW YORK COURT OF APPEALS.

Mary MENNEILEY, *Appt.*,
v.
EMPLOYERS' LIABILITY ASSURANCE
CORPORATION, Limited, *Respnt.*

(148 N. Y. 586.)

1. The words "inhaling gas," in a provision describing causes of death against which a policy does not insure, apply only to cases where gas is inhaled intentionally, voluntarily, and consciously.
2. A provision that death "from anything accidentally taken, administered, or inhaled" is not insured against applies only where something has been voluntarily and intentionally although mistakenly taken, administered, or inhaled.
3. A provision that death "from accidents that shall bear no external and visible marks" is not insured against by a life insurance policy means that there must be external and visible evidence that death was

accidental, and does not exclude liability for death caused by accidentally and involuntarily breathing illuminating gas while asleep.

(March 3, 1896.)

APPPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, reversing a judgment of the Monroe County Circuit in her favor in an action brought to recover the amount alleged to be due on a mutual benefit certificate. *Reversed.*

Statement by **Martin, J.:**

The facts in this case were agreed upon by the parties, and were as follows: "That on the 12th day of October, 1891, during the continuance of the said policy of insurance, Samuel D. W. Menneiley, the person mentioned in the complaint as the person insured in and by said policy of insurance, died. That at the time of his death he was stopping as a guest at the

NOTE.—As to what constitutes an accident within the meaning of an insurance policy, see *note* to *Fidelity & C. Co. v. Johnson* (Miss.) 80 L. R. A. 206.

For provisions against liability on an insurance policy, see *T. R. A.*

policy for death by inhaling gas, see also *Paul v. Travelers' Ins. Co.* (N.Y.) 3 L. R. A. 443, and *Pickett v. Pacific Mut. L. Ins. Co.* (Pa.) 13 L. R. A. 661, with *note*.

Millard Hotel, in Omaha, Neb. That he went to his room in said hotel on the night of the said 12th day of October, 1891, and at some time after he went to his room the illuminating gas therein accidentally escaped into his room. That early in the morning of the 13th day of October, 1891, the said Menneiley was found dead in his bed, his room being tightly closed on the inside, and filled with such illuminating gas. That the death of said Menneiley was occasioned by accidental means, and arose from and was caused by his involuntarily and accidentally breathing into his lungs the said illuminating gas, which had so accidentally escaped into such room, the escape of such gas being immediately discoverable upon entering said room, in consequence of which inspiration of said gas he died the same night of asphyxia. That the accident from which said Menneiley died caused no external and visible marks, and the body of said Menneiley bore no external and visible marks of the accident on account of which he died, unless the facts that illuminating gas emanated from his body when artificial respiration was produced, to the perception of the person producing such artificial respiration; that the room, on entering the same, was easily perceived to be full of illuminating gas, and that the gas was then escaping therein; and that inspection of the body showed life to be extinct,—be held or found to constitute such external and visible marks, within the meaning of the term 'external and visible marks,' contained in the policy. The defendant does not admit that such facts constitute 'external and visible marks,' within the meaning of the term 'external and visible marks,' contained in the policy. The plaintiff claims that they do. That the plaintiff herein gave immediate notice of said accident, with full particulars thereof, in writing, to the United States managers of the defendant, at Boston, and, prior to the commencement of this action, furnished them with full proof and evidence thereof. That on the 27th day of January, 1892, plaintiff duly demanded of the defendant payment of said policy, but that the defendant refused to pay the plaintiff any amount on said policy, claiming that said policy did not insure against such a risk as that which caused the death of the insured. This action was commenced February 11, 1892."

Mr. William Nathaniel Cogswell, for appellant:

The clause exempting the company from liability in case the accident arose from inhaling gas does not apply to such a case as this.

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443.

The clause exempting the company from liability "against death or disablement arising from anything accidentally taken, administered, or inhaled" does not apply to such a case as this.

Ripley v. Railway Pass. Assur. Co. 2 Bigelow, Life & Acc. Ins. Rep. § 738; *Providence L. Ins. & L. Co. v. Martin*, 32 Md. 310; *Burry v. United States Mut. Acc. Assn.* 23 Fed. Rep. 712; *Bacon v. United States Mut. Acc. Assn.* 123 N. Y. 304, 9 L. R. A. 617; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661.

The clause in the policy as to 'external and

visible marks" does not discharge the defendant from liability.

United States Mut. Acc. Assn. v. Barry, 131 U. S. 100, 33 L. ed. 60.

Mr. W. A. Southerland, with Messrs. Butler, Stillman, & Hubbard, for respondent:

The defendant had the right, and certainly attempted to stipulate against liability in case of death caused by gas.

The defendant's policy has successfully attempted to stipulate against liability in cases like the one at bar.

The expressions "inhaling gas" and "anything accidentally taken, administered, or inhaled" are not tautologous, and do not refer to one and the same thing.

In *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443, this court said that the words "inhaling gas" cannot refer to an involuntary and unconscious act. But in the case at bar the company expressly stipulated against something besides "a voluntary and intelligent act by the insured" and it did provide against "an involuntary and unconscious act."

Richardson v. Travelers' Ins. Co. 46 Fed. Rep. 843.

The death of Menneiley was not caused by any accident that bore "external and visible marks."

If a dead body in and of itself constitutes the "external and visible marks" caused by an accident, then the words used in the policy are meaningless, and the defendant has first contracted that an accident to render it liable must produce visible and external marks, and in the same words it has stipulated that there can be no death without such external and visible marks.

Martin, J., delivered the opinion of the court:

This action is upon a policy or contract of insurance issued by the defendant to Samuel D. W. Menneiley, by which, in case of his death from any accident within the provisions of the policy, the defendant agreed, within three months thereafter, to pay to the plaintiff the sum of \$5,000. The conditions contained in the policy, so far as applicable to the questions involved in this case, are as follows: "This policy does not insure against death or disablement . . . from accidents that shall bear no external and visible marks . . . nor against death or disablement arising from anything accidentally taken, administered, or inhaled, contact of poisonous substances, inhaling gas, or any surgical operation or exhaustion consequent thereon." The general term held that the clause in the policy which provides that it does not insure against death or disablement arising from anything accidentally taken, administered, or inhaled, described an act that was not voluntary and intelligent, but accidental, and that the admitted facts bring this case within that exception. That court also held that the facts did not establish a case within the exception as to inhaling gas; citing the decision of *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443. 'Thus the sole ground upon which judgment was directed for the defendant was

that it was not liable because the cause of the death of the insured was within the exception in the policy as to death arising from anything accidentally taken, administered, or inhaled. Moreover, the respondent admits that in this state, under the authority of the *Paul Case*, the words "inhaling gas," contained in the policy, when read in the light of the context, apply only to cases where gas is inhaled intentionally, voluntarily, and consciously, and that under the decision in that case the judgment of the general term cannot be upheld on the theory that that provision exempted the defendant from liability under its policy. In the *Paul Case*, Judge Gray, in delivering the opinion of the court, said: "But, in expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course, the deceased must have in a certain sense, inhaled gas; but in view of the finding that the death was caused by accidental means, the proper meaning of words compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act, necessarily involved in the process of inhaling." In that case it was distinctly held that the defendant was not exempt from liability under such a provision where the death of the insured was caused by the accidental inhaling of illuminating gas. The facts in that case were so nearly like those in the case at bar that no distinction between them exists. The *Paul Case* was referred to in *Bacon v. United States Mut. Acc. Assn.* 123 N. Y. 304, 308, 9 L. R. A. 617, and its doctrine expressly recognized as correct. It was also followed in *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 91, 13 L. R. A. 661. It follows that the judgment appealed from cannot be sustained upon the ground that the clause in the policy excepting death from inhaling gas from its provisions exempts the defendant from liability in this case.

The respondent, however, urges that upon the admitted facts the general term properly held that the provision with reference to "anything accidentally taken, administered, or inhaled," exempted the company from any liability whatever under its policy. We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured, or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. That is made more apparent by that portion of the provision which relates to

something "administered," as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered. All the cases thus provided for plainly involve voluntary and conscious action on the part of the insured, or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured. That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly taken, administered, or inhaled, there can, we think, be but little doubt. As thus construed, this provision, manifestly, did not exempt the defendant from liability in this case, as it was admitted that the death of the insured was occasioned by accidental means, and was caused by involuntarily and accidentally breathing illuminating gas which had escaped into the room where he was sleeping at the time of his death. The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes. The general provision applies when it is inhaled for other purposes. Applying to the construction of this policy the principles stated in the opinion in the *Paul Case*, it is obvious that the construction we have placed upon the policy is the proper and correct one.

The only remaining question relates to the provision which declares that the policy "does not insure against death or disablement . . . from accidents that shall bear no external and visible marks." It is somewhat difficult to understand precisely what was intended by this clause of the policy. We are, however, of the opinion that the language employed, when fairly construed, indicates that its purpose was to provide that a case of death or injury should not be regarded as within the policy unless there was some external or visible evidence which indicated that it was accidental; in other words, that only such injury as could be shown by external and visible evidence to have been accidental should be regarded as within the policy. In this case it is admitted that the decedent's death was occasioned by his involuntarily and accidentally breathing illuminating gas which had accidentally escaped into his room; that there were no visible marks of the accident upon the body of the deceased, but, when artificial respiration was produced, illuminating gas emanated therefrom to the perception of the

person producing such artificial respiration; that upon entering the room it was perceived to be full of gas, and that gas was then escaping therein; and that an inspection of the body showed life to be extinct. We think this admission furnishes sufficient evidence of an external and visible character that the death of the decedent was accidental to exclude it from this exception in the policy, and hence that it was one of the accidents against which the defendant intended to insure. The respondent discusses this question upon the theory that this clause in the policy should be construed as though it read, "from accident where there shall be no external and visible marks upon the body of the deceased." A fair construction of the language does not, we think, justify the conclusion that such was its intent and purpose, but that the more reasonable construction is that which has already been suggested.

If we are correct in these conclusions, it follows that the judgment of the General Term should be reversed, and the judgment upon the verdict directed for the plaintiff should be affirmed, with costs to the plaintiff in all the courts.

All concur, except **Andrews**, Ch. J., not voting, and **Haight**, J., not sitting.

PEOPLE of the State of New York, *Respt.*,
v.

Henry J. HAVNOR, *Appt.*

(149 N. Y. 195.)

1. **Due process of law is not furnished by a judgment pronounced after opportunity to be heard** by a court of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law.
2. **Every man's liberty and property are to some extent subject** to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all.
3. **The limitation on legislative exercise of the police power** is that such a statute must have a reasonable connection with the welfare of the public.
4. **A statute prohibiting barbers from carrying on their trade on Sunday** is a constitutional exercise of the police power to promote the public health.
5. **The physical welfare of the citizen** is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power.
6. **A statute permitting barbers in two localities of the state only to pursue their business** during certain hours on Sunday does not deny to barbers in other places the equal protection of the laws, since it affects all within the same localities alike.

NOTE.—The constitutionality of Sunday laws is overwhelmingly established by the decisions found in a note to *Judefund v. State* (Md.) 22 L. R. A. 721. In conflict with the above case of **PEOPLE v.**

31 L. R. A.

(April 14, 1896.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of the Court of Special Sessions for the City and County of New York convicting him of violating the statute against keeping a barber shop open for business on Sunday. *Affirmed.*

Statement by **Vann**, J.:

In June, 1895, the defendant was engaged in business as a barber at number 57 West Thirty-Third street, in the city of New York, and had been for the period of nine years. His establishment included "eleven ordinary chairs, three baths and two ladies' hair-dressing chairs." He kept his shop open on Sunday afternoon until 8 o'clock, for the purpose of shaving his customers and cutting and dressing their hair. Some of his patrons, who worked late Saturday night, and rose late the next day, were in the habit of being shaved on Sunday afternoon, as well as others who could not shave themselves and yet desired to be shaved every day as a matter of cleanliness. On Sunday, June 9, 1895, after 1 o'clock in the afternoon, the defendant's shop was open and he was present while one of his employees shaved a customer and payment for the service was made to the defendant in person.

No other material facts appeared upon the trial, which resulted in the conviction of the defendant, who was fined \$5. The judgment was affirmed by the appellate division and the defendant brought this appeal.

Mr. Albert I. Sire, for appellant:

The act is void under N. Y. Const. art. 1, which provides that "no person shall be deprived of life, liberty, or property without due process of law."

It is void under the rights guaranteed by the Constitution of the United States to the citizens of the several states.

U. S. Const. 5th and 14th Amendments.

The legislature cannot, under the guise of its police power, enact laws to suppress harmless acts which have no relation to the health, safety, or wellbeing of society.

People v. Gillson, 109 N. Y. 389; *Live Stock Dealers' & B. Asso. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34.

All laws which impair or trammel these [constitutional] rights which limit one in the choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain him in his otherwise lawful movements are infringements upon his fundamental rights of liberty which are under constitutional protection.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S.

HAVNOR is the recent Illinois decision in *Eden v. People*, — L. R. A. —, which is not yet reported, and is at this date subject to application for rehearing.

746, 28 L. ed. 585; *Live Stock Dealers' & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 389.

The limit to the exercise of the police power can only be this: The legislation must have reference to the comfort, safety, or welfare of society; it must not be in conflict with the provisions of the Constitution.

Potter's Dwar. Stat. 458; *Austin v. Murray*, 16 Pick. 121; *Slaughter House Cases*, *supra*; *Coe v. Schultz*, 47 Barb. 64.

When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end.

Health Department v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710; *People, Nechamcus, v. Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718.

The act is an instance of class legislation and should be condemned on this ground.

Mr. John D. Lindsay, with **Mr. John R. Fellows**, for respondent:

The work of a barber on Sunday is not a work of necessity.

Phillips v. Innes, 4 Clark & F. 234; 2 Rob. Pr. 400; *Com. v. Jacobus*, 1 Pa. Legal Gaz. 491, 15 Cent. L. J. 145; *Com. v. Williams*, 1 Pearson (Pa.) 61; *Com. v. Waldman*, 140 Pa. 89, 11 L. R. A. 563; *Com. v. Dextra*, 143 Mass. 28; *Ungericht v. State*, 119 Ind. 379; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555.

But even though it were necessary, in the sense and under the circumstances sought to be shown in the case at bar, that a considerable number of persons should be shaved on Sundays, the legislature might nevertheless prohibit it.

People v. Moses, 140 N. Y. 214; *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *People, Hobach, v. Sheriff of Kings County*, 13 Misc. 557.

The legislature having the unquestionable right to regulate the observance of the Sabbath, the act here in question, being an appropriate exercise of the right, will not be invalidated as an unreasonable or unwarranted interference with the defendant's right to exercise his trade, and therefore violative of N. Y. Const. art. 1, § 6, which provides that "no person shall be deprived of life, liberty, or property without due process of law."

Wynehamer v. People, 13 N. Y. 391; *Bertholf v. O'Reilly*, 74 N. Y. 521, 30 Am. Rep. 323; *People v. Gillson*, 109 N. Y. 389.

The statute cannot be said to be class legislation and therefore violative of the 14th Amendment to the Federal Constitution.

Missouri v. Lewis, 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578.

Vann, J., delivered the opinion of the court:

The main ground upon which the defendant asks us to reverse the judgment against

him is that the statute under which he was convicted is in conflict with that provision of the Constitution which provides that "no person shall be deprived of life, liberty, or property without due process of law" (Const. art. 1, § 6). The statute in question, entitled, "An Act to Regulate Barbering on Sunday," provides that "any person who carries on or engages in the business of shaving, hair cutting, or other work of a barber on the first day of the week shall be deemed guilty of a misdemeanor . . . provided that in the city of New York and the village of Saratoga Springs barber shops . . . may be kept open and the work of a barber performed therein until 1 o'clock of the afternoon of the first day of the week." Laws 1895, chap. 823.

The defendant claims that this statute deprives him to a certain extent of his "liberty," by preventing him from carrying on a lawful calling as he wishes, and also of his "property," by preventing the free use of his premises, tools, and labor, and thus rendering them less productive. It is not claimed that his occupation is of a noisy nature or that he so carried on his business as to disturb the peace, quiet, and good order of the neighborhood, or that the act for which he was convicted, if done on any day of the week other than the first, or at any hour of that day prior to 1 o'clock in the afternoon, would have been a violation of law. Nor is it claimed that the conviction was authorized by the common law, or that it was based upon any statute except the one above cited, and, indeed, the judgment of the court of special sessions expressly refers to that act and adjudges the defendant guilty of a misdemeanor because he violated its command.

The phrase "due process of law" is not satisfied by a judgment pronounced, after an opportunity to be heard, by a court of competent jurisdiction in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law. *Wynehamer v. People*, 13 N. Y. 378, 393. In a broad sense, whatever prevents a man from following a useful calling is an invasion of his "liberty," and whatever prevents him from freely using his lands or chattels is a deprivation of his "property." *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 105, 50 Am. Rep. 636. Yet, during the history of our state many laws have been passed which, to some extent, have interfered with the right to liberty and property but their accord with the Constitution has seldom been questioned, and, when questioned, has been generally sustained. The power of taxation, the right to preserve the public health, to protect the public morals and to provide for the public safety may interfere somewhat with both liberty and property, yet proper statutes to effect these ends have never been held to invade the guarantees of the Constitution. While the confinement of the insane or of those afflicted with contagious diseases infringes upon personal liberty, and the destruction of buildings to prevent the spread of fire, the exercise of the power of eminent domain and the prevention of cruelty to animals en-

croach upon the right to property, still the proper exercise of these powers, under the authority of the legislature, although constant and known of all men, gives rise to no question of moment under the Constitution. The sanction for these apparent trespasses upon private rights is found in the principle that every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. Dependent upon this principle is the great police power, so universally recognized, but so difficult to define, which guards the health, the welfare, and the safety of the public. While this power may not be employed ostensibly for the common good, but really for an ulterior purpose, when its object and effect are manifestly in the public interest, as was said in the *Jacobs Case*, "it is very broad and comprehensive, and . . . under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other." (p. 108). In the exercise of this power the legislature has the right, generally, to determine what laws are needed to preserve the public health and protect the public safety, yet its discretion in this respect is not wholly without limit, for our courts have been steadfast in holding that the statute must have some relation to the general welfare; that the purpose to be reached must be a public purpose, and that "the law must in fact be a police law." Thus it has been held that "an act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases" (Laws 1884, chap. 272) was unconstitutional, because it did not tend to promote the public health, and that this was not the end actually aimed at. *Re Jacobs, supra*. For the same reason "an act to prevent deception in sales of dairy products" (Laws 1881, chap. 202) was declared to conflict with the Constitution, as it absolutely prohibited an innocent industry that was not fraudulently conducted, solely for the reason that it competed with another and might reduce the price of an article of food. *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34. When, however, the act was so changed as to make the substance accord with the title (Laws 1885, chap. 183), it was held to be constitutional. *People v. Arensburg*, 105 N. Y. 123, 59 Am. Rep. 483. In a recent case, an act prohibiting the sale of any article of food upon the inducement that something would be given to the purchaser as a premium or reward (Laws 1887, chap. 691), was held to be an unauthorized invasion of the rights of property, and an improper exercise of the police power of the state. *People v. Gillson*, 109 N. Y. 389. It was expressly declared in that case that the courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the common good, and that unless such relation exists the statute cannot be upheld as an exercise of the police power.

Subject, however, to the limitation that 81 L. R. A.

the real object of the statute must appear upon inspection to have a reasonable connection with the welfare of the public, the exercise of the police power by the legislature is well established as not in conflict with the Constitution. *Heister v. Metropolitan Bd. of Health*, 37 N. Y. 661, 669; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 Am. Rep. 86; *Re Ryers*, 72 N. Y. 1, 7, 23 Am. Rep. 88; *People v. Kemp*, v. *D'Oench*, 111 N. Y. 359; *People v. Ewer*, 141 N. Y. 129, 25 L. R. A. 794; *People v. Nechameus*, v. *Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710. When thus exercised, even if the effect is to interfere to some extent with the use of property or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights. *Phelps v. Racey*, 60 N. Y. 10, 14, 19 Am. Rep. 140; *Prentice v. Weston*, 111 N. Y. 460.

The vital question, therefore, is whether the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety. The object of the act, as gathered from its title and text, was to regulate the prosecution of a particular trade on Sunday by prohibiting it from being carried on as a business on that day except in two localities to which the prohibition applies only after a certain hour. It does not require the observance of the Sabbath as a holy day, or in any sense as a religious institution, as is evident from the fact that the entire day is left open to all secular employments but one, and a part of the day, in certain places, to that. There is nothing in the act to prevent the defendant from carrying on his trade "in any manner or in any place that he pleases. He is simply prohibited from carrying on that trade upon Sunday."

The peculiar character of the first day of the week, not simply on account of the obligations of religion, but as a day of rest and recreation, has been recognized for time out of mind both by the legislature and the courts. Statutes passed upon the subject while we were a colony of Great Britain, as well as under the various Constitutions in force since our organization as a state, have, so far as appears, been uniformly enforced by the courts. 29 Car. II. chap. 7; 2 Greenl. 89; Andrews, 467; 1 Rev. Laws, 194; 2 Rev. Stat. 675, § 70; Laws 1788, chap. 42; Laws 1801, chap. 34; Laws 1847, chap. 349; Laws 1883, chap. 358, Penal Code, § 263.

Similar laws in other states, and especially those which require the closing of places of business on Sunday, have generally been sustained. *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696; *Voglesong v. State*, 9 Ind. 112; *Shorer v. State*, 10 Ark. 259; *Warner v. Smith*, 8 Conn. 14; *Bloom v. Richards*, 2 Ohio St. 387; *Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518; *Com. v. Has*, 122 Mass. 40; *Bohl v. State*, 3 Tex. App. 683; *Cooley*, Const. Lim. 5th ed. 589, 726; *Tiedeman*,

Pol. Powers, p. 183; Hare's Am. Const. Law, 766.

While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced. The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is an incident to all general laws. Sunday statutes have been sustained as constitutional almost without exception, the most notable instance to the contrary, *Ex parte Newman*, 9 Cal. 502, decided by a divided court in an early day in California, having been subsequently overruled by the courts of that state. *Ex parte Andrews*, 18 Cal. 685; *Ex parte Koser*, 60 Cal. 202.

The leading case in our own state upon the subject is that of *Lindenmuller v. People*, 33 Barb. 548, in which Judge Allen discussed the common law as well as legislation affecting the Sabbath with great force and clearness. He held, in substance, that the body of the Constitution recognizes Sunday as a day of rest and an institution to be respected, by not counting it as a part of the time allowed to the Governor for examining bills submitted for his approval; that the Sabbath exists as a day of rest by the common law without the necessity of legislative action to establish it; and that the legislature has the right to regulate its observance as a civil and political institution. That case was expressly approved in *Neuendorff v. Duryea*, 69 N. Y. 557, 561, 563, and was referred to as one "which has never been questioned in a court of higher or equal authority," and "as declaring the law of this state." It was cited with approval in *People v. Moses*, 140 N. Y. 214, 215, where Judge Earl, speaking for a majority of the court, said: "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people and the peace, quiet, and good order of society, has authority to regulate its observance, and prevent its desecration by any appropriate legislation is unquestioned." While works of charity and necessity have usually been excepted from the effect of laws relating to the Sabbath, and sometimes, also, those persons who keep another day of the week, still quiet pursuits have not, even when they can be carried on without the labor of others, because general respect and observance of the day, so far as practicable, have been deemed essential to the interest of the public, including as a part thereof those who prefer not to keep the day, as their health and morals are entitled to protection, even against their will, the same as those of any other class in the community. According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of gen-

eral rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business. *Lindenmuller v. People*, *supra*.

It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any question relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power, and hence valid under the Constitution, which "presupposes its existence, and is to be construed with reference to that fact." *Carthage v. Frederick*, 122 N. Y. 268, 273, 10 L. R. A. 178.

The statute under discussion tends to effect this result because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest, needed both by the employer and the employed, and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on Police Powers: "If the law did not interfere, the feverish, intense desire to acquire wealth, . . . inciting a relentless rivalry and competition, would ultimately prevent, not only the wage-earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation by resting periodically from labor," Tiedeman, Pol. Powers, p. 181. As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health.

We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose of the utmost importance by promoting the observance of Sunday as a day of rest. It follows, therefore, that it does not go beyond the limits of legislative power by depriving any one of liberty or property within the meaning of the Constitution.

The learned counsel for the defendant, however, criticises the act in question as class legislation, and claims that it is invalid under the 14th Amendment to the Constitution of the United States, because it denies to barbers who do not reside in New York or Saratoga the equal protection of the laws. That amendment does not relate to territorial arrangements made for different portions of a state, nor to legislation which, in carrying out a public purpose, is limited in its operation, but within the sphere of its operation affects alike all persons similarly situated. *Missouri v. Lewis*, 101 U. S. 22, 30, 25 L. ed. 989, 992; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924. It was not designed

to interfere with the exercise of the police power by the state for the protection of health, or the preservation of morals. *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 256. The statute treats all barbers alike within the same localities, for none can work on Sunday outside of New York and Saratoga, but all may work in those places until a certain hour. All are therefore treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578. As was said by the learned appellate division in deciding this case: "If the legislature has power to regulate the observance and prevent the desecration of the Sabbath, it has the power to say what acts in the different localities of the state it is necessary to prohibit to accomplish this purpose. It is quite conceivable that an act in one locality, thickly settled, should be prohibited which in sparsely settled districts of the state could be allowed, and for this reason an act might be objectionable in one district, but not in another. All of these regulations have in view the proper observance of the day, and are within the discretion of the legislature."

We think that the statute violates no provision of either the Federal or state Constitution, and that the judgment appealed from should therefore be affirmed.

All concur, with **Vann, J.**, for affirmance, except **Gray** and **Bartlett, J.J.**, who dissent, each reading for reversal, and **Haight, J.**, who concurs in both dissenting opinions.

Gray, J., dissenting:

This enactment can only find its justification, in my opinion, in an attempted exercise of the police power of the state. I cannot suppose that it is to be defended as a proper or reasonable extension of the "Sunday law" of the state. That law includes in the works of necessity, which it permits, "whatever is needful for the good order, health, or comfort of the community." The occupation of the barber has not been deemed unlawful under it, and it would look like a relapse into the narrow groove of earlier Puritanical belief if we should now regard it as inconsistent with the due observance of the Sabbath day. Conceding, as I do, to the legislature a wide range in the exercise of what is known as the police power. I think that, in this piece of legislation, it has overstepped the limits and has infringed upon the constitutional guaranties, which, in effect, assure to us the enjoyment of our liberty and of our property in all reasonable ways. While it has been frequently observed that it is difficult to define the limits of the police power of the state, it is nevertheless agreed that an enactment in that direction must be one having reference to the comfort, the safety, or the welfare of society. A line of decisions in the Federal and state courts has erected these as monuments to denote the boundaries of this extraordinary power which is deemed to reside in the legislative agents of the people of the state. We know that this power is not above the Constitution, but that it is subject to it, 31 L. R. A.

and when legislation violates any of its provisions, in the letter or the spirit, it is the duty of the courts, upon the faithful performance of which the people confidently rely, to interpose the barrier of their judgments against its enforcement. Under the constitutional guaranty every one is at liberty to follow any lawful avocation which is not injurious to the community, and to enjoy its fruits, and any interference by the legislature, under the guise of a police regulation, must be seen by the court to have some real reference to the common good. The mere declaration of the legislature is not conclusive. It cannot seriously be said that the defendant's business is one that conflicts with the comfort, safety, or welfare of the community, when carried on upon the first day of the week, called Sunday. It is in its nature a peaceable occupation, and, as usually conducted, cannot and does not interfere with the quiet of the day, or with the performance by any citizen of the duties of the day, however appointed. It is one that not merely conduces to the comfort of the individual, but promotes his decent appearance as a member of the community, and it is quite impossible to conceive of the business as, in any reasonable way, militating against the requirements of society with respect to the Sabbath day.

The learned justices of the appellate division have thought that it is discretionary with the legislature to enact laws for the regulation of the observance of the Sabbath. That discretion does exist so far as to prevent what is or amounts to a desecration of the day, as was decided in *People v. Moses*, 140 N. Y. 215, but it should not be deemed to exist so far as to interfere with a peaceable calling, and one more or less necessary to the comfort and decency of members of the community.

But this legislation, in my judgment, is particularly objectionable and deserving of judicial condemnation, for the reason that it discriminates unreasonably in dealing with those who are engaged in the pursuit of a lawful avocation. It certainly must be implied in our governmental system that legislation shall be equal as to all and just in its commands. If that were not so, government by the people for the people would exist but in name. The fundamental guaranties, on which rest our social structure, would be delusive. The legislature cannot act arbitrarily, and if this act is to be defended as a proper exercise of the police power, then it is without shadow of excuse in discriminating against barbers who do not reside in the city of New York or in the village of Saratoga Springs. Legislation which discriminates in this wise is not in harmony with the idea of our democratic form of government. Where it touches the pursuit by individuals of a lawful avocation, it should act with impartial hand; affecting all alike and subjecting every one interested to the same restraints for the sake of the common good. There is no sensible or plausible reason for the discrimination made by this law. It is unnecessary, unreasonable, and hostile to the true policy of the state. Regarded as

an exercise of the police power, it cannot be justified as either necessary for the good of society or as conducive to its welfare; and it is violative of constitutional principles, in that it restrains unduly and unequally the liberty of those engaged in a lawful business.

I think the judgment appealed from should be reversed and that the defendant should be discharged.

Bartlett, J., dissenting:

While this court has very properly held that the Christian Sabbath is one of the civil institutions of the state, and that the legislature may regulate its observance and prevent its desecration (*People v. Moses*, 140 N. Y. 214), I think the case at bar presents an instance where the lawmakers have overstepped the bounds of legitimate legislation in the alleged exercise of the police power. Laws 1895, chap. 823, provides substantially that any person who engages in the business of a barber on the first day of the week shall be deemed guilty of a misdemeanor; provided that in the city of New York and the village of Saratoga Springs barber shops may be kept open until one o'clock of the afternoon of Sunday.

The Penal Code provides (§ 263) that all labor on Sunday is prohibited, excepting the works of necessity or charity.

These works are then defined as including "whatever is needful during the day for the good order, health, or comfort of the community." The legislature by permitting barber shops to remain open for a portion of the first day of the week in two localities of the state necessarily proceeded upon the theory that the business of the barber is a work of necessity contributing to the comfort of the community.

I think it clearly within the power of the legislature, in order to regulate the observance of the Sabbath, to control the hours during which a barber shop may be kept open on the first day of the week, even if the comfort of the community may be to some extent interfered with in so doing.

This principle is recognized by the Penal Code (§ 267), which prohibits the public sale of any property upon Sunday, but allows articles of food to be sold and supplied before ten o'clock in the morning and certain articles of personal property to be sold during the entire day.

If, then, the business of the barber is a work of necessity contributing to the comfort of the community, can it be a reasonable exercise of the police power to arbitrarily extend the comfort of a Sunday morning shave to the inhabitants of the city of New York and the village of Saratoga Springs and deny it to the rest of the state, including great cities like Brooklyn and Buffalo?

I think the act under consideration is vicious class legislation and in direct violation of the 14th Amendment of the Constitution of the United States, which provides that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within

its jurisdiction the equal protection of the laws."

The act is, in my judgment, a specimen of grotesque and absurd legislation resting upon no principle of public policy and utterly indefensible under any reasonable or proper exercise of the police power.

The Supreme Court of the United States has held that the 14th Amendment does not impair the police power of a state (*Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923), and it has further decided that it does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is operated. *Hayes v. Missouri*, 120 U. S. 68, 71, 30 L. ed. 578, 580. There is, however, nothing in these adjudications which will sustain the act under consideration. In the exercise of the police power the legislature is vested with the amplest discretion, the precise limits of which cannot be accurately defined, but there is a point beyond which that discretion cannot be exercised.

The language of Judge Peckham in delivering the opinion of this court in *People v. Gillson*, 109 N. Y. 401, is apposite. The learned judge, referring to *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 638, said: "As is also said in the last case, it is generally for the legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient or appropriate to accomplish such ends the exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists the enactment cannot be upheld as an exercise of the police power."

Can it be said, after a perusal of the act in question, that its provisions are a reasonable and proper exercise of the police power?

I think not; it is an arbitrary, discriminating exercise of that power which ought not to be tolerated.

The good offices of the barber, being a work of necessity needful on Sunday for the comfort of the community, should be extended to all portions of the state alike.

It is true the legislature might allow the barber shops to remain open longer on Sunday in a great city than in a country village, but subject to reasonable regulation as to hours all barbers and their customers are entitled to the equal protection of the laws.

The claim that the work of the barber is one of necessity, needful during the early hours of Sunday for the comfort of the community, rests upon years of practical construction of the various laws regulating the observance of the Sabbath.

I think that chapter 823, Laws of 1895, is void as violating the 14th Amendment of the Constitution of the United States, and for the further reason that it is not a proper exercise of the police power.

The judgment appealed from should be reversed.

WISCONSIN SUPREME COURT.

Jacob MAHLER and Wife, *Respts.*,
v.

George BRUMDER, *Appt.*

(.....Wis.....)

1. **The express refusal of a city to accept a plat with a certain strip designated thereon as a street,** and the inclosure and use of one end of the strip as private property on which the owners are compelled to pay assessments for improvements on another street, preclude a finding that this portion was a public road or street.
2. **A private party cannot maintain an action** to enjoin the obstruction of a public road or street which is a *cul de sac* by a fence between his property and the end of the road merely because he purchased his premises with reference to a plat which indicated the existence of such road.
3. **Special or peculiar damages** differing, not merely in degree, but in kind, from those which are deemed common to all, must be suffered in order to give a private party a right of action to abate a public nuisance.
4. **Equity cannot be successfully invoked** to inflict injury or damage on the defendant without securing any substantial right or benefit to the plaintiff.

(March 10, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiffs in an action to enjoin the obstruction of an alleged highway. *Reversed.*

The facts are stated in the opinion.

Messrs. Howard & Mallory, for appellant:

In order to create a dedication at common law there must be an intention to dedicate on the part of the owner, and actual acceptance or user by the public for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.

2 Dill. Mun. Corp. p. 628; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407; *Connehan v. Ford*, 9 Wis. 240; *Tupper v. Huson*, 46 Wis. 646; *Trerice v. Bartau*, 54 Wis. 99; *Eastland v. Fogo*, 66 Wis. 135; *State, Lightfoot v. McCabe*, 74 Wis. 481; *Cunningham v. Hendricks*, 89 Wis. 632; *Benson v. St. Paul, M. & M. R. Co.* (Minn.) 64 N. W. 393; *Holdane v. Cold Spring*, 21 N. Y. 474; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261.

This intent to dedicate must be made to appear clearly, and if the intent to dedicate is absent there is no valid indication.

Cunningham v. Hendricks, *supra*.

It does not appear that Van Valkenburgh intended to dedicate this east 100 feet absolutely and irrevocably to the public use, or that he intended to dedicate it at all.

NOTE.—On the general question of damages to an abutting owner by closing a highway, see *note* to *People, Hart, v. Marin County* (Cal.) 26 L. R. A. 656; also the later case of *Chicago v. Burecky* (Ill.) 29 L. R. A. 568.

31 L. R. A.

Where one who has offered to dedicate land for a public street conveys such land before his offer is accepted the conveyance operates as a revocation of the offer.

Chicago v. Drezel, 141 Ill. 89; *Field v. Manchester*, 32 Mich. 279; *White v. Smith*, 37 Mich. 291; *Cass County Supers. v. Banks*, 44 Mich. 467; *Buskirk v. Strickland*, 47 Mich. 389.

Where it is sought to establish a dedication by a sale of lots with reference to a map or plat the extent of such dedication is to be determined from the consideration of the whole map, the object being to ascertain the intention.

Hogue v. Albina, 20 Or. 182, 10 L. R. A. 673; *Pearce v. McClenaghan*, 5 Rich. L. 178, 55 Am. Dec. 710.

This land could not become a public street until it was properly accepted. It was a mere private easement. It could only become a street by an acceptance of a plat thereof by the city of Milwaukee.

Fischer v. Laack, 76 Wis. 313; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261; *Oliver v. Pitman*, 98 Mass. 46; *Regan v. Boston Gaslight Co.* 137 Mass. 37; *Dorman v. Bates Mfg. Co.* 82 Me. 438; *Holdane v. Cold Spring*, 21 N. Y. 479.

One claiming the benefit of an estoppel must rest his claim on his own title deed, and not on the deed of another through which he has not derived his title.

Dorman v. Bates Mfg. Co., and *Oliver v. Pitman*, *supra*; 7 Am. & Eng. Enc. Law, p. 23.

There is nothing in plaintiffs' deed, or in that of their grantors, to show that Washington Place extends or ever did extend 300 feet east, and they cannot rely on deeds to which they are strangers to show the extent of Washington Place.

Bell v. Todd, 51 Mich. 21; *Fox v. Union Sugar Refinery*, 109 Mass. 292.

The plaintiffs cannot maintain their action unless they can show some special injury peculiar to themselves.

Carpenter v. Mann, 17 Wis. 156; *Williams v. Smith*, 22 Wis. 597; *Greene v. Nunnemacher*, 36 Wis. 50; *Larson v. Furlong*, 50 Wis. 687; *Clark v. Chicago & N. W. R. Co.* 70 Wis. 593; *Janesville v. Carpenter*, 77 Wis. 288, 8 L. R. A. 808; *Zettel v. West Bend*, 79 Wis. 316; *Kuehn v. Milwaukee*, 83 Wis. 583, 18 L. R. A. 553; *Wood, Nuisances*, 2d ed. § 740, p. 810; *Kirch v. Davies*, 55 Wis. 299.

Messrs. Miller, Noyes, Miller, & Wahl, for respondents:

Dedication or no dedication is a question of fact.

Eastland v. Fogo, 58 Wis. 274, 66 Wis. 133; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407.

If the facts of dedication are undisputed the question is one of law for the court.

State v. Schwein, 65 Wis. 207; *Yates v. Judd*, 18 Wis. 126; *Sanborn v. Chicago & N. W. R. Co.* 16 Wis. 20.

Laying out and platting lands and selling lots in reference to such plat show a dedication.

Weisbrod v. Chicago & N. W. R. Co. 21 Wis. 603; *Fischer v. Laack*, 76 Wis. 330.

No action by the municipality is necessary to constitute a valid acceptance of the dedication.

Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23.

Here is a public highway upon which plaintiffs lived, and which plaintiffs were entitled to use. It is of more importance to them than to the public generally. People who dwell upon other streets might not care whether Washington Place was a street or whether a nuisance was maintained thereon; but to these plaintiffs it was of importance.

Pettibone v. Hamilton, 40 Wis. 415; *Erens v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 597.

Where a highway is unlawfully obstructed any person who wishes to use the street may remove the obstruction and abate the nuisance.

Jones v. Davis, 35 Wis. 377; *Williams v. Fink*, 18 Wis. 266; *Elliott, Roads & Streets*, p. 492; *Brown v. Perkins*, 12 Gray, 89.

The statute covers cases like the one at bar. Rev. Stat. § 8189.

Cassoday, Ch. J., delivered the opinion of the court:

Grand avenue runs east and west in Milwaukee. The next street north of it is Wells street, which is parallel with Grand avenue, and 486 feet from it. Washington avenue (now Twenty-Seventh street) runs north and south, and crosses those two streets at right angles. In 1883, Van Valkenburgh became the owner of all the land between Wells street and Grand avenue, from Washington avenue east for a distance of a little more than 385 feet. The land was then open and unplatted. Thereupon Van Valkenburgh platted the same with lots fronting on Grand avenue, Washington avenue, and Wells street. There was also designated upon the plat a street or roadway 46 feet wide, and running east from east line of Washington avenue 300 feet, and named thereon "Washington Place." The north line of "Washington Place," so called, was and is 210 feet south of the south line of Wells street, and the south line of Washington Place was and is 230 feet north of the north line of Grand avenue, and several lots fronted on Washington Place from either side of it, but that plat did not mention nor refer to Twenty-Sixth street, which was not then in existence, and was not established nor laid out until several years afterwards. Van Valkenburgh thereupon submitted such plat to the common council of the city for acceptance, but they declined to accept of the same, and notified him to that effect. Nevertheless, he graded and graveled the street, and put in gutters and wooden curbing and plank sidewalks, and sold lots fronting thereon. April 12, 1894, the plaintiff, Mrs. Mahler, acquired title to one of the lots fronting thereon through several mesne conveyances, the first being a deed from Van Valkenburgh to Murray, June 21, 1884, each and all of which deeds described the land as commencing at a point on the north line of Washington Place, 130 feet east of the east line of Washington avenue; thence east, along said north line of Washington Place, 40 feet to a point; thence north 105 feet, to a point; thence west 40 feet, to a point; thence south 105 feet, to place of beginning. November 18, 1889,

81 L. R. A.

the city resolved to open Twenty-Sixth street, and for that purpose Van Valkenburgh conveyed that portion thereof east of the defendant's premises, hereinafter described, to the city July 12, 1892. Some time prior to the acts complained of, the defendant acquired title derived from Van Valkenburgh, in 1884 and 1886, through several mesne conveyances, to two lots, each fronting on the east 100 feet of Washington place, and each running back therefrom 105 feet, and also acquired title, derived from Van Valkenburgh, May 23, 1887, through several mesne conveyances, to the east one third of Washington Place, being that portion of Washington Place between the two lots he acquired as above mentioned, and also a strip 3 feet wide and 256 feet long between said lots and Washington Place on the west, and Twenty-Sixth street on the east. The plaintiffs concede that, before they obtained their lot in question there was a wire fence entirely across Washington Place, 200 feet east of Washington avenue, and parallel with that avenue, being 30 feet east of the east line of the plaintiffs' lot; that, after they acquired such title as indicated, they tore down that wire fence; that some time afterwards the defendant caused a second fence to be built on the same line where the wire fence had stood, and which last fence was constructed of heavy plank cedar posts and clapboards, which last fence the plaintiffs cut down and removed; that two weeks afterwards the defendant rebuilt the same upon the same line, and of similar materials; that thereupon, and on November 5, 1894, the plaintiffs commenced this action in equity to abate and remove said fence as a nuisance, and to enjoin and restrain the defendant from constructing and maintaining such fence. The defendant answered by way of admissions, denials, and counter allegations to some of the facts as stated and others to be stated. At the close of the trial, the court found, in effect, some of the facts stated, and also, in effect, that Washington Place, and the whole thereof, was a public road or highway, and that such fence was a nuisance therein and ordered judgment abating the same, and perpetually enjoining the defendant from constructing or maintaining such fence. From the judgment entered thereon accordingly, the defendant brings this appeal.

1. The finding of the trial court to the effect that that portion of Washington Place east of the fence mentioned had been a public road or highway ever since 1883 is contrary to the undisputed evidence. As indicated, the city, in 1883, expressly refused to accept the plat with Washington Place designated, thereon as a street. There is no claim or pretense that Washington Place, so designated on that plat, extended east to any street or roadway, public or private. On the contrary, it is undisputed that its east end, as designated on that plat, terminated on lands then owned wholly by Van Valkenburgh, and that his land extended still further east for a distance of more than 85 feet. So it is undisputed that, for nearly seven years prior to the time when the plaintiffs obtained their lot, Van Valkenburgh and his grantees of the land abutting upon that portion of Washington Place east of the line

where the fence is so located, by conveyances and otherwise, treated that portion of Washington Place as private property, to which neither the public nor any other parties or persons had any right, title, or interest; and the city not only refused to accept the same as a public road or street, as mentioned, but compelled the owners thereof to pay assessments thereon as private property, for opening, grading, and improving Twenty-Sixth street; and there is no evidence that that portion of Washington Place east of the line of that fence was used by the public during any portion of such seven years as a road or street, public or private. The law is well settled that, to constitute a public street or highway by dedication, there must not only be an absolute dedication,—a setting apart and a surrender to the public use of the land by the proprietors,—but there must be an acceptance and a formal opening thereof by the proper authorities, or a user which is equivalent to such acceptance and opening. *Holdane v. Cold Spring*, 21 N. Y. 474; *Fonda v. Borat*, 2 Keyes, 48; *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261; *People v. Underhill*, 144 N. Y. 324; *Connehan v. Ford*, 9 Wis. 240; *Hanson v. Taylor*, 23 Wis. 547; *Eastland v. Fogo*, 66 Wis. 138. Obviously, there was no such acceptance or user; and hence it was competent for the proprietors and abutting owners to revoke the same, and they did revoke the same. *Holdane v. Cold Spring*, *supra*. We must hold that the portion of Washington Place upon which such fence was located never became a public road or street, nor did any portion thereof east of the line where that fence was located become such public road or street.

2. As to the portion of Washington Place west of the line of that fence, it may be otherwise. It appears that in 1891 and 1892 Van Valkenburgh obtained certain adjudications to the effect that certain tax certificates on that portion of Washington Place west of the fence were void, for the reason that the same was a public road or street, and hence exempt from taxation. Since that portion of Washington Place opened directly upon the public avenue at its west end, it may be that, under the authorities, it was not precluded from being a public street or road by the mere fact that it was and is a *cul de sac*. *Moll v. Benckler*, 30 Wis. 584; *Schatz v. Pfeil*, 56 Wis. 429; *Moore v. Roberts*, 64 Wis. 538; *People, Williams, v. Kingman*, 24 N. Y. 559; *Elliott, Roads & Streets*, p. 1, and cases there cited. Assuming that that portion of Washington Place west of the fence is a public road or street, yet that would not make the fence a public nuisance; and, even if it were, still that would not give the plaintiffs, as private citizens, a right of action to abate the same, for it is well settled that, to entitle a private party to maintain an action to abate a public nuisance, it must appear that he has suffered some special or peculiar damages, differing, not merely in degree, but in kind, from that which is deemed common to all. *Zettel v. West Bend*, 79 Wis. 316; *Hay v. Weber*, 79 Wis. 591; *Evans v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 603. Such being the law, it is obvious that the right of the plaintiffs to maintain this private action is no 31 L. R. A.

greater nor less by reason of Washington Place in front of their lot being regarded as a public road or street, or merely as a private road or street. In other words, the only ground upon which the plaintiffs can expect to maintain this action, if at all, is that, as owners of the lot mentioned, the fence is as to them a private nuisance.

3. It must be admitted that the only rights the plaintiffs have in or upon Washington Place, differing in kind from the rights of the public, they acquired under and by virtue of the deed of the lot which they received April 12, 1894. That deed, like the deed from Van Valkenburgh to Murray of the same lot, ten years before, and all intervening deeds, described the lot by metes and bounds, and located the south line of the lot as running along and upon the north line of Washington Place; and yet, by reason of Van Valkenburgh's plat, recognized in the deeds, it may be, and for the purposes of this case we assume, what is most favorable to the plaintiffs, that, under the adjudication of this court, their lot extends to the centre of Washington Place. *Pettibone v. Hamilton*, 40 Wis. 402; *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642. Such rights of the plaintiffs, having been acquired by the deed, are necessarily measured by the language of the deed. *Goddard, Easem.* (Bennett's ed.) 314; *Constock v. Van Deusen*, 5 Pick. 163; *Miller v. Washburn*, 117 Mass. 371; *Fischer v. Lauck*, 76 Wis. 313. Since the deed recognizes the plat, it must be construed with reference to the plat. *Ibid.* In the case at bar there was no covenant or agreement in any of such deeds, or at all, that Washington Place or any part of it should remain open for the use or benefit of such grantees, or at all; and our statute, unlike the law in some states, expressly declares that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." Rev. Stat. § 2204; *Ferguson v. Mason*, 60 Wis. 383. The rights of the plaintiffs are based upon the grant with reference to such plat, and nothing more. "When an incorporeal right of such a nature is created by grant," says a learned author, "the question whether it is or is not appurtenant to land depends upon the nature of the right and the intention of the parties creating it. In order to make such a right appurtenant to land, the right must be in its nature an appropriate and necessary adjunct of the land conveyed, having in view the purposes for which the land is conveyed; and the conveyance must show that the parties intended the right to be made appurtenant to the land conveyed." Washb. *Easem.* 4th ed. pp. 8, 9. Nothing will pass as an easement to a dominant estate, although it may have been used with it, unless a right thus to use it has become consummate, and thereby made appurtenant to the granted premises, or is expressly mentioned in the deed conveying the same as an easement intended to be conveyed thereby." *Id.* p. 41. Another learned author is equally explicit: "A right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used even by the dominant owner for any purpose unconnected with enjoyment of the domi-

nent tenement, neither can it be assigned by him to a stranger, and so be made a right in gross, nor can he license a stranger to use the way when he is not coming to or from the dominant tenement." *Goddard's Easem.* p. 209; *Ackroyd v. Smith*, 10 C. B. 164; *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650. A right not connected with the enjoyment or use of a parcel of land granted cannot be annexed as an incident to that land, so as to become appurtenant to it. *Linthicum v. Ray*, 76 U. S. 9 Wall. 241, 19 L. ed. 657. "A thing is appurtenant to something else," said Field, J., "only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter." *Humphreys v. McKissack*, 140 U. S. 313, 314, 35 L. ed. 476. Upon the principles stated, the plaintiffs, under and by virtue of their deed of the lot mentioned, and as incident to the grant, acquired the right to use Washington Place so far as the same was appurtenant to their lot, and to freely pass over the same to and from their lot and the public avenue on the west; and this right included the right of all persons having occasion to go to or from the premises of the plaintiffs. This is equally true of those owning lots abutting upon Washington Place east of the plaintiffs' lot, as well as such abutting owners south and west of their lot. But, as indicated, such rights of the plaintiffs did not, under the facts and circumstances stated, give them any right to remove the fence mentioned, nor to break into the defendant's premises on land not appurtenant to their lot. Had Washington Place, as originally platted, connected with any public street or roadway on the east, a different question would have been presented. The views expressed are abundantly supported by authority as well as reason. *Badeau v. Mead*, 14 Barb. 328; *Cor v. James*, 59 Barb. 144, 157, Affirmed 45 N. Y. 557; *Spir v. Utrecht*, 121 N. Y. 429; *People v. Underhill*, 144 N. Y. 316; *Langmaid v. Higgins*, 129 Mass. 353; *Pearson v. Allen*, 151 Mass. 79.

4. Besides, the case is not one calling for equitable interference. Equity should not be successfully invoked merely to inflict injury or damage to the defendant, without securing any substantial right or benefit to the plaintiff.

Atty. Gen. v. Nichol, 16 Ves. Jr. 338; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black. 485, 17 L. ed. 311.

The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to dismiss the complaint.

Winslow, J., dissenting:

There are a few well-established legal principles which seem to me to call for affirmance of this judgment. These principles I shall briefly state: (1) It is now well settled that a *cul de sac* may be a highway. *Elliott, Roads & Streets*, p. 1, and authorities cited; *Bartlett v. Bangor*, 67 Me. 460; *Schatz v. Pfeil*, 56 Wis. 429. (2) When a land owner surveys and plats land and sells lots with reference to such plat (as here), there results an immediate and irrevocable dedication of the streets marked on the plat which is binding on both vendor and vendee. 2 Dill. Mun. Corp. 3d ed. § 640, and authorities cited in note 2; *Donohoo v. Murray*, 62 Wis. 100, citing and approving *Bartlett v. Bangor*, *supra*. (3) The purchaser's right extends to have all the streets remain open which were marked on the plat, and he may enforce such right: 2 Dill. Mun. Corp. *supra*; *Elliott, Roads & Streets*, p. 112, and cases cited in note. (4) This right is based upon the principle of estoppel, and not upon the doctrine of grant or covenant. The grantor is estopped from denying the existence of the indicated ways, because it is presumed that the indicated ways add value to the lots, and that the purchaser paid such added value. *Elliott, Roads & Streets*, p. 113. (5) This right extends equally to a way which is a *cul de sac*. The purchaser has the right to have the entire *cul de sac* kept open, and not merely that part which is necessary for his use in reaching some other highway. *Thomas v. Poole*, 7 Gray, 83; *Rodgers v. Parker*, 9 Gray, 445; *For v. Union Sugar Refinery*, 109 Mass. 292. (6) The enjoyment of such a right will be protected by injunction. 2 Story, Eq. Jur. 12th ed. §§ 926, 927. Believing these propositions to be unassailable, I cannot agree with the conclusion reached on this case.

Marshall, J.: I concur in the foregoing dissenting opinion by Mr. Justice Winslow.

NEW HAMPSHIRE SUPREME COURT.

Lucian PICKERING

v.

Lydia A. MOORE.

(.....N. H.)

1. A tenant has a right to manure produced on the leased premises by stock in excess

of that maintainable by the products of the premises from fodder produced elsewhere.

2. A tenant will not lose his property in manure owned by him by intermixing it without fraudulent intent with that owned by the landlord of the same quality and value without the latter's consent.

3. One of two tenants in common of a

NOTE.—Rights of landlord and tenant in respect to manure on leased premises.

In England there are few decisions upon this general question,—not enough to determine clearly what the common law is. Most of the cases in which the question has arisen there have been governed by an express covenant in the lease or by custom in the particular locality where the case

R. A.

arose. The few cases in which the question was free from controlling circumstances seem to conflict and are too meagerly reported to make it certain that they were not in fact governed by special circumstances.

In *Webb v. Plummer*, 2 Barn. & Ald. 746, the lease expressly prohibited the carrying away of manure.

quantity of manure may rightfully take away his share without the intervention of a court to make the division.

(March 16, 1894.)

ACTION to recover damages for the alleged wrongful conversion by defendant of certain manure alleged to have been the property of plaintiff. *Judgment for plaintiff.*

On March 31, 1883, defendant leased for a term of three years a farm to plaintiff who covenanted to consume and convert into manure to be used and left on the farm all hay and fodder raised on the farm. Plaintiff held over and

continued to occupy until May 30, 1892. During the last year of his occupancy he procured large quantities of fodder not raised on the farm which upon being converted into manure, was mixed in a single heap with that produced from fodder raised on the place. Defendant prevented him from taking it away.

Further facts appear in the opinion.

Messrs. Leach & Stevens for plaintiff.

Messrs. Albin & Martin for defendant.

Carpenter, J., delivered the opinion of the court:

The plaintiff held the farm after the expiration of three years as tenant from

In *Smith v. Chance*, 2 Barn. & Ald. 754, the lease required the consumption of the hay on the premises or for every load of hay removed there should be a return of two loads of manure.

In *Richards v. Bluck*, 6 C. B. 437, 6 Dowl. & L. 325, 12 Jur. 963, the lease contained the covenant that the tenant should during the term consume and convert into manure and spread on the premises all the green crops grown thereon, or in case he sold any part of them he should for every ton sold bring back and spread on the premises a ton of good stable manure.

In *Beaty v. Gibbons*, 16 East, 116, the covenant provided that the tenant should spread the manure on the farm and should sell and dispose of such as remained upon the premises at the end of the term to the succeeding tenant, and the court held that the covenant prohibited him from taking the manure off from the premises but that it was his property, and that if the succeeding tenant used it before paying for it he was guilty of trespass.

Under a covenant to use the land in a husband-like manner the tenant ought to use on the land all the manure made there, but he may carry away corn and straw not used up at the end of the term and is not bound to return the manure made from it. *Watson v. Welch*, 1 Esp. N. P. 131 (279), 26 Vin. Abr. 488.

In *Leigh v. Lillie*, 6 Hurlst. & N. 165, 30 L. J. Exch. 25, the lease provided that the tenant should not carry away any manure under the increased rent of £10 for every ton carried away.

A bond conditioned that the tenant would not remove any of the manure made on the farm is broken by his permitting a third person to remove manure made by cattle housed on the farm but belonging to such third person and fed with fodder brought upon the farm by him. *Hindle v. Pollett*, 6 Mees. & W. 529.

In *Clarke v. Roystone*, 13 Mees. & W. 752, it appeared that the custom was for the tenant to pay for the value of the manure upon going in, and to receive pay for the value of that left on going out; and it was held that an agreement to leave the manure upon the land upon going out excluded the custom and removed the liability to pay upon going in.

A covenant to expend the manure on the farm will prevent the removal of any manure which exists at the expiration of the term, but not that which is made subsequently while the tenant is holding over. *Elliott v. Elliott*, 20 Ont. Rep. 134.

In *Massey v. Goodall*, 17 Q. B. 310, 20 L. J. Q. B. 526, 15 Jur. 991, the covenant was that the tenant should not sell any manure produced on the farm without the written consent of the landlord.

In *Shier v. Shier*, 22 U. C. C. P. 142, there was a covenant in the lease regulating the rights of the parties as to the manure.

In *Pulteney v. Shelton*, 5 Ves. Jr. 147, an injunction was granted to restrain the tenant from removing manure and other products of the farm.

31 L. R. A.

And in *Onslow v. —*, 16 Ves. Jr. 172, an injunction was allowed against taking away manure.

But in *Hilgson v. Mortimer*, 6 Car. & P. 616, it seems to be conceded that the tenant has a right to carry away manure made during the term, since the action was for taking away a portion of the earth on which the manure rested.

If the lease provides that the manure shall be left on the land to be used by the landlord or the succeeding tenant it excludes the operation of a custom which required the tenant to leave the manure but entitled him to be paid for it. *Roberts v. Barker*, Car. & M. 808, 3 Tyrw. 945.

In New Brunswick it is not contrary to the course of good husbandry to remove manure from the farm; and in the absence of any custom or special agreement to the contrary the outgoing tenant has a right to the manure lying in heaps in the barnyard, and may take it away as a personal chattel at the end of the term. *Foshay v. Barnes*, 12 N. B. 450.

The mere relation of landlord and tenant is not sufficient to support an action for failure to expend a certain quantity of manure on the farm each year. *Brown v. Crump*, 1 Marsh. 567.

But the relation of landlord and tenant is sufficient to support an undertaking to cultivate the farm in a good and husband-like manner and not to carry away any of the manure made on the premises. *Powley v. Walker*, 5 T. R. 373.

American authorities.

In this country the rule is quite general that in the absence of a special agreement the manure must be left upon the premises and cannot be removed therefrom in all cases of agricultural leases.

Manure upon a farm used either for cultivation or for a dairy farm, and made partly from the products of the farm and partly from feed purchased elsewhere, cannot be removed by the tenant off from the farm. *Bonnell v. Allen*, 53 Ind. 130.

An outgoing tenant in agriculture is not entitled to the manure made on the farm during his term, even though lying in heaps in the farmyard, and though it was made from his own fodder and by his own cattle. *Lassell v. Reed*, 6 Me. 222.

In *Chase v. Wingate*, 68 Me. 204, 28 Am. Rep. 36, the court in considering the right of a mortgagor to take away manure made on the mortgaged premises says that as between landlord and tenant manure made in the course of husbandry on the farm is so attached to and connected with the realty that in the absence of an express stipulation or understanding to the contrary it passes as appurtenant to it. This doctrine rests upon the ground that it is for the interest of good husbandry and the encouragement of agriculture that manure produced on the farm should be consumed upon it, and that the land should not be impoverished by the removal therefrom of the material necessary for its enrichment and the growth of the succeeding crop.

year to year, upon the terms expressed in the lease. *Russell v. Fabyan*, 34 N. H. 218, 223; *Conway v. Starkweather*, 1 Denio, 118.

Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent. *Saunders v. Twiss*, 26 N. H. 345, 349; *Perry v. Carr*, 44 N. H. 118, 120; *Hill v. De Rochemont*, 48 N. H. 87, 88. The doctrine "was established for the benefit of agriculture. It found its origin in the fact that it is essential

to the successful cultivation of a farm that the manure, produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial."

In *Gallagher v. Shipley*, 24 Md. 418, 87 Am. Dec. 611, it is stated that by the general current of American as well as English authorities the tenant under a farming lease has no right to remove from the premises any manure made either wholly or in part from the products of the farm. But if the land is used for the purpose of herding cattle, and is not cultivated, there is nothing to prevent the removal of the manure produced in the course of that business.

Manure made on a farm occupied by a tenant in the ordinary course of husbandry is by usage, practice, and the general understanding so attached to and connected with the realty that in the absence of any express stipulation on the subject an outgoing tenant has no right to remove it or sell it to be removed. *Daniels v. Pond*, 21 Pick. 367, 32 Am. Dec. 269.

The rule of *Daniels v. Pond* is recognized in *Fay v. Muzzey*, 13 Gray, 53, 74 Am. Dec. 619, which was a case involving the duty of an administrator in reference to manure on the premises of his intestate.

Manure passes with the land in the absence of express agreement to the contrary. *Strong v. Doyle*, 110 Mass. 92.

The manure belongs to the owner of the farm. *Lewis v. Lyman*, 22 Pick. 437.

The lease may provide that the manure shall be left on the premises. *Brown v. Magorty*, 156 Mass. 209.

The manure belongs to the farm as an incident necessary for its improvement and cultivation. *Plumer v. Plumer*, 30 N. H. 558.

The removal of manure by a tenant is waste. *Barrington v. Justice*, 4 Pa. L. J. 289.

The sale and removal by a tenant at will of manure manufactured on the premises in due course of husbandry is waste. *Perry v. Carr*, 44 N. H. 118.

Under a lease providing that for every ton of hay not consumed on the farm the tenant should bring on a certain quantity of manure and should leave at the end of the term an amount equal to what he found there when he took possession, he cannot remove any of the manure made during the term, although he leaves the requisite amount at the end and although it is made from eel grass gathered for that purpose on the farm. *Hill v. De Rochemont*, 48 N. H. 87.

It is common to insert a covenant in the lease of a farm to leave the manure of the last year upon it. *Middlebrook v. Corwin*, 15 Wend. 169.

Where a farm is let for agricultural purposes, in the absence of stipulation or custom, the manure does not belong to the tenant but to the farm. *Ibid.*

Wheat straw is not embraced in the term "manure" so as to require its retention and use on the farm. *Fobes v. Shattuck*, 22 Barb. 567.

In case of the partition sale of a farm in possession of a tenant the purchaser of the barn and barnyard will get title to the manure lying therein, so that the tenant cannot afterwards take it and spread it on land bought by another person. *Elting v. Palen*, 60 Hun, 306, 31 L. R. A.

When a farm is let for agricultural purposes the outgoing tenant has no right to remove manure made on the farm during his term. The fact that the farm is used as a milk farm and not strictly for agricultural purposes in the general sense of that term does not vary the rule. *Wain v. Connor*, 5 Clark (Pa.) 164.

The mere fact that the tenant buys some hay and some grain to feed to the stock does not give him any title to the manure. *Lewis v. Jones*, 17 Pa. 382, 55 Am. Dec. 550. The court says it is implied from the letting of a farm for agricultural purposes that the tenant will cultivate the farm according to the rules of good husbandry. A course of husbandry that would permit the tenant to take away the manure would be injurious to the public interest and ruinous alike to landlord and tenants.

A tenant cannot remove the manure as against one who purchases the farm from his landlord. *Wetherbee v. Ellison*, 19 Vt. 379.

Exceptions to the rule.

There may be circumstances under which the manure does not belong to the lessor, and there is an occasional dissent from the rule which gives it to him generally.

A tenant who occupies a barn to keep his cattle in and feeds them from his own hay procured elsewhere will be entitled to the manure. *Corey v. Bishop*, 48 N. H. 146.

The landlord has no right to the manure if the produce from which it is obtained is not grown on the farm, or in case it is made in connection with a livery-stable business. *Carroll v. Newton*, 17 How. Pr. 189.

A lessor has no claim to manure made in buildings unconnected with agricultural property or out of the course of husbandry. *Needham v. Allison*, 24 N. H. 355.

An agreement between the parties may make the manure personal property, and it does not then become realty by being left upon the premises at the expiration of the term. *Fletcher v. Herrick*, 112 Mass. 382.

In *Staples v. Emery*, 7 Me. 201, the court in considering the right to take manure on execution against a tenant at will says that the rule which precludes the tenant from taking the manure after the end of the term or during its last year does not apply at earlier times during the term, and that the loss would fall on the tenant and not on the landlord if it was taken off from the farm, so that there is nothing to prevent its being done.

Manure made by an outgoing tenant may be removed by him in the absence of covenant or custom to the contrary provided it is done before he gives up possession of the farm. *Smithwick v. Ellison*, 2 Ired. L. 326, 38 Am. Dec. 697. In that case the court says that the contrary rule is held in some of the states as settled upon the ground of the usage and general understanding of the country, but that since no custom has been shown to exist in that state which would govern that case the question must be determined upon common-law principles.

H. P. F.

Haslem v. Lockwood, 37 Conn. 500, 505, 9 Am. Rep. 350. Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husband-like manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (*Perry v. Carr*, and *Hill v. De Rochemont*, *supra*).—in other words, whether the express or implied obligation to cultivate the farm in a husband-like manner binds him as matter of law, to convert into manure all the fodder grown on the premises,—is a different, and possibly an open question. *Wing v. Gray*, 36 Vt. 261, 266, 267; *Levis v. Lyman*, 22 Pick. 437, 441, 445; *Middlebrook v. Corwin*, 15 Wend. 169, and cases cited; *Brown v. Crump*, 1 Marsh. 567; *Legh v. Hewitt*, 4 East, 154, 159; *Moulton v. Robinson*, 27 N. H. 550, 561; *Cooley*, Torts, 334, 343, 344. However that may be, no rule of good husbandry requires a tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder procured by purchase, or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in ordinary course of husbandry. It is produced "in a manner substantially like making it in a livery stable." *Hill v. De Rochemont*, 48 N. H. 87, 90; *Corey v. Bishop*, Id. 146, 148. It is immaterial whether the additional stock is kept for hire, or is the tenant's property. *Needham v. Allison*, 24 N. H. 355.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure, of the same quality and value, without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him." *Ryder v. Hathaway*, 21 Pick. 298, 306; *Gilman v. Hill*, 36 N. H. 311, 323; *Robinson v. Holt*, 39 N. H. 557, 563, 75 Am. Dec. 233; *Moore v. Bowman*, 47 N. H. 494, 501, 502; *Cheshire R. Co. v. Foster*, 51 N. H. 490, 493. "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule wholly out of harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but also because it would compel the other party to pay, not damages, but a penalty." *Cooley*, Torts, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined. *Gardner v. Dutch*, 9 Mass. 427, 430, 431; *Ryder v. Hathaway*, *supra*; *Chapman v. Shepard*, 39 Conn. 418, 425; *Kimberly v. Patchin*, 19 N. Y. 330, 341, 75 Am. Dec. 334. Assuming that they were, the action may be

maintained. A tenant in common has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his cotenants. Where two have each an equal title to an indivisible chattel, "as of a horse, an ox, or a cowe," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is impossible. Hence neither can lawfully take it from the possession of the other. The one excluded from possession has no legal remedy, except to take it "when he can see his time." Co. Litt. § 323; *Southworth v. Smith*, 27 Conn. 355, 359, 71 Am. Dec. 72. A tenant in common of personal as well as real property has a right to partition, if partition is possible, and, if not, to a regulation of its use equivalent to partition, or to a sale. Co. Litt. 164, 165a; *Stoughton v. Leigh*, 1 Taunt. 402, 411, 412; *Morrill v. Morrill*, 5 N. H. 184, 185; *Crowell v. Woodbury*, 52 N. H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible, by weight, measure, or number, into portions identical in quality and value, as corn and various other articles, a different case is presented. There is no question of legal or equitable right. There is, and can be, no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial, functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process,—in other words, enforce the conceded right. One may, in general, do without a decree what equity would decree that he might do. Neither law nor equity allows one, in the exercise of his own rights, to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense, and without danger of injustice to his cotenant. Except in *Daniels v. Bronen*, 34 N. H. 454, 69 Am. Dec. 505, it has never been held, so far as observed, that a tenant in common is liable to his cotenant, in any form of proceeding, for taking from the latter's possession, and consuming or destroying, his just proportion, only, of the common property. The conveyance by a tenant in common of a part of the common land by metes and bounds

may effect a partition, and will if it does no injustice to his cotenants,—if their just share can be assigned to them out of the remaining land. *Holbrook v. Bowman*, 62 N. H. 313, 321. No reason is perceived why a similar doctrine should not be applied in the case of a common tenancy of chattels. If A and B own in common 100 horses, and B sells 10 of them to C why should A be permitted to take them "when he can see his time," if he has possession of, and can have his full share assigned to him from, the remaining 90? However that may be, a tenant in common of goods divisible by tale or measure may, without the consent and against the will of his cotenant, rightfully take and appropriate to his sole use, sell, or destroy, so much of them as he pleases, not

exceeding his share, and by so doing effect, *pro tanto*, a valid partition. To this extent, *Daniels v. Brown*, *supra*, is overruled. *Haley v. Colcord*, 59 N. H. 8, 47 Am. Rep. 176; *Gage v. Gage*, 66 N. H. 282, 288, 28 L. R. A. 829; *Seldon v. Hickock*, 2 Cal. 166; *Lobbett v. Stowell*, 51 N. Y. 70, and cases cited; *Stall v. Wilbur*, 77 N. Y. 158, 164; *Cooley*, Torts, 453; 6 Am. L. Rev. 455-459, and cases cited. The defendant by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights. *Evans v. Mason*, 64 N. H. 98.

Judgment for the plaintiff.

Wallace, J., did not sit. The others concurred.

TENNESSEE SUPREME COURT.

Louis EICHENGREEN, *Appt.*,
v.
LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(.....Tenn.....)

1. **False imprisonment of an innocent person** on a charge of attempting to pass counterfeit money which is procured by a railroad detective while acting within the scope of his authority renders the railroad company liable in this particular matter although he exceeded his authority and acted contrary to his instructions respecting the caution to be exercised.
2. **An express order of an unlawful arrest** by an agent of a railroad company is not necessary to render the company liable if the arrest was procured by the agent acting within the scope of his employment.

(February 18, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Sumner County in his favor for a less sum than he demanded in an action to recover damages for false imprisonment. *Reversed*.

The facts are stated in the opinion.

Messrs. S. F. Wilson, J. W. Blackmore, and G. W. Boddie, for appellant:

A corporation is responsible for the acts of its agents, done either *in contractu* or *in delicto*, in the business of their employment, just as an individual is liable.

Philadelphia, W. & B. R. Co. v. Quigley, 62 U. S. 21 How. 262, 16 L. ed. 73; *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008; *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791; *Harris v. Louisville, N. O. & T. R. Co.* 35 Fed. Rep. 116.

NOTE.—For carriers' liability for false imprisonment of a passenger, see *note* to *Mulligan v. New York & R. B. R. Co.* (N. Y.) 14 L. R. A. 791, also *Gillingham v. Ohio River R. Co.* (W. Va.) 14 L. R. A. 798; *Palmer v. Manhattan R. Co.* (N. Y.) 16 L. R. A. 136; *Central R. Co. v. Brewer* (Md.) 27 L. R. A. 63; and *Atchison, T. & S. F. R. Co. v. Henry* (Kan.) 29 L. R. A. 465.
81 L. R. A.

Under this principle it may be liable for the fraud, for the assaults, and for false imprisonments done and effected by its agents.

Duggan v. Baltimore & O. R. Co. 159 Pa. 248; *Dexter & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Lynch v. Metropolitan Eler. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141; *Hutchinson v. Western & A. R. Co.* 6 Heisk. 684; *Wheelers v. Second Nat. Bank*, 1 Baxt. 509, 25 Am. Rep. 783; *Harris v. Louisville, N. O. & T. R. Co. supra*; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101-117, 37 L. ed. 97-105.

The principal is liable to third parties for whatever the agent does and says, whether contract, representations, or admissions he makes; whatever negligence he is guilty of, and whatever wrongs he commits, provided he acts within the scope of his apparent authority, and provided a liability would attach to the principal if he was in the place of the agent.

1 Am. & Eng. Enc. Law, p. 410, note 3; *Town v. Tennessee Nat. Bank*, 9 Heisk. 479; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352, 25 Am. Rep. 780.

If an agent acting within the scope of his agency or apparent authority commit a wrong to the injury of a third party, the principal is liable, and in such case the principal is not relieved because the agent in the matter exceeded his authority.

Wachter v. Phoenix Assur. Co. 132 Pa. 438, 1 Am. & Eng. Enc. Law, p. 415, note 2; *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Duggan v. Baltimore & O. R. Co. supra*.

And if he employs means outside of his authority.

14 Am. & Eng. Enc. Law, p. 804, note; *Griswold v. Gebbie*, 126 Pa. 353.

A master is liable for the acts of his servants performed in the course of his employment, although the master did not directly authorize the act, nor subsequently ratify it.

Philadelphia & R. R. Co. v. Derby, 55 U. S. 14 How. 468, 14 L. ed. 502; *New Orleans, M. & C. R. Co. v. Hanning*, 82 U. S. 15 Wall. 649, 21 L. ed. 220; *Bay Shore R. Co. v. Harris*, 67 Ala. 9; *Memphis & O. River Packet Co. v. McCool*, 83 Ind. 398, 43 Am. Rep. 71; *Chicago, N. L. & N. O. R. Co. v. Scurr*, 59 Miss. 464, 43 Am.

Rep. 373; *Johnson v. Central Vermont R. Co.* 56 Vt. 707.

And where he acts wantonly or wilfully if within the scope or course of his employment.

Nashville v. Brown, 9 Heisk. 1, 24 Am. Rep. 289; *Puryear v. Thompson*, 5 Humph. 397; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39; *Georgia R. Co. v. Newsome*, 60 Ga. 492; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571.

If the wrongful acts of the agent result in the wrongful arrest of the party, the corporation is liable.

Fields, Priv. Corp. § 331; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; *Lynch v. Metropolitan Elec. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141; *Standish v. Narragansett S. S. Co.* 111 Mass. 512, 15 Am. Rep. 66; *Duggan v. Baltimore & O. R. Co.* 159 Pa. 248.

Whether the servant was acting in the course of his employment when he committed the wrongful or tortious act is a question of fact for the jury.

14 Am. & Eng. Enc. Law, p. 809; *Redding v. South Carolina R. Co.* 3 S. C. N. S. 1, 16 Am. Rep. 681.

Any one who participates in a wrongful arrest, whether directly or by causing others to engage in it, by exciting, directing, consenting to, or encouraging, is liable therefor.

Johnson v. Tomkins, Baldw. C. C. 571; *Clifton v. Grayson*, 2 Stew. (Ala.) 412; *Mullen v. Brown*, 138 Mass. 114.

Especially if the arrest is without lawful warrant.

McGarrahan v. Lavers, 15 R. I. 302; *Floyd v. State*, 12 Ark. 439, 54 Am. Dec. 250; *Stoddard v. Bird, Kirby* (Conn.) 65; *Burlingham v. Wylee*, 2 Root, 152; *Stoyel v. Lawrence*, 3 Day, 1; *Cooper v. Johnson*, 81 Mo. 483; *Veneman v. Jones*, 118 Ind. 41.

This plaintiff, if entitled to recover at all, was entitled to more than nominal damages as defined by the judge.

3 Lawson, Rights, Rem. & Pr. § 1077; *Page v. Mitchell*, 13 Mich. 63, 86 Am. Dec. 75; *Duggan v. Baltimore & O. R. Co.* 159 Pa. 248.

Messrs. J. J. Turner and Dismukes & Seay for appellee.

McAlister, J., delivered the opinion of the court:

The plaintiff sued the defendant company in the circuit court of Sumner county to recover damages for an alleged false imprisonment. There was a verdict and judgment in favor of the plaintiff for \$1. The plaintiff appealed, and has assigned errors.

The plaintiff, Eichengreen, was a drummer, representing a Philadelphia firm engaged in the manufacture of soaps. On reaching the town of Gallatin, Sunday evening, August 9, 1891, he was arrested by two policemen, as he stepped from the train of defendant company. The arrest was made in pursuance of a telegram, sent from Bowling Green, by one W. J. Stewart, who was in the employment of defendant in the capacity of a special agent or detective. The record discloses that the plaintiff, Eichengreen, had for several days been in Bowling Green, Ky., and desiring to go to

Gallatin, Tenn., he went to the railroad ticket office to purchase a ticket. In payment of his ticket he handed the agent a \$5 bill, which the latter pronounced counterfeit. Eichengreen explained that he had received the bill from one of the banks in Bowling Green, and remarked to the agent, "You are off." He then handed the agent a \$20 bill and received his change. Stewart, the special agent or detective of the company, claims that he was standing near, and overheard the conversation between the plaintiff and the ticket agent at Bowling Green, that the plaintiff was in company with one Newmark, and that plaintiff, Newmark, and himself all boarded the train at Bowling Green, going south. Stewart further stated that, on the train, the plaintiff and Newmark talked a good deal in a foreign language, that they exchanged coats, and that one of them asked him (Stewart) if there was not a train out of Gallatin that night about 10 o'clock. Stewart testified that these facts aroused his suspicions, and he came to the conclusion these men were crooks. He thereupon sent to the telegraph operator at Gallatin the following dispatch: "Tell your police authorities to meet me at the depot. A man on train with counterfeit money going to get off at your station. Tried to pass \$5 of it at Bowling Green. [Signed] W. J. Stewart." As already stated, on the arrival of the train at Gallatin, Eichengreen and his companion, Newmark, were both arrested. It was claimed by plaintiff that they were pointed out by Stewart and the conductor of the train to the policemen who made the arrest. The prisoners were both taken to the city workhouse where Newmark was released upon assurances from Eichengreen that the former had nothing to do with the matter, and if anyone was guilty of attempting to pass counterfeit money, he was the man. Eichengreen, after much trouble, and possibly two hours' detention, was permitted to deposit his watch and money with the city marshal as security for his appearance at the police court the following morning. It appears that no warrant was sworn out against the defendant, and, there being no proof against him, he was, the next day, discharged. Thereupon the plaintiff commenced this suit against the company for damages for false imprisonment. On the trial, it was shown that the \$5 bill Eichengreen attempted to pass at Bowling Green was counterfeit, but the latter testified that he had no knowledge of the counterfeit,—explaining that, while in Bowling Green, he had boarded with one McLure; that he (Eichengreen) drew a draft on his house in Philadelphia for \$50, and McLure had it cashed for him at a bank in Bowling Green; that among the bills paid McLure by the bank, and turned over by the latter to the plaintiff, was the \$5 bill in question. Stewart, the special agent or detective of the company, stated, on the trial, that he heard Eichengreen, the plaintiff, tell the ticket agent at Bowling Green, when the bill was refused, that he had gotten it from one of the banks at Bowling Green. It was insisted on behalf of the company that the arrest of plaintiff was not procured by Stewart or any employee of the company; but, if it was, such act was not within the apparent or real scope of the agent's au-

thority, and the company is not liable. In respect of the first proposition, there was evidence tending to show that, on the arrival of the train at Gallatin, the conductor of the train pointed out the plaintiff to the policeman, who immediately arrested him. About this time, Stewart, the detective of the company, came up and said to the policeman: "Why have you not arrested the other one? There are two of them." And, pointing to Newmark, the policeman arrested him. It further appears that Stewart, after the arrest of these parties at the depot, Sunday evening, proceeded on his way to Nashville, and sent back the following telegram to the operator at Gallatin, *viz.*: "Let me know what the officers found on those fellows. They tried to pass \$20 at Louisville yesterday. They are good stock if the officers work it. They intended to work the town to-night and get out on first train. Stewart." The record shows that Stewart also returned to Gallatin the next morning to learn, as he claims, whether any counterfeit money had been found on the prisoners. There was other evidence tending to show Stewart's complicity in the arrest of the plaintiff. On the subject of Stewart's authority to make arrests, it was shown on the trial that he was the chief of special agents or detectives employed by the company. These detectives were employed for the purpose of protecting the property of the company, and of ferreting out and prosecuting parties guilty of crimes against the company. Stewart, it seems, had general instructions from the officers of the company not to make arrests without first consulting the local attorneys of the road. It was shown, however, that he was authorized to make arrests when the proof against the party was clear, and there was not time to consult local counsel, lest the criminal might escape. The plaintiff, who was following the business of a drummer, had visited Gallatin on previous occasions, and was, as already stated, well known to some of the merchants of that city, and by them and others proved an excellent character on the trial below. The jury returned a verdict in favor of plaintiff for \$1. The result of the verdict is that the plaintiff isonerated with the payment of a heavy bill of costs, since, by the terms of our statute, the plaintiff in an action for false imprisonment recovers no more costs than damages, unless his recovery exceeds the sum of \$5. This verdict practically absolves the company from all liability, and upon this basis the assignments of error will be considered.

The first assignment is that the court erred in refusing plaintiff's fourth request, *viz.*: "If you find, from the proof, that the plaintiff was illegally and wrongfully arrested in Gallatin, August 9, 1891, and that his said arrest was caused or procured by the agents of the company while acting within the scope of their authority, either express or implied, then the company would be responsible, although the said agents, in procuring or causing his wrongful arrest, were exceeding their authority, or acting in the matter contrary to instructions." We think this assignment well taken, and that the instruction asked should have been given, especially for the purpose of correcting an

affirmative error on this subject in the general charge. The trial judge had instructed the jury that, if Stewart was not acting in the capacity of a detective for the company, the defendant would not be liable under any circumstances. He then continues: "But, if you find he was so acting, you will next proceed to inquire if he was acting within the scope of the authority conferred upon him by the company, because, if he was acting as such detective of the company, if he at the time was exceeding his authority, then he would be liable, and not the company." This instruction was erroneous, for the law is that, if the agent is acting within the scope of his employment, the master is liable although the particular act may have been in excess of his authority, and directly contrary to instructions. Says Mr. Wood, in his work on Master and Servant (§ 307), *viz.*: "It is not necessary, in order to fix the master's liability, that the servant should, at the time of the injury, have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and if so, the master is liable, even though the servant acted wilfully, and in direct violation of his orders. A master cannot screen himself from liability for an injury committed by his servant within the line of his employment, by setting up private instructions or orders given by him, and their violation by the servant. By putting the servant in his place, he becomes responsible for all his acts within the line of his employment, even though they are wilful and directly antagonistical to his order. . . . The master can never escape liability for an abuse of authority by the servant; therefore, the question always is, whether there was any authority, express or implied, on the part of the servant to do the act." See also *Id.* § 309. Again, the same author, at § 299, says: "The question is not whether the particular act was authorized, but whether the act done grew out of the exercise of an authority which the master had conferred upon the servant. In other words whether it is an incident to the authority granted, and done in the line of the servant's duty." The author then illustrates the principle with a case bearing some analogy to the case at bar. "Thus," says the author, "it would be absurd to hold that a person who has employed a detective to discover and arrest persons committing certain depredations upon his property, could only be chargeable for arrests legally made by him, upon the ground that the employer must be presumed to have only employed him to act in a legal manner and upon legal grounds. Having employed the detective to make arrests at all, it intrusts him to make any arrest in the line of his duty which he deems advisable, and if he makes an illegal or improper arrest the employer is responsible therefor." Thus, in the Indiana case of *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102, the railroad company employed a detective to detect, arrest, and prosecute persons who unlawfully obstructed its railway; and, in the performance of his duties, he, without legal authority, arrested the plaintiff, who was an innocent per-

son. It was held the company was liable for the false imprisonment of the plaintiff by the detective. *Lynch v. Metropolitan Elev. R. Co.* 90 N. Y. 77, 43 Am. Rep. 141; *Williams v. Planters' Ins. Co.* 57 Miss. 759, 34 Am. Rep. 494; *Goff v. Great Northern R. Co.* 30 L. J. Q. B. 148; 1 Am. & Eng. Enc. Law, p. 415, note 2; *Cantrell v. Cobwell*, 3 Head, 471; *Byram v. McGuire*, Id. 530; *Deihl v. Ottenville*, 14 Lea, 191.

The record discloses that Stewart, the special agent or detective of defendant company, was employed to look after any irregularities that he saw on the line of the road or divisions, investigate cases of robbery, obstructions on the track, and crimes against the company; that, when a depredation of any character had been committed, it was in the line of his duty to investigate it thoroughly, get all the information he could about it in his own way, and then go to the company's attorney, and take advice in respect of the proper course to pursue. But there was also evidence tending to show that, if the detective caught parties in the act of breaking into a depot, or breaking into a car, or placing obstructions on the track, or doing any kindred act, when there was not time to consult anybody, and the party might escape, then he would have a right to make an arrest. So it is obvious, from this evidence, that this detective was especially charged with the apprehension and prosecution of parties committing offenses against the company: and while, under general instructions, it was the duty of the agent to consult the local attorney before making an arrest, it is shown that, in certain emergencies, the authority of the agent to make an arrest without such consultation was recognized. The attempt to pass a counterfeit bill upon the ticket agent was certainly an offense against the company, and, having been committed in the presence of this detective, the right to arrest or procure the arrest of the guilty party may fairly be said to have been in the line of his employment, and within the authority conferred upon him. But the agent was bound, at the peril of the company, to know that the accused party was in the act of committing a crime, and not innocently passing the bill, and not himself the victim of the counterfeit. The record discloses that this detective was in the habit of exceeding his authority in making arrests, and this fact was known to the company. In November, 1888, he arrested two persons at Birmingham, and had them lodged in jail. Mr. Harrah, at that time general manager of the company, wrote him, *viz.*: "You must be very careful hereafter, and not make any arrest without first consulting our attorneys, and getting their opinion as to the company's case. I would rather that the arrest should not be made than that the company should get into trouble over having made an arrest without being able to establish a case against the party or parties arrested. Please bear this in mind in future." This letter serves to illustrate the character of Stewart's employment, and the manner in which he exercised his authority, and also fixes knowledge of that fact upon the company. We are therefore of

opinion the circuit judge erred in refusing the instruction asked.

Assignments of error are also made upon certain instructions given the jury at the request of defendant's counsel. The first instruction was, *viz.*: "If Stewart simply telegraphed the operator to notify the police that a man was on train who had passed or attempted to pass counterfeit money, then that would not authorize the police to arrest him, unless he was directed to do so by an agent who had authority to act in such a matter." This instruction in the opinion of the court, was misleading, since it does not give the entire import of the telegram. The message from Stewart, it will be remembered, begins, *viz.*: "Tell your police authorities to meet me at the depot." And there was evidence tending to show that, upon the arrival of the train, Stewart and the conductor pointed out the two suspects to the policemen. Again, the instruction is erroneous, in that the liability of the company for the arrest is made to depend upon the order or direction of the agent, when the company would be equally liable if the agent procured the arrest, or set in motion the machinery by which the arrest was made, although not expressly ordering or directing it. For the same reason, we think the following instruction, submitted to the jury at the request of defendant's counsel, was also misleading, to wit: "If W. J. Stewart was ordered by his employer not to arrest parties, but to report the same to the railroad authorities, unless in an urgent case of wrong to the company, and if Eichengreen simply offered to pass a counterfeit bill at Bowling Green, then, unless said Stewart ordered his arrest, or swore out a warrant against the plaintiff, the defendant would not be liable in this case." For the same reason, the ninth request of defendant's counsel should not have been given in charge to the jury. In this latter instruction, the court sets out the telegram sent by Stewart to the operator at Gallatin, and instructs the jury that it would not authorize the plaintiff's arrest, unless Stewart or some one of defendant's employees ordered it. It is not necessary that the arrest of plaintiff should have been expressly ordered by any agent of the company; but, if it appear that it was procured by any agent of the company, acting within the scope of his employment, the company would be liable.

It is also assigned as error that the circuit judge, in explaining the measure of damages, used this expression, *viz.*: "You will consider these things upon the question of damages, if you ever get to that point," etc. It is objected that this expression was improper, since it was calculated to convey to the mind of the jury the impression that, in the opinion of the court, there would be difficulty on the part of the jury in reaching the assessment of damages. But we do not feel called upon to determine this question, or other errors assigned, as they may not arise on a new trial in the objectionable form in which they are now presented.

The judgment is reversed, and the cause remanded for a new trial.

J. Milton PARKER *et al.*,

v.

BETHEL HOTEL COMPANY *et al.*, and
W. J. Webster *et al.*, *Appts.*

(.....Tenn.....)

1. **Nonuser of the franchise of a corporation**, and the sole proprietorship of all its capital stock, will not constitute a dissolution of the corporation without a judicial adjudication thereof.
2. **The existence of a corporation or its title to property** cannot be attacked collaterally on the ground of its dissolution or forfeiture of franchise until dissolution has been judicially pronounced.
3. **A sole stockholder of a corporation** has no title, legal or equitable, to its property which he can convey by a deed in his own name.
4. **An entry on the books of a corporation is not necessary** to vest a vendee of shares of stock with all the title which the vendor had notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration.
5. **The defense of laches** does not generally apply where the situation of the parties has not been altered and one has not been put in a worse condition by the delay of the other.
6. **The defense of usury cannot be set up by an assignee** for certain creditors among whom is not included the one claiming the usurious debt, where the assignee has no property chargeable with the payment of that debt in common with others, and the assets coming to him will not be affected by the fact that such usury does or does not exist.
7. **Service of process** on the persons who were last elected president and secretary of a corporation which has been defunct for several years, and one of whom has claimed to be the sole stockholder and owner of the assets where they appear and answer in a suit to wind up its affairs, must be regarded as having been made on them officially as well as individually.

(February 22, 1886.)

A PPEAL by defendants Webster *et al.*, from a decree of the Court of Chancery Appeals modifying a decree of the Chancery Court for Maury County in a proceeding to annul a trust deed given by defendant corporation and to dissolve and wind up the corporation; Webster and the beneficiaries under the trust deed appealing from so much of the decree as held that the corporation was not dissolved, that the holders of stock were not barred by laches from enforcing their claims, and that the trust deed was not binding, and from so much of the decree as refused to reduce the claims of the Second National Bank and S. W. Warfield for usury. *Modified and affirmed.*

The facts are stated in the opinion.

Mr. E. H. Hatcher, for appellants:

The power of building, equipping, and operating the opera house, embodied in the charter

of the Bethel Hotel Company, was absolutely void.

Heck v. McEwen, 12 Lea, 97; Mill. & V. Code, §§ 1795-1800.

When Lucius Frierson became the sole owner of all the stock of this corporation it became dissolved.

Bellona Co's Case, 3 Bland, Ch. 446; Wait, Insolvent Corp. §§ 365, 370, 385.

The resolution of liquidation and the sale of all the hotel property worked a dissolution of the corporation also.

Slee v. Bloom, 19 Johns. 458, 10 Am. Dec. 273; *James v. Woodruff*, 10 Paige, 541; *Bruce v. Platt*, 80 N. Y. 379; Wait, Insolvent Corp. p. 932.

Complainants were not stockholders. They held the stock simply as collaterals and upon the back of each certificate was the following: "Transferrable only in person or by attorney, on the books of the company, upon the surrender of this certificate." This stipulation upon the back of the certificate of the stock was the regulation by the company of the manner in which alone transfers could be made, and was actual notice, to every one into whose hands the stock came, of the only method of transfer recognized as valid.

Mill. & V. Code, § 1705, subsec. 3.

The complainants as collateral holders of the stock are barred by limitations and by their laches in enforcing whatever, if any, rights they had by virtue of such holdings. *Vigilantibus et non dormientibus jura subeunt.*

Abraham v. Ordway, 158 U. S. 416, 39 L. ed. 1036; *Harter v. Trochig*, 158 U. S. 448, 39 L. ed. 1049; *Evers v. Watson*, 156 U. S. 527, 39 L. ed. 520; *Alsop v. Riker*, 155 U. S. 460, 39 L. ed. 222.

Creditors whose claims are infected with the vice of usury do not come into court with clean hands. A court of equity will leave these usurious creditors just where it found them unless they will do equity in regard to the claims which they are asking the court to enforce for them.

1 Story, Eq. Jur. § 301; *Corby v. Bean*, 44 Mo. 379; *First Nat. Bank v. Stauffer*, 1 Fed. Rep. 187; *Guthrie v. Reid*, 107 Pa. 251; *Johnston v. Lasker Real Estate Assn.*, 2 Tex. Civ. App. 494; *Lucas v. Government Nat. Bank*, 78 Pa. 228, 21 Am. Rep. 17; *Overholt v. First Nat. Bank*, 82 Pa. 490. See also *Sydney v. Mt. Sterling Nat. Bank*, 94 Ky. 231.

Messrs. W. J. Webster and Figures & Padgett also for appellants.

Messrs. G. T. Hughes, Fussell & Wilkes, W. S. Fleming, Jr., Granbery & Marks, and John T. Williamson for complainants.

Bradford, Special Judge, delivered the opinion of the court:

On the 24th day of May, 1880 P. C. Bethel, W. D. Bethel, Lucius Frierson, Eugent Pillow, J. M. Mayes, and L. W. Black became incorporated, under the laws of the state of Tennessee, as the Bethel Hotel Company. The business of the corporation, as declared in its charter, was the erection, furnishing, and operation of an hotel in the town of Columbia, Tenn.; the hotel building to include store

NOTE.—As to the sole ownership of the stock of a corporation, see *note* to Louisville Bkg. Co. v. Elennan Bros. & Co. (Ky.) 19 L. R. A. 884.

81 L. R. A.

houses and a concert hall. The charter was taken out under chapter 142 of the Acts of 1875, and is in the form prescribed for hotel companies, except that words were added authorizing it to build and own storehouses and a concert hall. The corporation was duly and regularly organized, with a capital stock of \$100,000, divided into shares of \$50 each. After its organization the building contemplated by the charter was erected on a lot owned by the corporation. The building was so designed and constructed that the part used for hotel purposes was on the second floor, with an entrance on the first floor. The stores were on the first floor, under that part of the building used as an hotel; but the precise situation of the concert hall, or, as it is called, the "opera house," does not appear. The corporation occupied and used the building, or leased it, or both, from the date of its completion until September 1, 1885. On that date the Bethel Hotel Company and Lucius Frierson, for the consideration of \$22,500, payable in ten annual instalments, evidenced by the notes of the purchasers, conveyed to Mayes & Dodson certain parts of the building, particularly described, which were designated as the "hotel proper" part of said building, including the part from the second floor up, and all appurtenances and privileges incident thereto. The deed to Mayes & Dodson was signed, "Bethel Hotel Company; W. D. Bethel, President; Lucius Frierson, Secy. & Treas.; and Lucius Frierson." The sale and conveyance to Mayes & Dodson were authorized by the stockholders of the corporation at a meeting held shortly before, at which a majority, but not all, of the stockholders were present or represented. This meeting was the last ever held by the stockholders of the Bethel Hotel Company. At the time the sale aforesaid was made to Mayes & Dodson, and at the date of the meeting of the stockholders which authorized it, the great majority of the stock of the corporation was owned by Lucius Frierson and by W. D. Bethel, individually and as administrator of the estate of P. C. Bethel, deceased. The holdings of Frierson amounted to \$34,000, or thereabouts, and those of Bethel to \$61,000. On the 28th day of August, 1886, Frierson purchased from Bethel all the stock held and owned by him individually and as administrator. Some time, either before or after the purchase of the stock from Bethel,—it does not appear which,—he acquired such of the stock as was not owned by him and Bethel, and thus became the owner of the entire capital stock of the corporation. The consideration Frierson paid and agreed to pay Bethel for said \$61,000 of stock was the following: The transfer and assignment to Bethel of the Mayes & Dodson notes payable to the Bethel Hotel Company, aggregating \$22,500; notes of McEwen & Dale for \$400, payable to Frierson; and his own notes, six in number, for \$658.33 each. To secure the payment of Frierson's notes and the McEwen & Dale notes, and guarantee the indorsement of Frierson and the Bethel Hotel Company on the Mayes & Dodson notes, the stock was left in the possession of Bethel, to whom was reserved "all the power usual to such a pledge in the case of default in payment and satisfaction of said notes." The contract

between Frierson and Bethel was in writing. In September, 1885, immediately after the sale to Mayes & Dodson, and the stockholders' meeting authorizing it, Frierson took possession of the residue of the property of the corporation, and used and treated it as his own. He leased it, collected the rents, used them for his own purposes, and accounted to no one. He used and controlled the property in this manner, without protest or interference from any one, until January, 1892, when it was conveyed in trust to defendant W. J. Webster, as will hereafter appear. During this long period of seven years, the corporation slept, or was dead, as will be hereafter determined. No meetings of the stockholders and directors were held, no officers were elected, and no business seems to have been transacted by the corporation. The explanation of this anomalous condition of affairs will be found in the claim made by Lucius Frierson that the corporation had ceased to exist after he had acquired all its stock, and that he became and was the real owner of its property. He says and claims that it was understood by the stockholders, at the meeting which authorized the sale to Mayes & Dodson, that the corporation would go into liquidation, and that he, as the owner of all its stock, would become the owner of all its property, and that a resolution to that effect was adopted.

Frierson appears to have been an active trading man. His business required the use of considerable money, and he was compelled to borrow largely from others. Both before and after the date of the alleged resolution of the board of directors putting the corporation into liquidation, he made a large number of loans from divers persons. To secure these loans he used as collateral his stock in the Bethel Hotel Company. On May 3, 1882, he borrowed from J. M. Mayes, trustee for Mrs. Annie Jackson and her children, \$4,000, executing his note therefor, and depositing, as collateral to secure the same, 100 shares of Bethel Hotel Company stock. The note was subsequently renewed, and 40 shares more of the stock were added as collateral. This note, with the collateral (140 shares) attached, came into the hands of G. T. Hughes, who succeeded Mayes as trustee. The Second National Bank loaned Frierson \$5,000 on the 2d day of August, 1882, taking his note for that amount, with \$6,000 of the stock of the Bethel Hotel Company attached as collateral. This loan was renewed nine different times. At the date of the last renewal, December 31, 1887, it was increased to \$6,000. The increased loan was renewed from time to time, until it was taken up on December 28, 1891, by A. N. Aiken and W. M. Mayes, who, at Frierson's request, and for his accommodation, executed four notes, three of which were for \$2,000 each, and one for \$325 (the latter being for interest and discount), payable to Frierson's order, which notes were delivered to the bank. The hotel company stock on the original loan was retained as collateral on the new notes executed by Aiken and Mayes. It may as well be stated here that these notes were renewed from time to time, and finally, on February 10, 1893, some payments having been made by Aiken, Mayes and Aiken executed their three notes, two of them being for \$2,000

each, and one for \$1,700. J. Milton Parker made Frierson a loan in October, 1888, and took as security 100 shares of the hotel company stock. Payments were made by Frierson, and it was reduced to \$1,994.61, and a note was executed for that amount on November 22, 1891, with the stock attached. Mrs. S. B. Francis loaned Frierson \$4,000 on November 1, 1888. This loan was secured by collateral of some kind, but what it was is not shown. In October, 1884, Frierson substituted for the original security 100 shares of Bethel Hotel Company stock. There were several payments on and renewals of this loan. The last note in renewal executed by Frierson was for \$2,737, dated April 21, 1891. The hotel stock, 100 shares, was attached as security. On the 14th day of April, 1892, Mrs. Francis recovered a judgment on said note in the chancery court of Maury county for \$2,901.22, and an order for sale of the stock. The order of sale was not executed. J. W. Frierson, Jr., is the administrator of the estate of Mrs. E. K. Mayes. He discovered, after qualifying, a note of Lucius Frierson for \$1,750, dated April 6, 1886, payable to Mrs. Mayes, with 40 shares of Bethel Hotel Company stock, attached as collateral. A new note was executed and delivered by Lucius Frierson to the administrator, April 6, 1892, for \$1,890, with the same security. W. B. Wilson holds a note of Frierson for \$1,700, dated April —, 1891, for money loaned. He holds as security 30 shares of the hotel company stock. This note is in renewal of one made in 1888. On February 10, 1891, Walter Steele loaned Frierson \$2,500, taking his note therefor. To secure this note, Frierson pledged 50 shares of the hotel company stock. On July 1, 1891, Frierson reduced the note, by payment, to \$1,500.

On the 12th day of January, 1892, Lucius Frierson conveyed by deed, to defendant W. J. Webster, the real estate owned by the Bethel Hotel Company; and the stock of that company purchased by him from W. D. Bethel. The purpose of said deed was to secure the payment of certain debts owing by said Frierson to sundry parties, aggregating about \$45,000. One of his creditors, W. C. Wooten, was preferred to the amount of \$5,000, but the other creditors were to be paid *pro rata*. The deed directed Webster to take immediate possession of the property, collect the rents, sell the property, and apply the proceeds to the payment of the debts named, in the order stated. Webster accepted the trust, and took possession of the property conveyed. None of the creditors of Frierson who had loaned him money on the stock of the Bethel Hotel Company were provided for in the deed of trust, except Aiken and Wilson, and they only in part. On the 27th day of August, 1892, J. Milton Parker, and the others of said creditors, filed the original bill in this cause against the Bethel Hotel Company, Lucius Frierson, W. J. Webster, trustee, and the creditors provided for in the deed of trust, except Aiken and Wilson. The purpose of the bill was to annul the trust deed to Webster, have the corporation dissolved and wound up, its property sold, and the proceeds distributed among the holders of its stock as they were entitled. The bill charged that Lucius Frierson had no other

interest in the property of the corporation than as a stockholder; that the legal title thereto was vested in the corporation, and had not been divested by the conveyance to defendant Webster; that they are not disposed to disturb the sale and conveyance to Mayes & Dodson, but insist that the proceeds of that sale should be equally distributed among the holders of the stock in the corporation, or that the \$61,000 of stock sold by W. D. Bethel to Frierson, and retained by him as security, should, upon an adjustment of the equities among the stockholders, and the final winding up of the affairs of the corporation, stand charged with the amount thereof. It was further charged that since Lucius Frierson had purchased all the stock in the corporation, and become the sole owner thereof, and there had been no meeting of stockholders, and the directors had parted with their stock and ceased to act, the corporation ought to be dissolved, its affairs wound up, its property sold, and the proceeds distributed. Complainants also charged that, by virtue of the transfer to them by Lucius Frierson of the stock severally held by them as security, title thereto was vested in them, and that they were entitled to receive all sums and dividends that may be paid or become due on account of said stock, as fully as though they were the absolute owners thereof, to the end that the several debts owing to them by said Frierson, and for the security of which said stock was hypothecated, should be paid. Complainants state that they make no objection to the transfer of the \$61,000 of stock by Bethel to Frierson, but insist that the conveyance thereof by the latter to Webster shall not be so construed as to vest any interest in the real estate of the corporation in Webster further than as a stockholder in said corporation.

Defendant Webster, as trustee, and on behalf of the beneficiaries named in the trust deed, answered the bill. He says the Bethel Hotel Company erected the building known as the "Bethel Hotel," and owned and operated it until September 1, 1885, when part of it was sold to Mayes & Dodson; that Lucius Frierson owned at that time all the stock in the company, except the shares of the Bethels, which he then purchased; that at that time the corporation went into liquidation, and ceased to transact any corporate business; that, upon becoming sole owner of all the capital stock, he became the equitable owner of the company's property and assets, took charge of it as his own, gave it in for taxes in his own name, and continued to hold it as his own, adversely to all the world, until he conveyed it to defendant Webster. It is insisted that all transfers, assignments, and pledges of stock made by Frierson after September 1, 1885, the date of the sale to Mayes & Dodson, and of the "liquidation" of the corporation, were void. As to the transfers and assignments of stock made before that date, it is not claimed that they were illegal; but it is averred that the assigns and holders thereof are estopped to assert any right in the corporate property conveyed to Webster, and are barred of any recovery or relief, because of long delay and laches in asserting or claiming their rights. The statutes of limitations of six and seven years are pleaded and relied on. Lucius Frier-

son also answered the bill. His answer is substantially the same as that of his codefendant Webster. He says that in September, 1885, he became the owner of the stock of the Bethel Hotel Company, and that it was intended and agreed, when part of the property was sold to Mayes & Dodson, that the company should go into liquidation, and that he should be the owner of the residue not sold, and that thereafter he gave it in for taxes in his own name. He admits that he pledged some of his stock after that date, but says he thought the shares so pledged represented shares or interests in the property of the corporation. W. D. Bethel also filed an answer. The substance of it is that there was a balance of \$1,640 due him from Frierson on the purchase of the \$61,000 of stock, and that he holds it as security for said balance.

Pending the cause, and before final decree, the following stipulation was entered of record, viz.: "In this cause it is agreed that the case shall be tried as if Wm. J. Webster, trustee, and the creditors represented in the deed of trust from Lucius Frierson to Wm. J. Webster, had filed a cross bill as of this date against the Second National Bank, J. Milton Parker, and S. W. Warfield, individually and as administrator of Mrs. Francis, and all other complainants, setting out and claiming credit, and to recover usury, as pointed out and indicated in the depositions of S. W. Warfield, Geo. Childress, J. M. Parker, and other complainants, and that it shall be taken as if answered, and all the equities denied, and the plea of the statute of limitations and all other defenses made, but shall be determined on the proof and facts as developed in the record, without the necessity of filing a cross bill and answer thereto; this course being taken to facilitate the trial of the cause at this term on its merits." During the progress of the cause, Mrs. S. B. Francis, one of the complainants, died, and the cause was revived in the name of S. W. Warfield, her administrator; and, the Second National Bank having suspended and gone into liquidation, the original bill was amended so as to make its receiver, John T. Williamson, a party complainant. Several other amendments were made, not necessary to be mentioned.

The chancellor decreed that the Bethel Hotel Company was not dissolved by the sale of the property to Mayes & Dodson, or the purchase of the stock of W. D. Bethel by Lucius Frierson, or the passage of the resolution by the stockholders authorizing a sale of the property to Mayes & Dodson, but that the property of the corporation, other than that conveyed to Mayes & Dodson, remained the property of the said hotel company, charged with a trust for the payment of its debts, and for distribution among its stockholders; that Lucius Frierson and his assignee, W. J. Webster, were estopped to deny the validity of the certificates of stock held by complainants, which had been transferred to them by Frierson, and that the holders of said stock were entitled to share in the assets of said corporation, and were not barred by any statute of limitations, or by any laches on their part. It was further decreed by the chancellor that, in the distribution of the proceeds of sale of the property of the corpora-

tion, the stock that had formerly belonged to W. D. and P. C. Bethel, and which had been transferred to Lucius Frierson by W. D. Bethel, personally and as administrator, should be charged with the sum of \$22,500, the amount of the Mayes & Dodson notes which were assigned by him to said Bethel. Frierson was relieved of liability for rents received during the time he had possession of the property. Touching the balance of the debt due W. D. Bethel, as administrator and personally, by Frierson, on the purchase of stock from him, it was ordered that the amount should be paid, first, out of the *pro rata* going to said stock in the distribution. This provision of the decree was assented to by all parties. The chancellor was of the opinion that the Bethel Hotel Company ought to be "wound up and dissolved," and he accordingly so decreed. He also directed that its property be sold, and the proceeds distributed. The Bethel Hotel Company owed no debts, and the proceeds of the sale of its property were accordingly ordered to be distributed among the holders of its stock. We will not stop to state the rulings of the chancellor on the question of usury. They will be adverted to later on.

Special appeals from the chancellor's decree were prayed by W. J. Webster, trustee, and the beneficiaries named in the deed of trust; by the Second National Bank and its receiver, John T. Williamson; and by S. W. Warfield, administrator of Mrs. S. B. Francis, deceased. The nature and extent of the several appeals can best be stated in the words of the decree, as follows: "From so much of said decree as adjudicates that the Bethel Hotel Company was not dissolved in 1885, and that all stock placed as collateral since 1885 were valid claims against the corporation, and all stock before 1885 were not barred by laches of the creditors holding the same as collateral, and so much of the decree as adjudicates that the Bethel stock should be charged with \$22,500 of the sale to Mayes & Dodson, and so much as adjudicates that W. J. Webster, trustee, and those claiming under him, are not entitled to all of said property, the said W. J. Webster, trustee, and the creditors named in the deed of trust, except, and pray an appeal to the next term of the supreme court, but not in any wise to affect the decree in their favor. To so much of said decree as charges the Second National Bank and John T. Williamson with usury, and reduces the debt of said bank by payments of interest made on said loans, and not allowing interest on said debt, said Second National Bank and John T. Williamson, receiver, pray an appeal to the next term of the supreme court. And to so much of said decree as charges the defendant S. W. Warfield, administrator, with all interest paid in excess of 6 per cent upon his debts, and directs the same to be credited upon said debt as of the date of their payment, the said S. W. Warfield, administrator, excepts, and prays an appeal to the next term of the supreme court." The case was heard by the court of chancery appeals. That learned court, in an elaborate and extremely able opinion, affirmed the decree of the chancellor in all respects, except his rulings on the questions of usury, and that part of it which directs

that the Bethel Hotel Company be dissolved, which were overruled.

It is not claimed that the legal title to the real estate conveyed in the trust deed was in Lucius Frierson at the date of that instrument, or ever was in him. The Bethel Hotel Company, it will be remembered, conveyed all that part of the building adapted to hotel purposes to Mayes & Dodson, leaving several stores and the opera house. It never made any conveyance of the residue of said property, or any part thereof. It is claimed that the corporation conveyed one of the stores to the wife of Lucius Frierson. It seems that on the 29th of August, 1886, "W. D. Bethel, president, and Lucius Frierson," made and executed a deed to one of the stores, and the lot on which it was situated, to Mrs. Kate Frierson, the wife of Lucius. According to the testimony of Lucius Frierson, this deed was authorized by the stockholders at the same meeting at which the resolution authorizing the sale of the hotel part of the building to Mayes & Dodson, and directing the liquidation of the corporation, was adopted. But the court of chancery appeals has found as a fact that the deed was executed without the knowledge of Mrs. Frierson, and was never delivered to her. It may be regarded as settled, therefore, that the legal title to the property conveyed to defendant Webster was at the date of that instrument in the Bethel Hotel Company, where it had been, unquestioned and undisturbed, since 1880, the year of its incorporation and organization. Defendants insist that, although Frierson may not have been invested with the legal title, he nevertheless had such an equitable estate and interest as entitled him to sell and dispose of the property; in other words, that he was the real owner of the property, and as such had the absolute right to use or dispose of it. This alleged equitable estate was not the creation of any deed or written contract executed by the Bethel Hotel Company, or of any corporate act or resolution adopted by the stockholders or directors, which in terms referred to or defined it, but is rather the result and consequence of certain facts and conditions, the existence of which is affirmed by the defendants.

It is said that the Bethel Hotel Company, by the alienation of that part of its property built for and adapted to the uses and purposes of an hotel, deprived itself of the means of conducting an hotel business, and that since 1885, the date of the sale to Mayes & Dodson, it had ceased to exercise its corporate franchises; that the stockholders, at the meeting held in September, 1885, passed a resolution, or agreed among themselves, that the corporation should go into liquidation; and that Lucius Frierson, being then the owner of all the capital stock of the corporation, became in consequence the equitable owner of all its property, with full power to use it or dispose of it in such manner as he might choose to do. The position of the defendant seems to be that all rights of the corporation in the property were extinguished, that it had ceased to be affected with any corporate uses, and that it belonged absolutely to Frierson. The facts affirmed by defendants are not, all of them, exactly as found by the court of chancery appeals. It is true that

the corporation sold and conveyed the hotel part of its building to Mayes & Dodson, retaining only the stores and opera house, and never afterwards engaged in the business of owning and operating an hotel. Lucius Frierson was not the sole stockholder in 1885, when the hotel was sold, and did not become such until August 28, 1886, when he purchased the Bethel stock. His stock, or a large part of it, at that time, and subsequently, was held as collateral security by other parties. It is not true that a resolution was ever adopted by the stockholders directing the liquidation or winding up of the affairs of the corporation, or that they were ever wound up. The facts, as found by the court of chancery appeals on this point, are stated in its opinion in the following words: "It may be fairly inferred, though it does not distinctly appear in terms in the proof, that, when the deed was made to Mayes & Dodson, it was then understood between W. D. Bethel and Lucius Frierson (they then owning practically all, or nearly all, of the stock) that Bethel should take the proceeds of the sale to Mayes & Dodson, amounting to \$22,500 and a sufficient amount in addition from Lucius Frierson, personally, to make \$30,000, and for this he would transfer his stock, \$61,000, to Frierson, and that this arrangement was consummated, so far as it could be done without direct corporate action of the corporation itself, by the paper of August 28, 1886, made by Bethel to Frierson; and this is what they understood by the resolution to go into liquidation, there being no debts due by the corporation; and, following out this idea from the date of the sale to Mayes & Dodson, Lucius Frierson proceeded to treat the property as his own, on the idea that he himself constituted the corporation. We do not think that he entertained the idea that the corporation was defunct, but simply that he was himself the corporation, and could do what he wished with the assets." In considering the position of the defendants, that Frierson became the equitable owner of the assets of the corporation, we must therefore leave out of view the idea that there was any corporate action looking to a dissolution of the corporation and winding up of its affairs. Frierson's estate or interest in the property, if he had any, rests on the postulate that in consequence of the nonuser of its franchises, and his sole proprietorship of all its capital stock the corporation was dissolved, and he became the equitable owner of all its property.

A corporation can be dissolved, and its existence wholly terminated, only by the extinguishment of the corporate franchises conferred by the state. An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs whenever a majority of its stockholders may deem it advisable. *Treadwell v. Salisbury Mfg. Co.* 7 Gray, 393, 66 Am. Dec. 490; *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 416. But the franchises conferred upon the stockholders by the state are not extinguished by the cessation from business thus brought about. 3 Morawetz, Priv. Corp. § 1004. In the case of *State, Memphis, v. Butler*, 86 Tenn. 614, 623, this court said the mere insolvency of a cor-

poration would not work a dissolution, nor would the assignment of all its property nor the appointment of a receiver extinguish the franchises with which the company had been invested, where there had been no proceedings for forfeiture inaugurated by the state, nor surrender by act of the stockholders. And so, also, the omission to elect directors or other corporate officers does not of itself work a dissolution of a corporation. The board of directors or other managers or officers do not form an integral part of a joint-stock corporation, and therefore the omission to elect them operates to suspend the powers of the corporation for the time being, since it cannot act without them, but a subsequent election will restore its functions. *Rose v. Roseburg & M. Turnp. Co.* 3 Watts, 46; *Boston Glass Mfg. Co. v. Langdon*, 24 Pick. 49, 35 Am. Dec. 292. And where the charter of a corporation, as in the present case, expressly provides that, in case of the failure to elect directors at the prescribed time, the old directors shall continue in office until their successors are elected, it is unavoidably true that the corporation will not be dissolved. *Slee v. Bloom*, 5 Johns. Ch. 366; *Cahill v. Kalamazoo Mut. Ins. Co.* 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; *Lehigh Bridge Co. v. Lehigh Coal & Nar. Co.* 4 Rawle, 9, 26 Am. Dec. 111. Nor is a corporation *ipso facto* dissolved by merely neglecting to exercise its corporate powers, so long as the possibility remains of resuming them. *Brandon Iron Co. v. Gleason*, 24 Vt. 228; *Russell v. M'Lellan*, 14 Pick. 63; *Atty. Gen. v. Bank of Niagara*, Hopk. Ch. 354. And the sale or disposal by a corporation of its real property, though it have the effect of substantially destroying the object for which it was created, does not of itself work its dissolution. *New Jersey Zinc Co. v. New Jersey Franklinite Co.* 18 N. J. Eq. 322, 335; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Barclay v. Talman*, 4 Edw. Ch. 123. Thus, it has been held that suspending active operations, resolving to go into liquidation, depositing with the United States treasurer money to redeem its outstanding circulation, and receiving a reassignment of its bonds, are acts insufficient to operate as a final dissolution of a national bank. *Ordway v. Central Nat. Bank*, 47 Md. 239, 28 Am. Rep. 455. In *Bache v. Nashville Horticultural Soc.* 10 Lea, 436, 443, it was said that "the nonuser of its franchises by a corporation will not alone work a dissolution, or affect the title or right of its property." And in *Maryville College v. Bartlett*, 8 Baxt. 231, it was held that the nonuser by the trustees of a corporation of its franchises and property did not affect the title of the corporation.

It is claimed by the defendants that the dissolution of the corporation was effected by the fact that Lucius Frierson became the sole owner of all its capital stock. Admitting it to be true that he was the owner of all the stock of the corporation, it by no means follows that the corporation was thereby dissolved and forfeited its franchises. On this question the latest text-writer on Corporation Law has this to say, *viz.*: "Contrary to early opinion, it is now generally held that the fact that all the shares in a joint-stock corporation have passed into

the hands of two members, or even into the hands of a single person, does not, *ipso facto*, work a dissolution of the corporation; since such sole owner may so dispose of the shares as, by the election of the necessary directors and officers, to continue the corporate existence." 5 Thomp. Corp. § 6653. And in 2 Morawetz, Priv. Corp. § 1009, it is said: "It is well settled that all the shares in a corporation may be held by a single person, and yet the corporation continue to exist; and, if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." It has been held that a corporation which has sold all its assets, with the intention of putting an end to its business, whose officers had all resigned, and whose stockholders had all transferred their shares to a single person, was nevertheless not dissolved, and that its existence could be terminated only by judgment of forfeiture, or by surrender accepted by the state. *Russell v. M'Lellan*, 14 Pick. 69, 70; *Newton Mfg. Co. v. White*, 42 Ga. 148; *Baldwin v. Cunfield*, 26 Minn. 43. The dissolution of a pecuniary or business corporation is effected in one of the following ways, *viz.*: (1) by the expiration of its charter; (2) by act of the legislature, where power is reserved for that purpose, or there is no constitutional inhibition; (3) by surrender of charter, which is accepted; (4) by forfeiture of the franchises and judgment of dissolution pronounced by a court having jurisdiction. 2 Morawetz, Priv. Corp. § 1004; Taylor, Priv. Corp. § 430. It is not pretended that the Bethel Hotel Company was dissolved in either of the ways indicated. The charter of the corporation has not expired, neither has it been repealed by the legislature, or been surrendered to the state by its members of stockholders. It may be true that there was a nonuser of its franchises by the corporation for a period of seven years or more, occasioned by the sale of the only property it owned which could have been used for hotel purposes. Undoubtedly, the nonuser of its franchises by a corporation is ground for dissolution and forfeiture of its charter, at the instance of the state; but until sentence of dissolution has been pronounced by a court of competent jurisdiction, in a proper proceeding instituted for the purpose, the corporation will continue to exist, notwithstanding its failure to use its franchises. And forfeiture can only be decreed in a proceeding directly instituted for the purpose by the state granting it. Mill. & V. Code, § 1712; *State v. Butler*, 15 Lea, 104, 110; *Jersey City Gas-light Co. v. Consumers' Gas Co.* 40 N. J. Eq. 427; *Broadwell v. Merritt*, 87 Mo. 95. Until dissolution has been thus judicially pronounced, neither the existence of the corporation, nor its title to its property, can be questioned collaterally. We are bound to conclude, therefore, that the Bethel Hotel Company was not dissolved, or its franchises extinguished, for any of the reasons alleged by the defendants; and it is now a corporation indued with life, with authority to own property and exercise all the powers conferred on it by its charter.

Defendants insist that the alleged equitable estate of Lucius Frierson in the property of the Bethel Hotel Company did not depend alone upon the dissolution of the corporation, but resulted also from the fact that he was the sole owner of all its capital stock. The proposition is that, if one person owns all the shares of stock of a corporation which owes no debts, he, in virtue of such ownership, becomes the equitable owner of all its property, or at least may sell and dispose of it by deed, if he choose to do so. This proposition is argued by counsel for defendants with force and ability, and is supported by some authority. It has found favor with the supreme court of Maryland. *Swift v. Smith*, 65 Md. 428, 433, 57 Am. Rep. 386. But the decision of that learned court is opposed by the current of authority, and seems to us to overlook and ignore certain principles that are fundamental. A corporation and its shareholders are distinct legal entities. In *Keith v. Clarke*, 4 Lea, 718, this court held that, notwithstanding the state owned all the stock in the Bank of Tennessee, "the bank and the state are entirely different legal entities;" and in *Lillard v. Porter*, 2 Head, 177, it was said: "Stockholders are totally distinct from the corporation." Important consequences result from this rule. The shareholders are neither responsible for the debts, nor for the torts of the corporation. In the absence of special circumstances, the shareholders cannot be parties, either plaintiffs or defendants, in actions respecting corporate rights, nor have they any title or direct interest in the property of the corporation. "Shareholders," says Thompson, "are not joint tenants, or in any other sense co-owners of the corporate property, either before or after its dissolution. The title to it rests exclusively in the legal entity called the corporation. A share of the capital stock merely gives the right to partake according to the amount put into the fund, of the surplus profits of the corporation, and ultimately on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation." 1 Thomp. Corp. § 1071. As the shareholders have no direct interest in the corporate property, they cannot convey the real estate of the corporation, though all join in the deed. In *Wheelock v. Moulton*, 15 Vt. 519, Redfield, J., stated the reasons for the rule in his usual clear and accurate style. In that case Moulton and Hutchinson, sole proprietors and owners of all the stock of a corporation, conveyed its real estate, in mortgage, to secure the repayment of money borrowed of the plaintiff, Wheelock. He brought suit to enforce his mortgage. Judge Redfield said: "The fact that the signers of this deed owned the whole of the shares, will make no difference in regard to the necessity of a vote of the corporation, in order to convey the land. The title to the land was in the corporation, not in the individual shareholders. The deed of one, or of any number of the stockholders will not affect the title of the land. The share owners are not tenants in common of the land. They have no title whatever to any of the property of the corporation. It is true that one who owned all the shares might control the corporation, and so he could if he owned a majority of the shares; 31 L. R. A.

but he could in either case do it only by a vote of the corporation, at a meeting held in strict accordance with the statutes of the corporation." And in *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, Mr. Justice Field, discussing the same question, said: "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither encumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." A very instructive case on this question is *Baldwin v. Canfield*, 26 Minn. 43. The facts of that case were very similar to those of this case, and the direct question now under consideration was passed upon. The opinion of the court was in accord with the cases above cited. See also *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131.

We are thus led, both by reason and authority, to the conclusion that Lucius Frierson, as sole stockholder of the Bethel Hotel Company, had no title, legal or equitable, to its property. The title to the property was in the Bethel Hotel Company, and could only be conveyed by it. The conveyance of its real estate is one of the most solemn acts of a corporation, and it can only be done in pursuance of a vote of the corporation, and by deed executed in the form and mode prescribed by law. Thomp. Corp. § 5096. At common law a corporation could not execute a deed to realty, except under seal; and the general corporations act of 1875, under which the Bethel Hotel Company was organized, provides that, if the corporation have no seal, it shall be bound by the signature of its name by a duly-authorized officer. To have made a valid conveyance of the real estate of the company, it was necessary, therefore, that the deed should have been executed in the name of the corporation, under seal, if it had one; and, if not, its name should have been signed by an agent duly authorized by its governing agency, its board of directors. *Garrett v. Belmont Land Co.* 94 Tenn. 460. As we have seen, nothing of this kind was done. The deed to defendant Webster was executed by Lucius Frierson in his own name, and under his own signature. The Bethel Hotel Company, although it owned the property, was in no sense a party to it. For this and other reasons given, the deed of Lucius Frierson, conveying the real estate of the Bethel Hotel Company to defendant W. J. Webster, was void, and conveyed to him no title or interest therein.

We have assumed as a fact, in the preceding discussion, that Lucius Frierson was in truth the sole owner of all the shares of stock of the Bethel Hotel Company at the date he executed the deed to Webster. But was he? It will be remembered that Frierson assigned most of his stock in the Bethel Hotel Company to complainants as security for money borrowed of them by him. Some of the loans were made before September 1, 1885, the date of the conveyance to Mayes & Dodson, and the time, it is claimed by him, that the resolution directing the liquidation and winding up

of the corporation was passed; and some of them were made subsequently. All of the loans and transfers of stock were made prior to the date of Frierson's deed to Webster. The stock owned by W. D. Bethel, personally and as administrator, was never transferred to him in fact. It was retained by W. D. Bethel as security for the payment of the purchase money agreed to be paid therefor by Frierson in the contract of August 28, 1886, between them. The certificates of stock had attached to them blank transfers and powers of attorney in the usual form. All of the certificates were not issued in the name of Lucius Frierson. He purchased from different persons, and, when they assigned their shares to him, they signed the transfers and powers of attorney. Frierson seems not to have surrendered the certificates and taken from the corporation others in his own name, but, when he pledged them as collateral, simply transferred them by delivery. For the purpose of defense, defendants have separated the complainants in two classes, *viz.*, those who acquired stock before September, 1885, the date of the alleged dissolution of the corporation, and those who acquired stock after that date. As to the latter, it is argued that, the corporation being dissolved, transfers of stock to them were inefficacious, and conveyed no interest. But this argument is built upon a false predicate. There was no dissolution of the corporation. The argument therefore fails to the ground.

As to those of complainants who obtained certificates of stock before September, 1885, it is said, they took them with notice of a by-law of the company that no transfer of stock would be good unless made on the books of the company, and, the by-law not having been complied with, the transfers were void. It is not claimed by complainants that transfers of the stock to them were made on the books of the company. Indeed, two of the complainants, Steele and Wilson, hold their certificates by simple delivery: Frierson, in whose name the certificates were made out, not having signed the transfer and power of attorney on the back. Although it is claimed that there was a by-law of the company requiring transfers on the books, it is probably no more than a presumption from the words on the certificates. But it may be assumed that there was such a by-law. A sale or transfer of stock, to be valid, need not be in writing. The certificate need not, in fact, be delivered. A transfer is perfectly good, although the seller of the stock never had a certificate at all, and although no certificate is issued to the transferee. An indorsement on the certificate, while not necessary, is the preferable and most convenient form of transfer, because the same instrument then combines the evidence of the seller's right to the stock, and of his transfer to the purchaser. *Lowell, Transfer of Stock*, §§ 43, 44. There is no longer any doubt that the transfer and assignment of certificates of stock in a corporation, either by absolute sale or by way of pledge or security for debt, passes to the vendee or pledgee the title thereto. *Cornick v. Richards*, 3 Lea, 25; *Cherry v. Frost*, 7 Lea, 1; *West Nashville Planing-mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252; *Caulkins v. Memphis Gaslight Co.* 85 Tenn. 683.

31 L. R. A.

Provision in the by-laws of the corporation, requiring the transfer to be made on the books of the company, is solely for the benefit of the corporation. When shares of stock are transferred, there is a complete substitution of one person for another in all the rights and duties attaching to the interest forming the subject of their contract. An entry on the books is not necessary to vest the vendee with all the title which the vendor had. By the sale and assignment, the vendor divests himself of not only the equitable, but the legal, title; and this principle applies, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration. 1 Spelling, *Priv. Corp.* § 498. In *Smith v. Nashville & D. R. Co.* 91 Tenn. 221, 238, Lurton, J., says: "The rule requiring transfer on the books of the company, by the well-settled line of decisions in this state, and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote, and to whom it may pay dividends." The title of the transferee is perfect, as between himself and the former holder; and he is entitled, upon presentation to the corporation of his certificate, to have himself registered on its books as the real owner. It is inchoate as to the corporations only until the transfer and registry on the books of the corporation have been made. What are the possible consequences of an omission to register the transfer of stock on the books of a corporation, it is unnecessary here to inquire, because nothing was done by the Bethel Hotel Company which in any way affected the rights of those holding the stock, and complainants, as the assignees of Frierson, acquired such title to and interest in the stock as could not be affected or impaired by any act or omission of his.

Defendant Webster, both for himself and for the other defendants represented by him, relies in his answer upon laches as a defense to the relief asked by those of the complainants who obtained the certificates of stock they hold prior to September, 1885. It is difficult to see how this defense can avail them. It is argued that Frierson having claimed, used, and managed the property of the Bethel Hotel Company as his own, with the knowledge of complainants, and without objection from them for about seven years before the institution of this suit, they are subject to the imputation of laches, and cannot for that reason, have relief. It is an old principle that a court of equity will not enforce stale demands, where a party has slept on his rights and acquiesced for an unreasonably long time. Laches and neglect are always discountenanced. Lord Camden, in *Smith v. Clay*, 3 Bro. Ch. 640, note. The doctrine rests upon the broadest principles of equity. Lapse of time obscures all human evidence, and often makes it impossible to discover the truth. Where the chances of establishing the truth are greatly impaired by lapse of time, it would be obviously unjust to enforce a demand after many years of acquiescence and delay. And so, where a party had done something, or had spent money, or altered his situation, in the

belief, generated by the delay and acquiescence of his adversary, that he had the right so to act, a court of equity will not interfere. But delay alone, unaccompanied by other circumstances, will not necessarily preclude relief. In every case where the defense is founded on mere delay, that delay, of course, not amounting to a bar of any statute of limitations, the validity of that defense must be tested upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay, and the nature of the acts done during the interval, which might affect either party, and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy. The doctrine of laches, as understood in courts of equity, implies injury to the party pleading it as a defense. Where the situation of the parties has not been altered, and one has not been put in a worse condition by the delay of the other, the defense of laches does not generally apply. In *Paschall v. Hinderer*, 28 Ohio St. 568, 580, it was said: "What constitutes a stale equity is a vexed question, hardly susceptible of an accurate definition. Length of time alone is not a test of staleness." "Laches," says the supreme court of Virginia, "in the assertion or prosecution of a claim, is not always enough to defeat it. The laches must be such as to afford a reasonable presumption of the satisfaction or abandonment of the claim, or such as to prevent a proper defense by reason of the death of parties, loss of evidence, or otherwise." *Tazewell v. Saunders*, 13 Gratt. 354, 362. In *Wollaston v. Tribe*, L. R. 9 Eq. 44, 50, a bill was brought in 1868 to set aside a marriage settlement executed in 1858 on the ground of fraud and mistake. Lord Romilly, M. R., said: "Great stress was laid on the lapse of time, but I think nothing of that, because all the persons are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort." So, in the present case, we are not dealing with "an altered state of matters." The status is unchanged. Frierson was not induced to do anything or to omit anything, to his hurt, by the alleged acquiescence or delay of complainants. In truth, it seems to us that Frierson's use and management of the company's property was in no sense inconsistent with the rights of complainants as transferees and holders of its stock. His repeated renewals of the debts for which the stock was pledged were a recognition on his part of the continued existence of the corporation and of its title to the property. Its property was what gave value to the stock, and it was undoubtedly in reliance on the continued ownership thereof by the Bethel Hotel Company that the complainants consented to renew their loans, and retain the stock as collateral. After what has been said, it is hardly necessary to notice the plea of the statute of limitations interposed by defendants.

There are a number of assignments of error by defendants, based upon the idea that the Bethel Hotel Company was dissolved. It suffices to say that, having found that the cor-

poration was not dissolved, these assignments must be overruled.

The debts of the Second National Bank and of S. W. Warfield, administrator of Mrs. Francis, were attacked by defendant Webster for usury. The notes held by the bank were executed by Aiken and Mayes, but the debt was really owing by Lucius Frierson. These gentlemen were original indorsers, but after a number of renewals of the paper, and some payments, Frierson became insolvent, and they then executed their own notes for the balance, without his name appearing on them. It was understood by all parties, however, that the debt was Frierson's. It was found to be a fact that interest had been paid on both debts in excess of the legal rate. As to the debt due the Second National Bank, the chancellor decreed that by charging and accepting usury the bank had forfeited all right to interest, and the payments made by Frierson on account of interest were applied in reduction of the principal. The chancellor decreed, also, that the usurious interest paid on the Francis debt should be applied on the principal. The chancellor was wrong. It is settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor. 27 Am. & Eng. Enc. Law, p. 949, note 4. In one case the defense of usury was likened to that of infancy. *Ransom v. Hays*, 39 Mo. 445. The exception to the rule stated embraces the debtor's sureties, guarantors, heirs, devisees, and personal representatives, and they are permitted to plead usury on the grounds of privity or common interest. *Cole v. Hills*, 44 N. H. 227; *Loomis v. Eaton*, 82 Conn. 550; *Goodhue v. Palmer*, 13 Ind. 457; *Cramer v. Lepper*, 26 Ohio St. 59, 20 Am. Rep. 756; *Merchants' Exch. Nat. Bank v. Commercial Warehouse Co.* 49 N. Y. 635. In the last case [note] the exception to the general principle is stated in these words: "All privies to the borrower, whether in blood, representation, or estate, may, both in law and equity, by the appropriate legal and equitable remedies and defenses, attack or defend against a contract or security given by the borrower which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower." It would seem that an assignee under a deed of trust for the benefit of creditors, or an assignee in bankruptcy, would fall within the exception, and could plead usury to a debt which was entitled to participate in the assets conveyed to them, on the ground of privity in estate. *Stein v. Swensen*, 44 Minn. 218, 222. *Nance v. Gregory*, 6 Lea, 343, 40 Am. Rep. 41. By Code, § 2712, a judgment creditor is also allowed to sue for and subject usury paid by his debtor to the satisfaction of his debt. But no other than a judgment creditor can do so. *McKinney v. Memphis Overton Hotel Co.* 12 Heisk. 104. The exception does not seem to have been extended beyond the limits above indicated. The reason and policy of the statute against usury is the protection of borrowers against the oppressive exactions of money lenders; and, to promote and sustain that policy, it is not necessary that other persons than the victim, or those standing in legal privity

with him, should be given the benefit of the statute. Defendant Webster does not fall within the exception to the general rule that a debt can be purged of usury only by the debtor. He is not a creditor of Frierson, but simply a trustee for certain creditors, none of whom appear to be judgment creditors. He is not such an assignee as, upon the ground of privity with the assignor, might have the right to attach a debt for usury. He holds, as assignee, no property chargeable with the payment of the usurious debts in common with other debts. If the debts owing to the Second National Bank and Mrs. Francis were included in the deed of trust to Webster, in might be his duty to relieve the trust property, to the extent of the usury paid on those notes. The assignee in such case holds the trust property for the benefit of the creditors named in the assignment, and it might be his duty to them to protect it from illegal burdens. But, as we have seen, the deed of trust executed by Frierson conveyed to Webster nothing except his interest in the W. D. Bethel stock. Webster became thereby the assignee of \$61,000 of stock in the company for the benefit of the creditors named in the trust deed, but acquired no interest in the property of the corporation itself. Neither did he acquire any interest in the surplus value of the stock held by the bank and Mrs. Francis as security for their debts. That belonged to Frierson. It was a matter of no concern, therefore, to Webster, trustee, whether the debts of the bank and Mrs. Francis were tainted with usury or not. The amount going to him, as assignee of the Bethel stock, upon a final winding up of the Bethel Hotel Company, and distribution of its assets among the stockholders, could not be affected one way or the other by the fact that the debts of the bank and Mrs. Francis were tainted with usury. Any surplus that might remain after paying them in full would go to Frierson. It is clear, therefore, that Frierson alone was interested, and no one but him could raise the question of usury, and this he has not done. There is also another ground upon which it must be held that the debt of Mrs.

Francis cannot be attacked for usury. This debt was reduced to a judgment in April, 1892. It has been held in this state that relief against usury will not be granted in equity after a judgment at law upon the debt. If the debtor has had his day in court, and failed or neglected to set up the defense of usury, the judgment is final and conclusive. *McKoin v. Cooley*, 3 Humph. 561; *Goff v. Dabbs*, 4 Baxt. 300.

It is hardly necessary to add, after what has been said, that the chancellor was in error when he decreed that the Bethel Hotel Company be dissolved. He had no power in this case to decree a dissolution. That could be done only in a suit instituted by the state for the purpose. The most that the chancellor could do was to wind it up and distribute its assets.

It was thought by the court of chancery appeals that the Bethel Hotel Company had not been brought before the court by proper service of process; and it being deemed necessary, for complete relief that this should be done, it was ordered that steps be taken, on the remand of the cause to the chancery court of Maury county, to bring the company before the court. We think the court of chancery appeals is mistaken. The Bethel Hotel Company has been sufficiently served with process, and is now before the court. The executive officers of the company last elected were W. D. Bethel, president, and Lucius Frierson, secretary. They hold over until the election of their successors, and were the president and secretary, respectively, of the company, when the original bill was filed, and are yet. Process was served on them, and they have severally filed their answers. We think service of process on them was all that could be had, and must be regarded as having been made on them officially as well as individually. We hold, therefore, that the Bethel Hotel Company was properly before the court.

In all other respects the decree of the Court of Chancery Appeals is affirmed.

The cause will be remanded to the chancery court of Maury county for further proceedings.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

THE WILLAMETTE.

Jacob NELSON *et al.*
v.

THE STEAMSHIP WILLAMETTE, OREGON IMPROVEMENT COMPANY,
Claimant, and L. S. J. HUNT *et al.*, Stipulators, *Appts.*

(70 Fed. Rep. 874.)

1. The right of a defendant to be sued in

NOTE.—The power of a court of admiralty to entertain jurisdiction of a proceeding *in rem* against a vessel for damages resulting from the death of a person caused by a collision has not yet been sustained by any decision in the Supreme Court of the United States. The decision in the present case at first sight seems to be in conflict with that of *Barton v. Brown* ("The Corsair"), 145 U. S. 335, 36 L. ed. 727, 31 L. R. A.

the division of the district of Washington in which he resides is waived by appearing in another division and having the action transferred to that of his residence.

2. A court of admiralty has jurisdiction of a suit by personal representatives of a passenger killed by collision between vessels, under a state statute giving a right of action for death by negligence, and making it a lien on the vessel, since, if the statute can preserve the right of action, it can give efficiency to the lien to be enforced in the appropriate tribunal.

in which the right to a libel *in rem* is denied, although the local law gave a right of action for the death where it did not expressly create any lien on the vessel. It is in the latter particular that the present case is distinguishable, as it appears from the Oregon statutes quoted by the court that such demands constitute liens and have preference over all other demands.

3. Recovery for personal injuries or death due to collision cannot be had by libelants intervening after the vessel has been released on stipulation under the original libel.

(September 18, 1895.)

APPEAL by defendants, stipulators for the Steamship Willamette, from a judgment of the District Court of the United States for the District of Washington, Northern Division, in favor of libelants and intervening libelants in a proceeding to enforce the liability of the steamship for personal injuries alleged to have been caused by its negligence. *Reversed in part. Affirmed in part.*

Before McKenna and Gilbert, Circuit Judges, and Knowles, District Judge:

The libel was filed in the western division of the district of Washington by Jacob Nelson. Subsequently intervening libels were filed by Philip L. Reese, administrator of John E. Moe, and by D. J. and Ella E. Wyncoop and also D. J. Wyncoop, individually. The ship was seized by the marshal. The Oregon Improvement Company claimed it, and it was released upon a bond for \$1,000,000 with L. S. J. Hunt and John Collins as stipulators. After the release of the ship further intervening libels were filed by Thomas Foran, Emma D. Miller, John Rankin, E. W. Vest, and Ida F. Richardson. The ship was held in fault and the following damages were awarded:

To the libellant, Jacob Nelson, for personal injuries sustained by himself, \$2,500; to the intervener, Philip L. Reese, for the death of John E. Moe, \$5,000; to the intervener Emma B. Miller, for the injuries sustained by herself, \$2,500; to the interveners D. J. Wyncoop, and Ella E. Wyncoop for the death of their son, Frank C. Wyncoop, \$3,500; for the injuries sustained by D. J. Wyncoop, \$2,500; for the injuries sustained by Ella E. Wyncoop, \$1,000; for loss and injury to baggage and property, \$300; to the intervener E. W. Vest, for the injuries sustained by him, \$700; to the intervener Thomas Foran, for the injuries sustained by him, \$3,500; to the intervener John Rankin, for the death of his son Joseph Rankin, \$3,500; and to the intervener Ida F. Richardson, for the death of her husband, W. N. Richardson, \$5,000.

Further facts appear in the opinion.

Mr. Andrew F. Burleigh for appellants. **Messrs. A. R. Tetlow and John H. Elder** for Nelson and Reese.

Mr. Ben Sheeks for Richardson.

Mr. A. H. Garretson for Miller and Vest.

Messrs. D. J. Crowley and P. C. Sullivan, for the Wyncoops, appellees:

An action can be maintained *in rem* against a steamship, for the wrongful death of a person.

At common law there was no right of action for damages occasioned by reason of the death of an individual by a wrongful act. This rule, however, has been modified by statute, and in the state of Washington is controlled by statutory regulations.

2 Hill's Code, §§ 138, 139, 148; 1 Hill's Code, § 1678; *Atropa v. Costello*, 8 Wash. 149; *Graetz v. McKenzie*, 3 Wash. 194; *Northern P.* 31 L. R. A.

R. Co. v. Ellison, Id. 225; *Hedrick v. Ithaco R. & Nav. Co.* 4 Wash. 400; *Southern P. Co. v. Lafferty*, 57 Fed. Rep. 536, 15 U. S. App. 193.

The decisions must be accepted by the court of appeals as an interpretation of the state statute by the highest court of such state. This rule is in consonance with that announced by the Supreme Court of the United States in discussing a similar statute.

Illinois C. R. Co. v. Barron, 72 U. S. 5 Wall. 90, 18 L. ed. 591; *Re Humboldt Lumber Mfrs. Asso.* 60 Fed. Rep. 423; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526; *Chicago v. Major*, 18 Ill. 349, 68 Am. Dec. 553.

As to the amount of damages, see—

The Raleigh, 41 Fed. Rep. 527; *The Mincola*, 44 Fed. Rep. 143; *Withcofsky v. Wier*, 32 Fed. Rep. 302.

As to rules for amount of damages in the cases of minors, see—

Birkett v. Knickerbocker Ice Co. 110 N. Y. 504; *Ihl v. Forty-Second Street & G. S. F. R. Co.* 47 N. Y. 320, 7 Am. Rep. 450; *Union P. R. Co. v. Dunden*, 37 Kan. 1; *Brunswick v. White*, 70 Tex. 504; *Oldfield v. New York & H. R. Co.* 14 N. Y. 310.

Where a statute gives a remedy, it can be enforced by the courts of admiralty.

The Oregon, 45 Fed. Rep. 62; *The City of Norwalk*, 55 Fed. Rep. 99; *Re Humboldt Lumber Mfrs. Asso. supra*; *Boden v. Demicolf*, 56 Fed. Rep. 846; *Barton v. Brown* ("The Corsair"), 145 U. S. 345, 36 L. ed. 730; *The Willamette*, 59 Fed. Rep. 797.

An administrator may intervene in a suit *in rem* for the recovery of damages for the death of his intestate, caused by the wrongful act or omission of the persons in charge of *res*.

The Oregon, 42 Fed. Rep. 78; *The City of Norwalk*, 55 Fed. Rep. 102; *The St. Nicholas*, 49 Fed. Rep. 671.

In courts of admiralty, in the absence of legislation by Congress, legislation of states will be enforced in at least three different cases, *viz.*: (1) in the establishment of the general rights of persons and property within the state limits; (2) in the exercise of the police power; (3) in certain local regulations of a maritime nature.

The City of Norwalk, 55 Fed. Rep. 108.

The Willamette alone was within the jurisdiction of the court, and the damages were properly assessed against the Willamette.

United States v. The Juniata ("The Juniata"), 93 U. S. 337, 23 L. ed. 930; *The Washington v. Cavan* ("The Washington & The Gregory"), 76 U. S. 9 Wall. 513, 19 L. ed. 787.

The discharge of the vessel on a stipulation does not change the character of the suit. The stipulation took the place of the vessel.

The Oregon, 45 Fed. Rep. 62; *United States v. The Haytian Republic* ("The Haytian Republic"), 154 U. S. 118, 38 L. ed. 931; *The T. W. Snook*, 51 Fed. Rep. 244; *Morrison v. United States Dist. Ct. for S. D. of N. Y.* 147 U. S. 14, 37 L. ed. 60; *The Antelope*, 1 Ben. 521.

Messrs. Stratton, Lewis, & Gilman for Foran and Rankin, and **Ben Sheeks** for Richardson, filed the following brief in support of motion to modify decree:

When merits clearly appear on the records,

it is the settled practice in admiralty proceedings not to dismiss the libel, but to allow the party to assert his rights in his newly claimed allegations.

The Adeline, 13 U. S. 9 Cranch, 244, 3 L. ed. 719; *Parsons, Shipping & Admiralty*, § 17; *La Tourrette v. Burton*, 68 U. S. 1 Wall. 43, 17 L. ed. 609; *Re McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 624; *Meyer v. Tupper* ("The *St. Lawrence*"), 66 U. S. 1 Black, 522, 17 L. ed. 180; *The General Smith*, 17 U. S. 4 Wheat. 438, 4 L. ed. 609; *Peyroux v. Howard*, 32 U. S. 7 Pet. 324, 8 L. ed. 700; *Rules of Admiralty Practice*, Nos. 12 and 92; *The Moses Taylor v. Hammons* ("The *Moses Taylor*"), 71 U. S. 4 Wall. 411, 18 L. ed. 397.

The right to treat this libel, if the allegations are sufficient to show an action in tort and *in personam*, as a libel *in personam* irrespective of any other allegations, is sustained by an abundance of authority.

Leathers v. Blessing, 105 U. S. 626, 26 L. ed. 1192; *Chamberlain v. Ward*, 62 U. S. 21 How. 564, 16 L. ed. 217; *The Charles Morgan v. Kouns* ("The *Charles Morgan*"), 115 U. S. 69, 29 L. ed. 316; *Betts, Adm. Pr.* p. 99; *Burton v. Brown* ("The *Corsair*"), 145 U. S. 335, 36 L. ed. 727; *Roberts v. The Huntsville*, 3 Woods, C. C. 386; *The Union*, 4 Blatchf. 90; *The White Squall*, 4 Blatchf. 103; *The Zenobia*, 1 Abb. Adm. 55; *The St. Johan*, 1 Hagg. Adm. Rep. 334; 2 Brown, Civil & Adm. Law, p. 400; *The Triune*, 3 Hagg. Adm. Rep. 114; *The Cephalonia*, 29 Fed. Rep. 332, Affirmed 32 Fed. Rep. 112; *Hrebrik v. Carr*, 29 Fed. Rep. 298.

Such course is not only proper but in justice will be taken whenever the same may or can be under the forms of the libel.

The Tonawanda, 34 Phila. Leg. Int. 394; *The Garland*, 5 Fed. Rep. 924; *The Clatsop Chief*, 8 Fed. Rep. 163; *The E. B. Ward, Jr.*, 17 Fed. Rep. 456; *The Manhasset*, 18 Fed. Rep. 918; *The Highland Light*, Chase, Dec. 150; *Rusk v. The Charles Morgan*, 18 Am. L. Reg. N. S. 624; *Hollyday v. The David Reeves*, 5 Hughes, C. C. 89.

Mr. Ben Sheeks, in support of motion to modify:

When the company appeared and answered the intervening libel the court had jurisdiction to render a personal judgment against it and such judgment should stand.

McKenna, Circuit Judge, delivered the opinion of the court:

The record in this case consists of many hundred pages, but we have reviewed and considered it carefully, and, being satisfied with the conclusions of the learned judge of the district court as to the cause of collision and the culpability of the *Willamette*, adopt his statement. It is as follows:

"This is a suit *in rem* by passengers who were injured and personal representatives and heirs of passengers who were killed by a collision between the passenger steamer *Premier* and the steam collier *Willamette*, on Admiralty inlet, about midway between Marrowstone point and Bush point. The *Premier* is a steel propeller, and was, at the time of the collision, plying as a regular passenger steamer on the route from Tacoma to Whatcom, *via* Seattle, Port Townsend, and Anacortes. The 31 L. R. A.

Willamette is an iron propeller built for the coal trade, and was, at the time of the collision, bound from Seattle to San Francisco, with a cargo of about 2,700 tons of coal. The collision occurred at 2:05 P. M., October 8, 1892. Admiralty inlet is wide. No other vessel or obstructions impeded either of the colliding vessels. The sea was smooth. The machinery of each vessel worked well, and both were in all respects properly equipped and easily controlled. And although fog hung over the place, and enveloped both vessels at the time of the occurrence, the collision could not possibly have happened if due care and the rules prescribed by law for the prevention or collisions, had been observed by the commanders of both vessels. The *Premier* has not been arrested or brought within the jurisdiction of the court. I shall therefore in this decision refrain from expressing any opinion upon the question as to whether she was in fault. If the collision was caused by culpable negligence on the part of the *Willamette*, she is liable for resulting injuries to passengers of the *Premier*, notwithstanding any fault on the part of the latter which may have been a contributing cause of the same injuries. *The Atlas*, 93 U. S. 302, 23 L. ed. 863. From the testimony of the *Willamette's* officers, I find that she left Seattle at 10:50 A. M., in a thick fog. When off West Point she was overtaken and passed by the passenger steamer *City of Kingston*, bound from Seattle to Port Townsend. She passed Point No Point at 1:10 P. M., and from that time until the moment of the collision her engines were working full speed, or nearly so. I do not accept as true the statements of her officers as to the course of the *Willamette* from Point No Point to the place of the collision. I find, according to the preponderance of all the evidence, that the *Willamette* took a course from Point No Point which brought her very near to Bush point, on the east side of the inlet. A few minutes before the collision she was actually seen by persons residing there. The *Premier* was then around Marrowstone point, and had passed the *Kingston*, and was heading S. E. $\frac{1}{4}$ E., which was her proper course. Being in the fog, she was sounding one blast of her whistle at frequent intervals, and said signals were heard on board of the *Willamette*, and also by people on Bush point. The *Willamette*, instead of pursuing her proper course,—keeping on the east side of the inlet,—deviated to the westward, and took a course aimed with fatal accuracy towards the approaching *Premier*. The master of the *Willamette*, in his testimony, swears that when he heard the *Premier's* whistle he mistook her for the *City of Kingston*, and it is altogether probable that he changed the course of the *Willamette* with the intention of following the *Kingston's* wake, and that, on account of his stupidity or perversity, he failed to discover that the vessel whose notes of warning were constantly sounding was approaching, instead of being overtaken. It is proved by the testimony of the assistant engineer in charge of the *Willamette's* engine room at the time of the occurrence that the first and only order occasioned by the meeting was 'Astern full speed,' and this he has recorded as being given at 2:05, the

very moment of the collision. The Willamette rammed the Premier at an angle of about 45 degrees, on her port side, just abaft the foremast, with such force as to cut into her hull nearly or quite to the latter's keel, the Willamette's bow being so firmly wedged into the structure of the Premier as to render her unable by her own efforts to pull away. After towing the Premier across the inlet to the beach near Bush point, and making her fast to the shore, her repeated efforts to back away and separate from the Premier, resulted in parting a hawser, and still the two vessels remained united, until, with the assistance of a tug, the Willamette was finally liberated, and the Premier sunk. The Willamette was in fault for deviating from her proper course, and for continuing at a dangerous rate of speed when the near proximity of another vessel was in fact known to her officers, instead of stopping until the position and course of the other vessel had been made out, and proper signals for passing had been given by both vessels as the law prescribes, and understood. As the direct result of this casualty, John E. Moe, who is represented in this suit by Philip L. Reese, as administrator of the estate of said Moe; Frank C. Wyncoop; W. N. Richardson, who is represented in this suit by his widow, Ida F. Richardson; and Joseph Rankin,—were killed; and Jacob Nelson, Emma B. Miller, D. J. Wyncoop, E. W. Vest, and Thomas Foran suffered personal injuries; all of said deceased and injured persons being passengers on board the Premier.

"The statutes of this state provide as follows: 'When the death of a person is caused by the wrongful act or neglect of another, his heirs, or personal representatives may maintain an action for damages against the persons causing the death. . . . 2 Hill's Code, § 138. 'A father, or in case of his death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.' Id. § 139. 'No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children; or if no wife, in favor of such child or children.' Id. § 148. 'All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable . . . for injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamboats, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued.' 1 Hill's Code, § 1678."

Judgments were rendered against the Oregon Improvement Company in favor of the libelants, respectively, and subsequently summary judgments against it and L. S. J. Hunt and John Collins, stipulators. From these judgments the company and the stipulators appeal, and assign as error:

31 L. R. A.

(1) That the court had no jurisdiction, because the action was commenced in the western division of the district, and that the cause occurred in the northern division, and claimant resides and the ship was seized in the latter division. (2) The court erred in its decree in favor of the intervening libellant Reese, administrator, for the death of his intestate, John E. Moe, and in favor of D. J. and E. E. Wyncoop for the death of their son, and for John Rankin for the death of his son, and for Ida F. Richardson for the death of her husband, for the reason that the court had no jurisdiction to entertain suits or actions in admiralty *in rem* to recover damages for death, brought by heirs or personal representatives of deceased persons. (3) That the court erred in decreeing that the libelants recover from the Oregon Improvement Company and said stipulators the sum of \$34,686.16. (4) That it did not make a decree dismissing the libels.

These assignments of error will be considered in order.

1. The act to provide for the times and places to hold terms of the United States courts in the state of Washington provides as follows:

"Be it enacted," etc. "That the state of Washington shall constitute one judicial district.

"Sec. 2.

"Sec. 3. That for the purpose of holding terms of the district court, said district shall be divided into four divisions to be known as the eastern, southern, northern, and western divisions.

"Sec. 4. That all civil suits not of a local character, which shall be brought in the district or circuit courts of the United States for the district of Washington, in either of the said divisions against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside, or, if there are two or more defendants residing in different divisions, such suit may be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or all of said divisions. All issues of fact in civil causes triable in any of the said courts shall be tried in the division where the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division." 26 Stat. at L. 45.

Against the contention of appellants the respondents urge that this act is not applicable to suits in admiralty, and cite the case of *Ile Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991. This view is not without plausibility, but we do not think it is necessary to definitely pass upon it, as we have based our decision upon other grounds. The record shows that the claimant made no objection to the jurisdiction of the court, but appeared in the action, prayed to be permitted to defend it, claimed and secured the release of the vessel upon giving a bond and signing stipulation. Afterwards, it filed exceptions to the libels, but this point was not taken, but claimant moved and obtained an order transferring the case to the northern division, its domicile, and the case was there tried. It will be observed

that the act constitutes the state one district, and there is nothing to affect its substantial jurisdiction. Mesne and final process issued in either division may be served and executed in all, and that the venue in either was not imperative against the consent of defendants is evident from the following provision of section 4:

"All issues of fact in civil causes, triable in any of said courts, shall be tried in the division in which the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division."

The venue of actions under statutes like the Washington statute has always been held to be a privilege which the defendant could exact or waive, even as to districts. The right of a defendant to be sued in that of his domicile may be waived, and is waived by not objecting. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 38 L. ed. 98. If to be sued in the district of one's domicile (usually the state in which one resides) is in the nature of a personal exemption, which may be waived, surely to be sued in a division of a district is of like nature, and may be waived. Under the act of February 18, 1875 (18 Stat. at L. 316, 320, chap. 80), which exempted national banks from suits in state courts in counties other than the county or city in which the bank was located, it was held in *First Nat. Bank v. Morgan*, 132 U. S. 141, 32 L. ed. 282, that such exemption was a personal privilege, which could be waived and was waived by appearing in such suit brought in another county, and not claiming the immunity granted by Congress. Nor do we conceive that it makes any difference, in the circumstances of this case, that it is *in rem*. If the owner had not appeared, a different question would have arisen. By its appearance, claimant became a party (*The J. W. French*, 13 Fed. Rep. 916), and assumed the situation of defendant, as regards the original libellant, Nelson, and the then intervening libellants, and answered; and on its motion, as we have seen, the action was transferred to and tried in the division of its residence, and in which the ship was seized, and judgments rendered against it. As to the effect of this, in addition to the cases cited, see also *Barry v. Foyles*, 26 U. S. 1 Pet. 314, 7 L. ed. 158; *Pollard v. Dwight*, 8 U. S. 4 Cranch. 421, 2 L. ed. 666; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237; *St. Louis & S. F. R. Co. v. McBride*, 141 U. S. 127, 35 L. ed. 659; *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247.

2. The question presented in the second assignment of error—that is, the power of a court of admiralty to entertain jurisdiction of suit by the representatives of a deceased person when the right of action survives by the local law—has not been passed on definitely by the supreme court, though it has come up incidentally in several cases. Whenever it has arisen in the district courts, with but few exceptions, the jurisdiction has been entertained, and by a few eminent judges it has been asserted without the aid of local law. The reasoning of the latter has been left unsubstantial by the decision of the supreme court in *Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 580, but it shows the disposition

of judges. The research of other courts has made it unnecessary to review or especially cite these cases. This has been ably and accurately done in *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 522, 21 L. ed. 369; *The Harrisburg v. Rickards* ("The Harrisburg"), 119 U. S. 199, 30 L. ed. 358; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814; *Barton v. Brown* ("The Corsair"), 145 U. S. 335, 36 L. ed. 727, and no disapproval is expressed of the cases reviewed. It may not be unnecessary repetition to refer to the case of *The City of Norwalk*, 55 Fed. Rep. 98, in which Judge Brown, of the southern district of New York, comments on previous decisions, and vindicates the jurisdiction of the district court with great strength of reasoning; and the cases *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 75, and *The Clatsop Chief*, 8 Fed. Rep. 163, in which Judge Deady, in the Oregon district, sustained, respectively, an action *in personam* and an action *in rem*, a statute in Oregon giving the right of action; and *Re Humboldt Lumber Mfrs. Assn.* 60 Fed. Rep. 428, decided by Judge Morrow, of the northern district of California, following and approving Judge Brown's reasoning. The case of *The City of Norwalk* was affirmed on appeal by the circuit court of appeals, and the conclusion and reasoning of Judge Brown approved. 20 U. S. App. 570, 9 C. C. A. 521, and 61 Fed. Rep. 364. The court, speaking by Judge Lacombe, said: "The case of the administratrix against the owners of the two vessels presents some further questions. It is contended that a libel *in personam*, for damages for loss of life under the state statute (N. Y. Laws 1847, chap. 450, as amended by Laws 1849, chap. 256, and Laws 1870, chap. 78) cannot be maintained in admiralty. This objection has been most exhaustively discussed by the learned district judge, and all the authorities bearing upon it stated and analyzed. There is nothing to add to his disposition of the question in the subdivision of his opinion which deals with it, except to say that we fully concur therein. The damages were the result of a tort committed on navigable waters of the United States; the tort was by place and circumstance a maritime one; the locality was within the waters of a state, which by its statute gave to the administrator of the person killed a right to receive for the benefit of the next of kin a sum of money by way of damages for the death of the intestate. The supreme court has expressly held that such statutes are valid, even when the tort was committed on navigable waters, in the absence of any regulation of the subject by Congress. *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 522, 21 L. ed. 369; *Sherlock v. Alling*, 98 U. S. 99, 23 L. ed. 819. There is no question here of an attempt to create a maritime lien by a state law; that law simply gives in certain cases a legal right to damages for a tort, which survives the person injured, and passes, as do other rights of property, to the legal successor to his estate. The admiralty courts, before the passage of the statute, exercised jurisdiction over precisely such claims for damages, when brought in his lifetime by the person injured, and there seems no sound reason why they should not exercise like jurisdiction when the tort is committed in a locality where the municipal

law preserves the right to redress beyond the life of the injured person. It is not logically an enlargement of jurisdiction so as to cover a general subject not cognizable before, but a mere increase of the varieties of cases embraced within that subject."

This action was *in personam*, but the reasoning of the court and of Judge Brown applies as well to actions *in rem*. If a collision is culpable, it is undoubtedly a marine tort, and the supreme court said in *The City of Panama v. Phelps* ("The City of Panama"), 101 U. S., on pages 453-464, 25 L. ed. 1061-1065:

"Injuries of the kind [the case was of injuries not resulting in death] alleged give the party a claim for compensation, and the cause of action may be prosecuted by a libel *in rem* against the ship; and the rule is universal that if the libel is sustained, the decree may be enforced *in rem*, as in other cases where a maritime lien arises. These principles are so well known and so universally acknowledged that argument in their support is unnecessary." Page 462, L. ed. 1064.

If a claim for compensation, if the party die, can be made to survive by statute to his representatives, it would not be very complete reasoning to hold that the remedy cannot also be made to survive. Indeed, there is language of Justice Gray in the case of *The H. E. Willard*, 52 Fed. Rep. 387, which supports the view that, the right being created, the admiralty courts of the United States will enforce it by their own rules of procedure. The learned justice said: "When a right maritime in its nature has been created by the local law, the admiralty courts of the United States may doubtless enforce that right, according to their own rules of procedure;" citing a number of cases, among which is *Barton v. Brown* ("The Corsair"), 145 U. S. 335, 36 L. ed. 727. In the case at bar, however, it is enough to say that, the tort being a maritime one, it would seem on principle and authority, if the local law is competent to preserve the right of action, it is competent to give it the efficiency of a lien to be enforced in the appropriate Federal tribunal. *Rodd v. Heartt* ("The Lottawanna"), 88 U. S. 21 Wall. 558, 581, 22 L. ed. 654, 664.

3. The fourth assignment of error is not very clear. If it means that the judgments are excessive as to amounts, it is not well taken. We cannot say the judgment of the court was not well exercised, and that the amounts awarded are excessive compensation for the injuries inflicted. If it means more than this, it is covered by the fifth assignment of error, which we shall now proceed to consider. The assignment is general, and it is not certain that the points specifically urged here were drawn 31 L. R. A.

to the attention of the district court. However, the right of the libelants who intervened to recover after the ship was released is discussed by both parties in their briefs, and submitted for decision. At the time judgments were rendered the construction of admiralty rule 34, and the extent of the jurisdiction to entertain petitions of intervening libelants, was disputable, but has since been settled by the supreme court in *The Oregon* (decided May 6 of this year) 158 U. S. 186, 39 L. ed. 943, in which it is held that a stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release, and hence the court should not entertain jurisdiction of such intervening petitions.

It follows, therefore, that the judgments of the District Court in favor of the intervening libelants, *Emma E. Miller*, and *E. W. Vest*, *Ida F. Richardson*, *Thomas Foran*, and *John Rankin*, should be reversed, and that the judgments in favor of *Jacob Nelson*, *D. J. Wyncoop*, and *Ella E. Wyncoop*, and *D. J. and Ella E. Wyncoop*, and *Philip L. Reese*, administrator, are affirmed; and it is so ordered.

A petition for rehearing and modification of the decree was subsequently filed and on October 31, 1895, the following additional decree was entered:

The decree heretofore entered is hereby modified so as to read as follows:

The judgments of the district court in favor of *Jacob Nelson*, *D. J. Wyncoop*, and *Ella E. Wyncoop*, and *D. J. and Ella E. Wyncoop*, and *Philip L. Reese*, administrator, etc., be and they hereby are affirmed with costs to the said appellees; and that the judgments in favor of intervening libelants, *Emma B. Miller*, *E. W. Vest* and *Ida F. Richardson*, be and they are hereby affirmed, as against the Oregon Investment Company, with costs, and that they be and they are reversed as against *L. S. J. Hunt* and *John Collins*, with costs to said stipulators; and that the judgments in favor of the intervening libelants, *Thomas Foran* and *John Rankin*, be and they are hereby reversed with costs to the appellees, and that as to them this cause is remanded to the district court for further proceedings, without prejudice to the right of the court below in its discretion to treat the intervening petitions of said *Foran* and *Rankin* as independent libels, and to issue process thereon against the steamship *Willamette*, or upon amendment against her owners, or to take such other proceedings therein as justice may require.

MONTANA SUPREME COURT.

STATE of Montana, *ex rel.* THOMAS
CRUSE SAVINGS BANK, *Appt.*,
v.

Alexander P. GILLIAM, Sheriff of Jefferson
County.

(.....Mont.....)

A statute extending the time for redemption upon the sale of mortgaged premises does not impair the obligation of the contract made by a pre-existing mortgage.

(March 16, 1896.)

A PPEAL by relator from a judgment of the District Court for Jefferson County denying a writ of mandamus to compel the delivery of a deed to property which it had purchased at sheriff's sale. *Affirmed.*

Statement by **De Witt, J.:**

This is an appeal from the judgment of the district court rendered in favor of the respondent, upon dismissing the relator's application for a writ of mandamus. Relator in the district court, asked for the writ commanding the respondent, who was sheriff of Jefferson county, to execute and deliver to it a deed of

real estate sold upon judgment foreclosing a mortgage upon the same. The petition set forth that on January 5, 1892, George S. Kennedy and wife executed to relator, to secure an indebtedness, a mortgage upon the real estate described in the petition; that on March 5, 1895, relator commenced an action to foreclose the mortgage, in which action judgment was rendered July 2, 1895. The judicial sale took place August 3, 1895. Six months having expired on February 4, 1896, the relator demanded a deed from the respondent, the sheriff. The respondent refused to make the deed, alleging as a reason that the time for redemption was one year instead of six months, and that the deed was not due until August 3, 1896. These facts were all set up in the petition, and were by the district court considered insufficient upon which to issue the writ of mandamus. The contention is based upon the fact that, when the mortgage was given, the redemption period under the law was six months. On July 1, 1895, the law went into effect which made the redemption period one year. The respondent, the sheriff, stood upon the statute as enacted, and refused to make the deed. The appellant's contention was that the statute of July 1, 1895, was unconstitutional and void as to this mortgage, in

NOTE.—*Statutes extending mortgagor's right of possession on foreclosure of pre-existing mortgages.*

The above case, following that of *Beverly v. Barnitz* (Kan.) *ante*, 74, clearly recognizes that the question involved is a Federal one on which the decision of the United States Supreme Court is the ultimate authority. After the publication of *Beverly v. Barnitz* the Supreme Court of the United States, in *Barnitz v. Beverly*, 163 U. S. —, 41 L. ed. —, reversed the decision of the Kansas supreme court and held the Kansas statute unconstitutional.

The Montana statute considered in the above case of *STATE, THOMAS CRUSE SAV. BANK, v. GILLIAM* is like the Kansas statute in extending the time for redemption upon a sale of mortgaged premises. It extended the time, which under the previous law was six months, to one year, while the Kansas statute extended it to eighteen months, but the principle involved in the two cases is the same. If, as we suppose, the Montana statute extended also the mortgagor's right to the possession and use of the premises without compensation. That was the effect of the Kansas statute, but is not expressly stated in the above case respecting the Montana statute.

The conclusion of the Supreme Court of the United States in the case of *Barnitz v. Beverly* is expressed in the opinion of Mr. Justice Shiras as follows: "We hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage." The opinion proceeds to discuss the subject as follows: "Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter

the mortgagor or the owner had no possession, title, or right in any way to the premises."

The Kansas statute contained another provision which does not appear in the Montana statute, or at least is not discussed in the above case of *STATE, THOMAS CRUSE SAV. BANK, v. GILLIAM*. That section in the Kansas statute provided that real estate once sold upon order of sale, special execution, or general execution should not again be liable for sale for any balance due upon the judgment or decree upon which the same was sold or any judgment or lien inferior thereto and under which the holder of such lien had a right to redeem. Upon this the opinion of Mr. Justice Shiras says: "Obviously, this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation."

Proceeding to discuss both provisions of the statute, the opinion further says: "It seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?"

"Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon, and subject it to the payment of the remnant of her debt. But this law,

that it was enacted after the mortgage was given, and thus impaired the obligation of the contract between the mortgagor and mortgagee. Mont. Const. art. 3, § 11, and U. S. Const. art. 1, § 10.

Mr. T. J. Walsh for appellant.

Messrs. Toole & Wallace for respondent.

De Witt, J., delivered the opinion of the court:

As noted in the statement, the only question in this case is whether the statute, having been enacted after the mortgage was executed, and which extended the time for redemption, is constitutional. Does the statute impair the obligation of the contract, or does it reach the remedy only? This case has been very ably briefed by learned counsel on each side. Appellant's counsel opens the discussion with the following appropriate remarks: "This vexed question, involving the subtle distinction between the obligation of a contract and the remedy for its enforcement, after slumbering for a period, has gained prominence on account of recent legislation in some of the Western states looking to some extent to the relief of the debtor classes. The great financial distress that has led to the enactment of these laws has inclined the courts to carefully examine the decisions heretofore made upon the

subject, the provisions of the Federal and state Constitution in relation to it, and solve the question in favor of the just and humane objects sought to be accomplished, if the same comes within the domain of legitimate legislation. Hence we keenly appreciate the desire of this honorable court to maintain in letter and spirit the salutary provisions of the fundamental law of the land, by preserving intact the obligations of a contract, and at the same time avert the disappointment of reasonable expectations that would result from declaring such laws invalid. The important question here to be determined is whether the act of the legislative assembly of this state in extending the time of redemption upon the sale of mortgaged premises impairs the obligation of the contract, or so operates upon the remedy, only, as to afford suitable and proper means for its enforcement." It is quite true, as counsel suggests, that we are deeply sensible of the importance of the constitutional question here involved; and, furthermore, we may add that we approached its consideration with a strong preconception against the constitutionality of the statute. Chief Justice Martin, of the supreme court of Kansas, said, in his able discussion of a similar statute: "From causes upon which all do not agree, and that we need not discuss, the burden of a private debt has been enormously increased of late

as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they became the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties.

"It is contended that the right to redeem, granted by the new statute, only operates on the purchaser, and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson v. Kinzie* (42 U. S. 1 How. 311, 11 L. ed. 143), where this court said:

"It [the new act] declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it moreover gives a new and like estate, which before had no existence to the judgment creditor to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An

equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security, by rendering the property unsalable for anything like its value. This law gives to the mortgagor, and to the judgment creditor [meaning creditors other than the mortgagee], an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution."

"The judgment of the supreme court of Kansas is reversed, and the cause remanded to that court, with directions for further proceedings not inconsistent with this opinion."

There can be no doubt from this opinion that the Supreme Court of the United States condemned the provision extending the time for redemption and for the mortgagor's possession and use of the premises as unconstitutional, irrespective of the other provision of the statute exempting the property from subsequent sale for the same debt, although the latter made a further and independent impairment of the mortgagee's rights. The result must be that the Montana case here reported is in effect overruled by *Barnitz v. Beverly*, 163 U. S. —, 41 L. ed. —.

The case of *State, German Sav. & L. Soc., v. Sears* (Or.) 43 Pac. 485, which is cited in the above Montana case, is reported to be still before the court on application for rehearing. This case, like the Montana and Kansas cases, is in effect overruled by the decision of the United States Supreme Court, while the Idaho case of *Wilder v. Campbell*, 43 Pac. 677, is thereby established as correct, since the Idaho court held a similar statute unconstitutional as to pre-existing mortgages.

B. A. R.

years. Farms valued five years ago both by borrower and lender at \$3,000 or \$4,000, and mortgaged for \$1,000, are now knocked down under the sheriff's hammer for less than the mortgage debt, the accumulations of a lifetime being often swept away by the shrinkage, and this through no fault of the mortgagor." *Beverly v. Barnitz*, 55 Kan. 466, *ante*, 74. The commercial and political conditions mentioned by the Kansas decision did not exist in this state to any such extent as they did in Kansas, and we do not know that the considerations which, it seems, moved the Kansas legislation, influenced ours. Our statute came in with the new Codes of 1895. But the suggestion even of the existence of any sentiment such as that expressed in the Kansas decision causes a court to hesitate and scrutinize closely, lest it may be that a statute passed in times of financial depression has overridden the fundamental law of the Constitution; for the Constitution is for good times and bad times, for adversity as well as prosperity. Entertaining such views, and having planted them in the decisions of this court upon the constitutional questions which we have heretofore considered, we approached the present matter with the apprehension that perhaps the legislature had yielded to some sentiment of commiseration for the present debtor, and forgotten the chart and compass of the Constitution. But this apprehension has been gradually and effectually dissipated by a renewed study of the cases from *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529, to *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, and in the state courts, the cases of *State, German Sav. & L. Soc. v. Sears* (Or.) 43 Pac. 482, and *Beverly v. Barnitz*, *supra*. The learning and reasoning upon this question have recently been thoroughly collected in the cases from Kansas and Oregon above noted.

While the question here presented is one under the state Constitution, it is also a Federal question, under the Constitution of the United States; and so viewing it, we are of opinion that the Kansas and Oregon decisions are sustained by the cases in the United States Supreme Court decided subsequent to *Bronson v. Kinzie*, 42 U. S. 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397, and *Howard v. Bugbee*, 65 U. S. 24 How. 461, 16 L. ed. 753. The Kansas and Oregon cases above mentioned ably review the history of this question as it has been treated in the United States decisions, especially the following cases: *Sturges v. Crowninshield*, and *Bronson v. Kinzie*, *supra*; *Terry v. Anderson*, 95 U. S. 628, 24 L. ed. 365; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 466; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 215, 6 L. ed. 606; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. ed. 132; *Curtis v. Whitney*, 80 U. S. 13 Wall. 68, 20 L. ed. 513; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Seibert v. United States*, 122 U. S. 284, 30 L. ed. 1161; *Clark v. Reyburn*, 75 U. S. 8 Wall. 318, 19 L. ed. 354; *United States v. Quincy*, 71 U. S. 4 Wall. 535, 18 L. ed. 403; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415.

Cordially concurring, as we do, with the

decisions of the Kansas and Oregon courts, and finding our reasons for such concurrence in the same United States Supreme Court cases discussed by them, and they having so thoroughly occupied the field before we reached it, it would seem, perhaps, to be an affectation of original research to write at much length in this opinion. But the importance of the case probably demands some setting forth of our reasons for holding that the United States Supreme Court decisions are to the effect that our law of 1895 is not unconstitutional.

While our Constitution forbids the legislature from passing a law impairing the obligation of contracts, the same inhibition is found in the Constitution of the United States; and therefore the Supreme Court of the United States is the court of final resort upon this question. That being true, we now base our decision upon the doctrines as announced by the United States Supreme Court since *Bronson v. Kinzie* and some of the cases immediately following it. Passing that early landmark in the history of the construction of U. S. Const. art. 1, § 10, to wit, *Sturges v. Crowninshield* (1819) 17 U. S. 4 Wheat. 122, 4 L. ed. 529, in which Chief Justice Marshall, as said by Chief Justice Martin of Kansas, "well-nigh exhausted the subject," we encounter *Bronson v. Kinzie* (1843) 42 U. S. 1 How. 311, 11 L. ed. 143, that much quoted, canvassed, approved, and criticised case. There were two points in that case, but there is only one with which we have now to do. It was there held that a law passed subsequent to the execution of the mortgage in question, which law gave the mortgagor twelve months in which to redeem, was void under article 1, § 10, of the Constitution of the United States. The case came from the state of Illinois, where the common-law view of the nature of a mortgage fully obtained. Upon this point, Chief Justice Taney, in rendering the decision, said: "We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon the failure of the mortgagor to comply with the conditions contained in the proviso, and at law he had a right to sue for and recover the land itself." *Bronson v. Kinzie*, 42 U. S. 1 How. 318, 11 L. ed. 145. There was nothing new in *McCracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397, or *Howard v. Bugbee*, 65 U. S. 24 How. 461, 16 L. ed. 753. They were decided upon the authority of *Bronson v. Kinzie*. But the common-law view of a mortgage no longer obtains in most of the states of the Union. As shown in *Beverly v. Barnitz*, and *State, German Sav. & L. Soc., v. Sears*, *supra*, that idea is "cut up by the roots;" and with us, in these days, a mortgage is simply a security for a debt. It is so in Montana. Therefore, whatever reason, if any, *Bronson v. Kinzie* obtains from the fact that the legal title to the real estate vested in the mortgagee upon failure of the mortgagor, disappears from the case when it is sought to apply it as an authority upon the modern commercial view that a mortgage is simply a security. Therefore, the contract between mortgagor and mortgagee, before us

for examination, was not in any way a conveyance of the real estate, but was simply a contract that the mortgagor would pay a certain sum of money. The mortgage was given as security for such payment. The payment was not made. The foreclosure of the security was had. The relator here bought on foreclosure sale. The relator then ceased to be a mortgagee, and became a purchaser, and the debt was extinguished in whole, the sale being for a sum sufficient to pay the whole debt. Then, and then only, did the relator approach the relations of owner of the real estate. Never before did it have anything like a title. Therefore it was simply a creditor of the mortgagor, having a security upon the mortgagee's real estate. By purchase at the foreclosure sale, it first came into proprietary relations to the real estate; and at the same time its position as mortgagee ceased wholly, and its position as creditor as well. Therefore, we must proceed to look at the relator, formerly a mortgagee, as now a purchaser, and ascertain whether a law had been passed impairing the obligation of the contract of purchase. We are satisfied that the decisions of the United States Supreme Court hold that the obligation of that contract was not thus impaired. The law was passed before relator purchased, and he purchased under the law of 1895, existing upon the day of his purchase. Upon this subject the opinion in the Kansas case above cited says: "The act of 1893 does not operate upon the rights of the mortgagee until his claim as such has been extinguished, either wholly or to the full extent of the proceeds of the sale of the mortgaged property. The mortgagor, it is true, may redeem the land within a certain time by payment of the sale price and interest thereon; but this is a matter wholly between him and the purchaser. If the mortgagee or judgment creditor has deemed it best to become the purchaser, and thus voluntarily change his relation, it is difficult to see how he has any just cause of complaint. By the mortgage contract, the real estate was pledged for the payment of the debt, subject to the equity of redemption. The state, by its proper officer has, at his instance, sold the property for its payment, and after he gets the proceeds of the sale he has no further claim upon that property, although he may proceed by general execution to obtain any balance due by seizure and sale of other property." *Beverly v. Barnitz*, 55 Kan. 466, ante, 74. See also the following remarks in the Oregon case: "The relator obtained no title or interest in the mortgaged premises by its contract, but only a lien thereon, and the right to subject the property to sale to satisfy its claim; and this right has in no way been altered, abridged, or postponed by the act of 1895. How can it be claimed, then, that this act impairs any of the obligations of the contract? It is true 'the law which binds the parties to perform their agreement' forms part of the obligations of the contract, but the act of 1895 does not postpone or lessen the duty of performance by the mortgagor. It does not diminish his duty to pay his debt at the time and in the manner agreed upon, or take away or interfere with any of the mortgagee's remedies to enforce its lien by subjecting the mortgaged premises to sale.

The statute existing at the time the mortgage was given, prescribing the time in which the mortgagor shall redeem from the purchaser at a foreclosure sale, if one should be made, had no relation whatever to the contract between the mortgagor and mortgagee. The purchaser's right depends upon the law in force at the time of the sale, and why shall he be permitted to appeal to the contract between the debtor and creditor? He is not a party or privy to such contract in any sense; and it does not alter the case that the purchaser and mortgagee are one and the same person. The relator ceased to be a mortgagee when the sale occurred. Thenceforward its interest in the property was as purchaser, and not as mortgagee; and to require it, as such purchaser, to conform to the law in force when the purchase was made, does not in any way impair the obligations of the mortgage contract." *State, German Sav. & L. Soc., v. Sears* (Or.) 43 Pac. 485.

But, as this is finally a Federal question, the decisions of the United States Supreme Court are more important as authority. We therefore turn to *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648. In that case the court had under consideration a statute which reduced the rate of interest on redemption of the real estate sold on a mortgage foreclosure from 10 per cent to 8 per cent. Mr. Justice Harlan, rendering the opinion, said: "The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute in force when the mortgage was executed, entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mortgagee when its debt was merged in the decree, or at least when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject, necessarily, to the law then in force defining the rights of purchasers." A kindred subject is treated later in the United States Supreme Court, as to which Chief Justice Martin, of Kansas, says: "In *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, it was held that a state was not forbidden by the clause of the Federal Constitution under consideration from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in the courts, the judgment creditor

having no contract whatever in that respect with the judgment debtor. The court held that the state law regulating the rate of interest on judgments formed no part of the contract." *Beverly v. Barnitz*, 55 Kan. 466, *ante*, 74.

The United States Supreme Court decision in *Connecticut Mut. L. Ins. Co. v. Cushman*, seems to us to be conclusive. It holds that, when the relator became a purchaser, it was like any other purchaser, and had been divorced from its character as mortgagee, and must be treated as a purchaser solely; and, as such purchaser, the law does not impair the obligation of any contract which it as such had. That the whole history of decision in the United States Supreme Court since the time of *Bronson v. Kinzie* has been to the effect that the law which we are now considering does not impair the obligation of the contract between the mortgagor and mortgagee when the latter becomes the purchaser is ably shown by Mr. Chief Justice Martin in his review of the history of the question in the United States Supreme Court. After reviewing in detail and quoting from the decisions of that court (listed above in this opinion) which have treated a large number of statutes, and held them not to be within the inhibition of article 1, § 10, of the Constitution of the United States, the learned chief justice of Kansas makes the following able summary of the position of the United States Supreme Court upon this subject: "If a state legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statutes of limitation; if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first instance in cash, to be afterward refunded, and the coupons taken up; if it may reduce the rate of interest on redemption from decretal sales; if it may lessen the interest on former judgments; if it may require the holder of a tax-sale certificate to give three months' notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office as a prerequisite to payment, and deplete the courts of the power to grant remedies in force when the judgments were rendered; if it may reduce the terms of court, in number and duration; if it may amend the laws as to attachments, garnishments, and receivers so as to take away causes therefor which were before sufficient; if, in short, 'it may regulate at pleasure the modes of proceeding' in the courts, and all this as to existing obligations,—it is difficult to frame a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages as to define and make more certain the indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure, and which indefinite estate is extended by the Federal courts of equity for six months in the first instance, and afterward 'once or oftener,' in the discretion of the chancellor, according to the circumstances of the case. Even if the statute in question should impair the remedy

formerly grantable upon a foreclosure, yet it should not for this reason be held invalid, for there is no constitutional inhibition against an impairment of the general remedies for the enforcement of broken contracts; and each and every of the special examples just cited is an instance of the impairment or abolition of a remedy allowable and in force when the obligation was incurred. Upon the whole, it does not appear that any judgment or decision of the Supreme Court of the United States requires this court to hold said chapter 109 unconstitutional, whatever may have been remarked by judges in delivering their opinions; for it is quite impossible to harmonize all that they have said, although the judgments or decisions may not be in conflict. Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the final arbiter,—supreme court of the union." *Beverly v. Barnitz*, 55 Kan. 466, *ante*, 74.

It thus appears to us that, if the precise question now before us should come to the United States Supreme Court for decision, that court would, by force of its own prior decisions, hold that this law under consideration is not unconstitutional. That seems to us to be settled by the later cases, notwithstanding the case of *Bronson v. Kinzie*. Indeed, we are wholly unable to distinguish *Bronson v. Kinzie* from *Connecticut Mut. L. Ins. Co. v. Cushman*, so that both decisions can stand together. We do not understand why extending a redemption period and reducing the rate of interest upon redemption are not exactly alike as to the impairing or not impairing the obligation of the mortgage contract. We venture the suggestion that, if one statute impairs the obligation, the other does also. The United States Supreme Court, in the later case of *Connecticut Mut. L. Ins. Co. v. Cushman*, does not attempt to distinguish its decision from the earlier decision in the case of *Bronson v. Kinzie*. In fact, the opinion in the later case does not mention the earlier case. We can reach no other conclusion than that *Connecticut Mut. L. Ins. Co. v. Cushman* overrules the principle of *Bronson v. Kinzie*. If our view in this respect is correct, then the force of the *Connecticut Mut. L. Ins. Co. v. Cushman* case is the stronger as a present authority, by reason of the existence of the modern view that a mortgage is security only. Therefore, under the views promulgated by the decisions of the United States Supreme Court, the statute which we are considering does not impair the obligation of the contract, unless it be upon one other ground which we have not before mentioned, and which we will now examine.

It is suggested that the obligation of the contract is impaired, in that the extending of the time for redemption would tend to reduce the number of bidders and the amount of bids at the mortgage foreclosure sale. This contention of the relator was decided adversely to him in the Kansas and Oregon cases above discussed. But, without quoting from them, we will again seek the authority which must be final with us on this question. The same contention was made in *Connecticut Mut. L. Ins. Co. v. Cushman*, and was disposed of by

Mr. Justice Harlan in the following language: "But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at decretal sale; this, upon the assumption that the probability of the debt being satisfied by the decretal sale of the property was lessened by reducing the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction by a subsequent statute of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security. In support of this proposition counsel cites several decisions of this court in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it effects; that the laws in existence when a contract is made, including those which affect its validity, construction, discharge, and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party and the rights acquired by the other; and that one of the tests that a contract has been impaired is that its value has been diminished, when the Constitution prohibits any impairment at all of its obligation. *Green v. Biddle*, 21 U. S. 8 Wheat. 1, 5 L. ed. 547; *McCracken v. Hayward*, 43 U. S. 2 How. 608, 11 L. ed. 397; *Planters' Bank v. Sharp*, 47 U. S. 6 How. 301, 12 L. ed. 447; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793. These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted when the mortgage was executed were those which in their direct or necessary legal operation controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of mortgagor to pay, the entire mortgage debt, with interest as stipulated in the mortgage up to the decree of sale; and the result of the sale in this case shows that the company, as mortgagor, has received

all that it was entitled to demand. The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and in no sense an injury to the mortgagee. When that act was passed there was no person to answer the description or to claim the rights of a purchaser; consequently, no existing rights were thereby impaired. That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract." *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 65, 27 L. ed. 653.

Having thus satisfied ourselves that the question before us is practically settled against the relator by the decisions of the United States Supreme Court, and that *Bronson v. Kinzie* has by later decisions lost all of its authority upon the question at bar, we shall affirm the judgment of the district court in dismissing the petition for a writ of mandamus, and shall hold directly, upon the merits, that the sheriff's deed in this case can be demanded only at the expiration of one year after the sale. Code Civ. Proc. 1895, § 1235.

We have not omitted to examine the case of *Wilder v. Campbell*, in the supreme court of Idaho, January 31, 1896 (43 Pac. 677). That case took a view the opposite to that which we here hold. There is nothing in the Idaho case to cause us to change our views. In fact, we are of opinion that this important question was not fully or fairly presented to the Idaho court. The opinion seems to approve *Bronson v. Kinzie*, but does not mention *Connecticut Mut. L. Ins. Co. v. Cushman* or *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925. It also cites with approval *Watkins v. Glenn*, 55 Kan. 417, ante, 82, but does not mention the overruling of that case in *Beverly v. Barnitz*, 55 Kan. 466, ante, 74.

The judgment is affirmed.

Hunt, J., concurs.

INDIANA SUPREME COURT.

William L. DENNY *et al.*, *Appts.*,
v.
STATE of Indiana, *ex rel.* Ferd E. BASLER.

(.....Ind.....)

1. An unconstitutional apportionment law may be declared void by the courts notwithstanding the fact that such statute is an exercise of political power.

NOTE.—For constitutionality of apportionment acts, see *State, Morris, v. Wrightson* (N. J.) 22 L. R. A. 548, and cases cited in footnote thereto; also *Fletcher v. Tuttle* (Ill.) 25 L. R. A. 143; *State, Guerguin, v. McAllister* (Tex.) 28 L. R. A. 523, and *People, Henderson, v. Westchester County Supers.* (N. Y.) 30 L. R. A. 74.
31 L. R. A.

2. A valid apportionment law can be passed only once for each enumeration period under Const. art. 4, § 4, providing for an enumeration every six years, and § 5, requiring an apportionment at the session next following the enumeration.

3. The court can take notice of its own records in another case either on suggestion of counsel or upon its own motion.

4. An unconstitutional apportionment law, even if it has been declared constitutional by one of the lower state courts, will not preclude the enactment by the legislature of a valid apportionment law.

5. The approximation to the dual constitutional requirements of county representation and proportionate popular repre-

sentation in the enactment of an apportionment law by the legislature is not reviewable by the courts except for gross abuse of discretion, providing both objects contemplated in the Constitution are kept in view.

6. **The requirement that legislative apportionment shall be according to the number of inhabitants**, in Const. art. 4, § 5, is no less binding than the provision that counties united in a district must be contiguous, or that no county for senatorial apportionment shall be divided.
7. **Judicial notice will be taken of a census** or other enumeration made under the authority of the state or of the United States, and also of the location, boundaries, and juxtaposition of the several counties of the state.
8. **The obligation of observing a constitutional requirement as nearly as possible** in an apportionment act becomes a binding force under the Constitution when the exact requirement cannot be observed.
9. **The injustice of allowing but one representative** to a county while other counties having a similar population are given a voice in the election of more than one representative must be avoided wherever possible.
10. **A judgment in an action brought by an individual** is not conclusive in a subsequent action to which he is not a party nor even a relator, although both cases turn on the constitutionality of a statute.
11. **The people of the state cannot be estopped** from asking for a determination of the validity of an apportionment law by failing to bring the matter to a decision until after a legislature has been chosen in pursuance of the act.
12. **The rule of stare decisis does not bind** the court in deciding the constitutionality of a statute where no property right or contract between the parties is involved.
13. **Double districts in which two or more counties are grouped and given a voice in the election** of more than one senator or representative, when neither of them has a voting population equal to the ratio for one senator or representative cannot be created under Const. art. 4, § 5, requiring apportionment among counties according to the male inhabitants above twenty-one years of age, and § 6, providing that where more than one county shall constitute a district they must be contiguous.

(January 30, 1896.)

A PPEAL by defendants from a judgment of the Circuit Court for Sullivan county in favor of relator in a proceeding brought to enjoin defendants from proceeding with an election under the law of 1895, and to compel them to do so under the law of 1893. *Reversed.*

The facts are stated in the opinion.

Messrs. Harris & Douthitt, W. A. Ketcham, Attorney General, A. W. Wishard, W. D. Bynum, Miller, Winter, & Elam, and M. E. Forkner for appellants.

Messrs. David Turpie, Jason B. Brown, Alonzo G. Smith, Lamb & Beasley, Elliott & Elliott, and Charles A. Korbly, for appellee:

The time when, or within which, a thing may lawfully be done, even when fixed by an ordinary statute, is mandatory and of binding 31 L. R. A.

force and obligation where the rights and interests of the public, the people at large, are affected or concerned therein.

Potter's Dwar. Stat. p. 255.

There are no circumstances, either of law or fact, which could warrant an act of apportionment by the legislature of 1895.

Every general assembly from 1851 to 1891 has uniformly acquiesced in the limitation of time as to the apportionment act, confining it to the "session next following each period of such making such enumeration." And this construction concerning the time of apportionment, so long approved and obeyed, is a thing of the highest moment to be considered in this decision.

Cooley, Const. Lim. 3d ed. p. 74, § 67.

Constitutional provisions are always presumed to be mandatory—not directory, unless expressly made so by their terms.

Cooley, Const. Lim. 3d ed. p. 86, § 79.

The enumeration at the short period of six years was intended to secure a readjustment and correction of the inequalities which might arise from the growth or shifting of the population within that period.

Parker v. State, Powell, 133 Ind. 189, 18 L. R. A. 567, 579.

It cannot be tolerated that a legislature, by a mere omission to perform its constitutional duty at a particular session, could thereby prevent for another period the apportionment provided for by the Constitution.

People, Carter, v. Rice, 135 N. Y. 491, 16 L. R. A. 836.

The legislature of 1893 in enacting an apportionment law, did not do so upon mere presumption, inference, or conjecture, or upon their own opinion or judgment. Their action was based upon a decision of the highest court of judicature in this state,—that the last act of apportionment, that of 1891, was unconstitutional and void, and that the duty of passing another such act devolved upon the next succeeding legislature, which was that of 1893.

The legislature of 1895 could not lawfully repeal an existing apportionment law for the purpose of enacting another at a time not authorized by the Constitution.

Where parties sought to be enjoined are public officers, acting under the color of lawful authority, their declarations as to their purpose are sufficient to warrant the writ of injunction. The complainant need not wait until steps are taken or any acts are done in the premises.

McArthur v. Kelly, 5 Ohio, 154; *Erwin v. Fulk*, 94 Ind. 237; *Caulbe v. Hultz*, 118 Ind. 16.

The court had jurisdiction of the subject-matter of the suit or controversy.

State, Lamb, v. Cunningham, 83 Wis. 90, 17 L. R. A. 145; *People, Carter, v. Rice*, and *Parker v. State, Powell*, *supra*.

The express mention of the time is a constitutional command excluding the performance of the act at any other time or in any other mode than that prescribed, for the reason that the express mention of one time implies the exclusion of all others.

Page v. Allen, 58 Pa. 328, 98 Am. Dec. 272; *Evansville v. State, Blend*, 118 Ind. 426, 4 L. R. A. 93; *Williamsport v. Kent*, 14 Ind. 306.

If the action of the various departments of government, acquiesced in by the people, with

reference to the passage and enforcement of such laws, has been uniform, unbroken, and long continued, it will form a contemporaneous construction of the Constitution, which the courts are bound to respect.

Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 203; *Slavson v. Racine*, 13 Wis. 393.

There is no room for an argument that the provisions of our Constitution are anything less than limitations upon the legislative authority of the state.

Cooley, Const. Lim. 78.

A provision of the Constitution will be held mandatory and binding upon the legislature when its terms leave no room for the exercise of discretion.

Greencastle Twp. v. Black, 5 Ind. 566; *Potter's Dwarr. Stat.* 220-230; *Weyer v. Second Nat. Bank*, 57 Ind. 198.

Howard, J., delivered the opinion of the court:

This was an action brought by the appellee to enjoin the appellants, as clerk of the circuit court, sheriff, and auditor of Sullivan county, from proceeding in their several official capacities to hold the election for 1896, for the senators and representatives in the general assembly, under or pursuant to the provisions of the apportionment act of 1895, and for a writ of mandate to compel said officers to proceed to hold said election for senators and representatives under the apportionment act of 1893. The material allegations of the complaint are: That the appellee's relator is a citizen, taxpayer, and voter of said county, and appellants are the proper officers to give notices, and furnish forms and ballots, and take other steps for the holding of general elections in said county; that the general assembly of 1891, that being the proper time therefor, passed an apportionment act for the election of members of the general assembly, which act was afterwards declared unconstitutional by the supreme court; that afterwards the general assembly of 1893 passed an apportionment act, which is still in force, and is the only valid law on the subject; that in 1895 the general assembly passed another apportionment act, which is unconstitutional, and at the same time, by a second act, repealed the apportionment act of 1893, which repealing act is also unconstitutional and void; that by the act of 1893 said Sullivan county was entitled to one representative in the general assembly, and, conjointly with Vigo and Vermillion counties, was entitled to one additional representative, which said provision was useful and beneficial to said relator; that by the pretended act of 1895 Sullivan county is entitled to but one representative in the general assembly, and the relator is thereby deprived of the rights, privileges, and benefits of said act of 1893; that, before bringing this action, said relator made demand of appellants that they proceed under and in accordance with the apportionment act of 1893 in performance of their duties in regard to the election of senators and representatives at the general election in November, 1896, but that appellants refused so to act, and asserted that they would proceed under said apportionment act of 1895;

L. R. A.

and that the appellants will so proceed unless enjoined therefrom, and will, unless commanded so to do by the court, fail, neglect, and refuse to proceed under and in accordance with that act of 1893, to the great and irreparable damage of appellee's relator. It is further expressly alleged that the provisions of the act of 1893 "are constitutional and valid enactments," and that the act of 1895 "is unconstitutional, fraudulent, abortive, void, and of no validity or effect for any purpose whatever." The prayer was that injunction and mandate might issue. There was a waiver by appellants of service of process, and of the issuing of an alternative writ of mandate, and thereupon they tendered their demurrer to the complaint, which was overruled. Appellants refusing to plead further, the court entered judgment against them upon the demurrer. By the terms of the decree the appellants were enjoined from proceeding for the election of senators and representatives under the apportionment act of 1895, and were commanded to exercise their official duties in relation to said election under the provisions of the act of 1893. The overruling of the demurrer to the complaint is the only error assigned on the appeal.

Appellee asserting the invalidity of the apportionment act of 1895, and asserting the validity of the act of 1893, and asking for an injunction against the enforcement of the former, with a mandate compelling an enforcement of the latter, it becomes necessary, in order to decide what, if any, relief appellee is entitled to, first to determine the constitutionality of the act of 1895. If that is found to be a valid law, the case is at an end, for the appellee is not entitled to any relief. If, however, the act of 1895 should be found invalid, then it would become necessary to determine the constitutionality of the act of 1893; for, unless the act of 1893 should be found constitutional, the appellee would not be entitled to the writ of mandate in favor of its enforcement, even though he might be entitled to have an injunction against the enforcement of the act of 1895. The first reason given for the demurrer is that the court has no jurisdiction over or of the subject-matter of the action. The basis for this contention is that the making of an apportionment for membership in the general assembly is an exercise of political power, which has been committed by the people to the wisdom of the legislative branch of the state government; that the courts may not, therefore, interfere with the exercise of this power by the general assembly. This, no doubt, speaking in broad terms, is true, but only to the extent provided by the people in framing the Constitution. The courts cannot say how an apportionment shall be made, nor even whether any apportionment shall be made. The province of a court, however, is to say what the law is. If, then, a law is enacted, and its validity is brought in question in a proper proceeding, and before a court of competent jurisdiction, the court must render judgment. That is the proper and necessary function of a court. The sole standard by which the validity of a law is to be tested is the fundamental law of the

land. The Constitution is the supreme law, to be respected alike by legislators and by courts. The people, through their Constitution, having thus set up the courts as the tribunals to pronounce upon the validity of all laws, and having made the Constitution itself the standard by which such laws shall be tested, the courts must determine whether any given law is in conflict with the Constitution or not. They have no choice in the matter, but must pronounce judgment; and it can make no difference what the law may be. An apportionment law that violates the Constitution must be held invalid, quite the same as any other. The question is, not what is the character or subject of the law, but whether it is in conflict with the Constitution. In recent years, the validity of apportionment acts has been before the courts of last resort in at least four states, besides our own. In two of these cases, in Wisconsin and Michigan, the courts held the acts unconstitutional. In the other two cases in New York and Illinois, the acts were held constitutional. But in all four cases, as well as in this state, the courts, without hesitation, assumed jurisdiction of the subject-matter of the controversy. *State, Atty. Gen., v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; *Id.*, 83 Wis. 90, 17 L. R. A. 145; *Houghton County Supers. v. Blacker*, 92 Mich. 638, 16 L. R. A. 432; *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 402; *People, Carter, v. Rice*, 135 N. Y. 473, 16 L. R. A. 836; *Parker v. State, Powell*, 133 Ind. 173, 212, 18 L. R. A. 567, 579; *People, Woodyatt, v. Thompson*, 155 Ill. 451. See, in particular, the forcible argument of Elliott, J., in his concurring opinion in *Parker v. State, Powell*, here cited. In *State, Atty. Gen., v. Cunningham*, *supra*, citing *Houston v. Moore*, 18 U. S. 5 Wheat. 1, 5 L. ed. 19, the power and duty of American courts to determine the constitutionality of all laws is asserted in this clear and vigorous language: "By a course of judicial decisions, reaching from the earliest history of American government to the present day, without a dissenting voice, it has been adjudged that courts of justice have the right, and are in duty bound, to test every law by the Constitution, as the fundamental and paramount law of the land, governing all derivative power and the exercise thereof. The judicial department, with us, is the proper power under the Constitution to declare the constitutionality of a law; and every act of the legislature contrary to the true intent and meaning of the Constitution will be declared by the courts null and void, and of no effect whatever." In so far, then, as an apportionment law violates the provisions of the Constitution, it will, as in the case of any other act of the legislature, be declared void. It need hardly be said, however, that, in so far as the Constitution itself has made the apportionment of the state discretionary with the legislature, that discretion, as in any other case, will be scrupulously respected by the courts. Yet more, since the subject of apportionment is, in general, in charge of the legislative department of the government, wherever there is no positive injunction in relation to this matter laid

upon the general assembly by the Constitution, there, also, the courts will refrain from substituting their discretion in place of the discretion of the legislature. Where, however, the Constitution has spoken, and the voice of the legislature is heard in conflict with the voice of the Constitution, there the courts will interfere, and will sustain the paramount law of the land as against its violation by the legislature; and to determine whether, in any given case, the Constitution has been violated by an act of the general assembly, the courts will always take jurisdiction, whether the act be one for legislative apportionment, or for any other purpose.

The remaining reason given for the demurrer is that the complaint does not state facts sufficient to constitute a cause of action against appellants. The main question in the case as made by the pleadings, and as discussed by counsel in their briefs and in the oral argument, arises under this head, namely, whether, under the Constitution, any apportionment act could be passed at the time when the alleged apportionment law of 1895 was enacted. The appellee contends that, since the Constitution has fixed a time, once in six years, when an enumeration of the voters of the state shall be taken, and an apportionment of senators and representatives made by law, there is thereby created a limitation upon the power of the legislature to make such apportionment at any other time. The appellants argue, on the contrary, that, since the making of an apportionment is an exercise of political power, and hence committed to the legislative department in the general grant of power to that department, therefore the legislature may exercise this function at any time, and that the provisions of the Constitution requiring the enactment of an apportionment law at the beginning of each period of six years were inserted in the fundamental law so that such apportionment should be made at least once in six years, but were not intended as a prohibition upon the general assembly from making other apportionments as often as that body might deem best. This question, we think, notwithstanding the elaborate and able arguments of counsel for appellants, must be decided in favor of the contention of appellee. It is provided, in section 1 of article 4 of the Constitution, that "the legislative authority of the state shall be vested in the general assembly, which shall consist of a Senate and a House of Representatives." If there were no particular provisions in the Constitution in regard to the subject of legislative apportionment, there is little doubt that, under the foregoing full and unrestricted vesting of legislative power in the general assembly, that body might in its discretion, and at any time, enact laws for the apportionment of its members among the several counties or other districts of the state, or might, perhaps, provide that all the members of the legislature should be chosen by the people at large. But § 4 of the same article provides that "the general assembly shall, at its second session after the adoption of this Constitution, and every six years thereafter, cause an enumeration to be made of all the male inhabitants

over the age of twenty-one years." And § 5 of said article contains the following provision: "The number of Senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each." We think the legitimate and necessary conclusion to be drawn from these two sections is that an enumeration of the voters shall be taken once every six years, and that, upon such enumeration as a basis, the apportionment of members of the legislature shall be made at the next ensuing session of the general assembly, and only then. Otherwise, and (as said by this court in *Parker v. State, Powell, supra*) "unless the general assembly is to be governed by the enumeration, when made, in the matter of districting the state for legislative purposes, the enumeration is a useless ceremony, and an unnecessary expense. The purpose in requiring the enumeration is to fix the number of voters in each county, at the time the apportionment is made, in order that the legislature may form districts so as to secure to each voter, as nearly as may be, an equal voice with every other voter in the state, in the selection of senators and representatives.

The enumeration at the short periods of six years was intended to secure a readjustment and correction of the inequalities that might arise from the growth or shifting of the population within that period." In case, then, there is in existence a valid apportionment law, and one passed within the proper enumeration period, it may be confidently affirmed that an attempt to make another apportionment, and at a time further removed from the time of taking the enumeration, is a violation, not only of the spirit, but of the letter, of the Constitution, all of whose provisions are mandatory, unless by their own terms made directory or simply permissive. The fixing, too, by the Constitution, of a time or a mode for the doing of an act, is, by necessary implication, a forbidding of any other time or mode for the doing of such act. So it was said, in *Morris v. Powell*, 125 Ind. 281, 9 L. R. A. 326: "Where the Constitution commands how a right may be exercised, it prohibits the exercise of that right in some other way,"—citing *Cooley*, Const. Lim. 64. See also *Williamsport v. Kent*, 14 Ind. 306; *Evansville v. State*, Blend, 118 Ind. 426, 4 L. R. A. 93; *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272.

It follows, then, that counsel are in error when they argue that, because the legislature is not expressly forbidden to pass an act of apportionment at a time different from the time fixed for that purpose, therefore it may, by virtue of its general power to legislate, enact apportionment laws whenever it pleases. The Constitution of the state of Wisconsin, in its provisions for enumeration and apportionment, directs that, "at their first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the Senate and assembly, according to the number of

inhabitants." It was said by the supreme court of that state, in *Slauson v. Racine*, 13 Wis. 398: "In our Constitution there is no express prohibition against an alteration of assembly districts. And whatever limitation exists upon the power of the legislature in that respect is to be derived from the general scope and objects of the provisions of the Constitution concerning the apportionment of senators and representatives. But it may well be said that these furnish such a limitation, and that, when the instrument provides for an apportionment and organization of districts once in five years, this implies that it shall not be done at any other time. This would seem clear with respect to a general apportionment, and perhaps the same implication would extend to any particular reorganization of assembly or Senate districts, by any law passed directly for that purpose." Under our Constitution, an enumeration is provided for every six, instead of every five, years; and the implication that an apportionment law can be passed only once for each enumeration period, thus found by the supreme court of Wisconsin to be necessarily drawn from the words of the Constitution of that state, must also be drawn from the like words of our own Constitution. Since the Constitution thus provided that an enumeration of the voters of the state shall always be made as preliminary to the enactment of an apportionment, it is evident that the theory of the framers of the Constitution was that the valid apportionment can be made only after the taking of such enumeration, and that, when such valid apportionment is once made, it should stand until after the making of the next enumeration. They do not, of course, contemplate the enactment of an invalid apportionment, or one made in violation of the letter and spirit of the Constitution. If, however, a valid apportionment were once made, it could not be made over again. Being a valid apportionment, to change it before another enumeration of the voters could but result in an invalid apportionment. Hence, it was provided that enumeration and apportionment should go together,—the one to be the complement of the other. When the enumeration should be taken, and the consequent apportionment made, the work would be complete, and would not, therefore, be repeated, in whole or in part, until the succeeding six-year period should come, when the dual work would again be done.

But counsel for appellants say that, even if it be true that an apportionment law can be passed but once for each enumeration period, yet, if no valid law has in fact been enacted, the continuing duty to pass such a law at the earliest time practicable always rests upon the lawmaking power until such valid apportionment is finally made. *People, Carter, v. Rice, supra*. Counsel says, further, that the last enumeration was taken in 1889; that at the next session of the general assembly thereafter, in 1891, an apportionment law was passed; that this law was adjudged unconstitutional by this court (*Parker v. State, Powell, supra*); that thereafter, in 1893; the legislature passed another ap-

portionment law; that this apportionment law of 1893 was invalid for the same reasons for which the act of 1891 was held invalid; that the legislature of 1895 found this invalid act of 1893 upon the statute book, declared it unconstitutional, and repealed it, and then passed the act of 1895, now under consideration; that, the act of 1893 being unconstitutional, it was as if no apportionment law was in existence. Therefore, the continuing duty of enacting a valid apportionment law rested upon the legislature of 1895, and hence the act of 1895 was passed at a proper time, and is valid and constitutional. Whether the legislature of 1895 had authority to enact an apportionment law must depend, as we have already seen, upon the fact as to whether there was then in existence a valid apportionment law, passed within the current enumeration period. That legislature could not, by any act of its own, create the necessity for the enactment of another law on the subject, as by repealing the law already in existence. If the apportionment act of 1893 were, indeed, a valid law, it could not be repealed by the legislature of 1895; for, in case of the validity of the act of 1893, it would most certainly have been unlawful to enact any other apportionment law until the next enumeration period, and the legislature could not change this condition by an attempt to repeal such valid apportionment to make room for another law on the subject. Such further law on the subject would have been premature, and out of due time, as fixed by the constitutional mandate. The repealing act, therefore, which was passed in 1895, as preliminary to the enactment of the apportionment act of that year, was itself either a violation of the Constitution or else a vain and useless act, being the repeal of an invalid law. But, if the legislature of 1895 could not repeal a valid apportionment act passed in 1893, the question arises whether the legislature of 1895 could in any case pass an apportionment law. It certainly had the power to do so if there were, at that time, no valid apportionment,—if the act of 1893 were, in fact, an unconstitutional law. The ordinary and proper course to be taken to determine whether the act of 1893 was unconstitutional, or not, was, as in other cases, to apply to the courts. These tribunals were open for the consideration of the validity of this, as of any other, act of the legislature. As it is the province of the legislature to enact laws, and of the executive to enforce them, so it is of the courts to determine their validity. This would have been the fitting course, rather than to have the legislature itself cry out against the good faith of its predecessor, and to declare against the constitutionality of the very law under which it was itself elected. In this case the indelicacy of the legislative criticism of a preceding legislature is the more marked when we reflect that, as shown by the files of this court in the case of *Wishard v. Lenhart* (No. 17,385) 42 N. E. —, appealed from the Marion circuit court, that court had already found the act of 1893 to be a valid and constitutional law. It would have been more seemly, as well as more effective, to have passed that

31 L. R. A.

case to a final hearing, rather than to have acted in defiance of the decision already rendered by the circuit court.

Some question having been made as to whether we can thus take notice of other records in this court in considering a case at bar, we may here remark that we have no doubt that this may be done, whether the court make such inspection of its own motion, or on the suggestion of counsel. See *Washington & I. R. Co. v. Cœur d'Alene R. & Nav. Co.* (No. 1) (decided by the Supreme Court of the United States, December 2, 1895) 160 U. S. 77, 40 L. ed. 346. But, apart from any consideration of propriety, the question recurs, Could the legislature of 1895 assume to determine for itself the constitutionality of the act of 1893, and, on such assumption of responsibility, proceed to pass another act of apportionment, leaving the courts to pronounce finally upon the question as to which of the two acts was constitutional? We have no doubt that the legislature of 1895 had this power. The members of that body took the oath taken by all those who perform official duties, namely, that they would support the Constitution. If those legislators believed, under their oaths, that there was no valid apportionment law in existence, based upon the last enumeration, it was their solemn duty to pass such a law. Their enactment of such a law was in itself, in effect, an appeal to the courts to decide whether they were mistaken or not, and to say which of the acts, if either, was the valid and constitutional law of the state. "Every department of the government," says Judge Cooley, in his *Constitutional Limitations* (chap. 4), "and every official of every department, may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction." And again, in the same connection, he says: "We shall find the general rule to be, that whenever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power that was involved in such action will be open for consideration in such suit or proceeding, and that as the courts must finally settle the particular controversy, so also will they finally determine the question of constitutional law." It may be admitted, then, that, as both the acts of 1895 and that of 1893 are before the court as acts of the legislature, in due form and duly authenticated, and the constitutionality or right of both is questioned, we must determine the validity of each. If, on such examination, one act is found valid, and the other invalid, the case is ended; so, also, if both are found invalid. If, however, both acts should, in all respects, except as to the date of enactment, be found to comply with the constitutional requirements, then it would follow, from what we have heretofore said, that, the act of 1893 being in itself a valid apportionment law, the legislature, in 1895, or at any other time prior to the next enumeration, could have no warrant, under the Constitution, to enact another apportionment law, and the act of 1895 would, for that reason alone, be void; while the act of 1893, being valid, would, during the enumeration period when

it was passed, and until the passage of a valid apportionment act after the ensuing enumeration, be the sole law upon the subject of apportionment. It therefore becomes necessary, apart from any question as to the time of the making of either apportionment, to determine the constitutionality of the act of 1895 and also of the act of 1898. By section 4 of article 4 of the Constitution as we have seen, an enumeration of the voters of the state is to be taken once every six years. The ensuing sections (5 and 6) of the same article provide for apportionment as follows: "Sec. 5. The number of senators and representatives shall, at the session next following each period of making such enumeration, be fixed by law, and apportioned among the several counties, according to the male inhabitants above twenty-one years of age in each: provided, that the first and second elections of members of the general assembly, under this Constitution, shall be according to the apportionment last made by the general assembly before the adoption of this Constitution.

"Sec. 6. A senatorial or representative district, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for senatorial apportionment, shall ever be divided."

It is clear, from these sections, that, in providing for an apportionment of members of the general assembly, two main objects were kept in view by the framers of the Constitution,—one being local county representation; the other, proportionate representation of all the people. The counties, as governmental subdivisions of the state, and the inhabitants, according to their number in each county, were to be represented. The striking and comprehensive language of the Constitution is: "The number of senators and representatives shall . . . be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each." Either of these objects—county representation, or proportionate popular representation—might be attained in perfection, were it not for the necessity of also attending to the other object; but the design was that neither be neglected or sacrificed for the other. The most exact proportionate representation would be secured by making a single district of the state, and electing all the members by the people at large. Each voter would thus have his absolute and equal weight with every other voter in selecting the members of the general assembly. But, besides resulting in the admitted evil of making the general assembly solidly of one political party, at least so far as elected at the same time, and thus wholly stifling the voice of the minority, this exactness of proportionate representation would also be attained at the total sacrifice of local county representation. On the other hand, if county representation only should be considered, then proportionate representation of population in large and in small counties would be wholly lost sight of. To secure the fullest possible local county representation with the nearest proportionate representation of the

voters in each county is the approximate result to be reached from these two requirements of the Constitution. The working out of this approximation is a practical problem, to be left to the patriotism and good judgment of the legislature, and hence not reviewable by the courts, except for gross abuse of discretion, and provided, only, that both objects contemplated in the Constitution be kept in view in the law enacted by the general assembly. *People, Woodyatt, v. Thompson*, 155 Ill. 451. By section 3 of article 4 of the Constitution it is provided that senators shall be elected for a term of four years, and representatives for a term of two years, from the day next after general election. And in section 3 of article 15 it is declared that whenever, either in the Constitution or in any law thereunder, it is provided "that any officer, other than a member of the general assembly, shall hold his office for any given term the same shall be construed to mean that such officer shall hold his office for such term and until his successor shall have been elected and qualified." Construing these two provisions of the Constitution together, it is apparent that the members of the general assembly remain in office only during the terms for which they were elected. Senators can under no circumstances hold office after four years, nor representatives after two years, from the day next after general election. So jealous were the people, in framing the Constitution, of the possible usurpation of power on the part of the legislature, that they thus expressly excepted members of the general assembly from that provision according to which all other officers are authorized to hold their offices until their successors are elected and qualified. But, while the general assembly is thus prevented from any attempt at perpetuating its existence by extending the terms of office of its members, yet there would be but little thus gained or saved to the people if the legislature might, through an unequal apportionment, perpetuate its power by insuring the re-election of its members, or the election of new members who should be in sympathy with those engaged in usurping and perpetuating power against the will of the majority of the people.

The principle of proportionate representation has always obtained in Indiana, even from a time preceding the formation of the Constitution of the United States. From the passage of the ordinance for the government of the Northwestern Territory, July 13, 1787, out of which territory our commonwealth was afterwards formed, this principle of proportionate representation has been of the very essence of our local self-government. The ordinance of 1787 names proportionate representation in the same category with the writ of habeas corpus, trial by jury, and due process of law, as fundamental rights to which the people of this territory shall always be entitled. On the formation of our state government, in 1816, the Constitution then adopted retained, in article 3, the same principle of proportionate representation, based upon an enumeration of the inhabitants every five years. Finally, on the adoption of the

present Constitution, in 1851, the principle was still continued. So that for over 100 years, the unvarying law of this territory and state has been, as affirmed by the Fathers of 1787: "The inhabitants of said territory shall always be entitled to the benefit of . . . a proportionate representation of the people in the legislature." It is true that the ordinance of 1787, and the Constitution of 1816, are no longer in force, only in so far as provisions of those instruments have been retained in our present Constitution. The principle of proportionate representation in the legislature has, however, been so retained, and consequently has been the law here during the whole period covered by those three charters of free government in Indiana. It is provided in the 2d section of article 1 of the Constitution of the United States that "the number of representatives shall not exceed 1 for every 30,000, but each state shall have at least one representative." Under the first census, Congress, in obedience to this provision of the Constitution, fixed the number of representatives at 120. By this apportionment, Massachusetts was entitled to 15 representatives, with an excess of 25,327, for which an additional representative was given. Other states, also, having large fractions of population left after supplying their respective quotas of representatives, based on the given ratio, were each awarded an additional representative, while states having but a small excess were each denied an additional representative. President Washington, with the advice of Jefferson, Madison, and others, vetoed the bill, as in violation of the constitutional provision above set out, that "the number of representatives shall not exceed 1 for every 30,000." The exact mathematical rule of apportionment, thus insisted upon in the beginning, proved unsatisfactory, inasmuch as it resulted in leaving a number of representatives unassigned, owing to the fractions of population left unrepresented after filling the quota to which the several states were entitled by reason of their full ratios of representation. The question continued to trouble Congress until 1832, when the rule adopted was that after each state was given one representative, and also the full number to which it should be entitled by reason of its population,—being one representative for each ratio,—the remaining representatives should be assigned, one each, to those states having the largest fractional remainders of population. This has since continued to be the law. In advocacy of the rule of approximation thus adopted, Mr. Webster, then in the United States Senate, said: "The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of representatives among the several states according to their respective numbers, as near as may be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. Congress is not absolved from all rule merely because the rule of perfect justice cannot be applied. In such a case, approximation be-

comes a rule. It takes the place of the other rule, which would be preferable, but is found inapplicable, and becomes itself an obligation of binding force." The Constitution of this state, like that of the United States, provides for an absolute rule of apportionment; not, as in some of our sister states, that the apportionment shall be "as nearly as may be," or "as nearly as practicable," according to the inhabitants of each county, but that it shall be, simply, "according to the number of male inhabitants above twenty-one years of age in each." Much, therefore, of what is said by the court of appeals of New York and the supreme court of Illinois in *People, Carter, v. Rice*, and *People, Woodyatt, v. Thompson*, *supra*, as to the discretion of the legislature in making apportionments, is inapplicable to the case before us. Our Constitution requires that legislative apportionment shall be according to the number of inhabitants, and that requirement is quite as binding as the injunction that a district formed of two or more counties "shall be composed of contiguous counties," or that "no county, for senatorial apportionment, shall ever be divided." One mandate of the Constitution must be respected as well as another, and, as Webster said, if the mandate cannot be absolutely obeyed, it should be observed at least as nearly as may be. "The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of mankind." While it is true, therefore, as already said, that the legislature has, and, in the nature of things, must have, large discretion in making an apportionment, yet, as held in *Parker v. State*, *Powell, supra*: "It cannot be successfully maintained that the incumbents of any department of the government have a discretion to disregard the Constitution of the state. . . . It is safe to say that when the acts of either of the three departments are in violation of the Constitution of the state, such acts are not within the discretion confided to that department."

Considering, then, the act of 1895 in the light of these principles, the main objection urged against it is what are called the "double districts;" that is, the grouping of two or more counties, neither or none of which has a voting population equal to the ratio for a senator or a representative, and giving to the district so formed more than one senator or representative. The court will take notice of a census or other enumeration made under the authority of the state or of the United States; also, of the location, boundaries, and juxtaposition of the several counties of the state. *State, Atty. Gen., v. Cunningham, supra*. By the act of 1895 the counties of Randolph, Delaware, and Madison are grouped into one district, which is given two senators. By the enumeration of 1889, under which the apportionment of 1895 was made, there were in the county of Randolph 7,250 male inhabitants over the age of twenty-one years; in Delaware, 7,138; and in Madison, 8,010. The ratio, or average

number of such voting inhabitants in the state entitled to be represented by one senator in the general assembly, was 11,020. None of the counties in this double district, therefore, had a voting population equal to the ratio for a senator, and yet each of them is allowed to vote for two senators. It was said in *Parker v. State, Powell, supra*, in speaking of Clark county, and also of Brown county, in relation to the apportionment of 1891,—each of those counties having a voting population less than the ratio for a senator: "When a county of that size has been assigned to a senatorial district, and given a voice in the election of one senator, it ceases, in our opinion, to be a factor in any legitimate scheme of apportionment for senatorial purposes." That, in the act of 1895, the scheme of apportionment by which this double representation was secured differed from the scheme or plan adopted in the act of 1891, can make no difference. The end attained is the same, whether it be done by a double district, or by two single districts. In either scheme a county having less than the ratio entitling it to be represented by one senator is nevertheless given a voice in the election of two senators. Indeed, the scheme adopted in the act of 1891 is the less objectionable. In that apportionment the counties of Clark, Scott, and Jennings, none of them having a population equal to the ratio, were joined in one district, and given a senator. So the counties of Clark and Jefferson neither with a population equal to the ratio, were formed into another district, and given a senator. If the four counties were put into one district, and given two senators, as they might have been, according to the scheme adopted in the act of 1895, the result could have been no more unjust than it was,—the four counties controlling the election of two senators by either plan. But in truth the plan adopted in the act of 1891 is the more nearly equitable, for the reason that, by making two single districts, instead of one double district, it might be possible for each district to elect a senator of its choice, notwithstanding the vote of the common county thrown in to control each district, whereas, if the four counties were thrown together, the combination would be sure to carry both senators. The plan of the act of 1891, condemned as it was (and rightfully so) by this court in *Parker v. State, Powell*, was yet nearer to the constitutional standard (local county representation) than is the double-district system of the act of 1895. So odious, indeed, has this double-district system been regarded, that in the Constitutions of many of the states it has been specifically forbidden, and the single-district system alone authorized, even so far as to require that a county entitled to more than one member should be divided into as many districts as there are members. The observations made in regard to the double senatorial district of Randolph, Delaware, and Madison apply also to the district made up of the counties of Clinton, Boone, and Montgomery, and also to that composed of the counties of Miami, Wabash, and Huntington. None of those counties had a voting population equal to

L. R. A.

the number fixed for one senator, and yet each is given a voice in the election of two senators. What is said of the double senatorial districts is likewise true of the double representative districts. The ratio for the election of a member of the house of representatives, according to the enumeration of 1889, was 5,510. The county of Perry had 4,152; Crawford, 3,076; and Orange, 3,454. None of these counties, therefore, had a voting population equal to the ratio for one representative; yet, by throwing the three into one district, each county was given a voice in the election of two representatives. The same may be said of the double representative district of Brown, Johnson, and Morgan, and that of Monroe, Lawrence, and Martin.

It may be replied that, by thus throwing counties into a double district, equality of proportionate representation is more nearly secured, and the fractions of population over and above even ratios are reduced in number and amount. If this argument were good, it should be pushed further. The greater the number of counties grouped into one district, the fewer will be the fractions of excess in population, and the more exact will be the proportionate representation of the people in the general assembly. If the number of counties in a senatorial district, and likewise in a representative districts, were increased to 92,—being the whole number in the state,—the perfection of equal proportionate representation would be attained. But if the senators and representatives were thus elected by the people at large, and on one ticket for the whole state, there would, as we have already seen, be a total loss of local representation,—the most precious right of free government. The counties would be obliterated. Yet, as we have also seen, the Constitution provides for county representation, quite the same as for proportionate representation. The words used in section 5 of article 4, as already quoted, are: "The number of senators and representatives shall . . . be fixed by law, and apportioned among the several counties, according to the number of male inhabitants above twenty-one years of age in each." Local representation was deemed by the framers of the Constitution to be as necessary as proportionate representation. So the members of the general assembly were not only to be apportioned "according to the number" of inhabitants, but were to be apportioned "among the several counties," and according to the number of inhabitants "in each." The rule, as stated by Pinney, J., in *State, Atty. Gen., v. Cunningham, supra*, citing Sedgwick, Stat. & Const. L. 200, and Endlich on Interpretation of Statutes, § 23, is "that effect is to be given to every clause or word of a statute, and no word is to be treated as unmeaning if a construction can be legitimately found which will preserve it and make it effectual . . . and this rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication;" citing also

Cooley, Const. Lim. 72, and numerous other authorities. In the section quoted from our Constitution, not only are "the several counties" named as entitled to representation, but particular attention is drawn to the representation of the inhabitants "in each" of the counties. And in section 6 of article 4 it is further provided that "no county, for senatorial apportionment, shall ever be divided." Regard for the integrity of the county, as a governmental subdivision of the state, is thus made an essential feature in every valid plan of apportionment.

The people of a county have common interests and objects, peculiar to themselves, and intimate public relations with each other. Hence, when the Constitution was formed, it was deemed of vital importance that the integrity of counties, in the formation of legislative districts, should be thus carefully guarded, "to the end that each county having sufficient population should have its own representatives in the legislature, chosen by its own electors, and them only, and owing no divided, perhaps conflicting, allegiance to any other constituency." True, because of the sparse population in certain parts of the state, it was, and is, necessary, in some cases, to include more than a single county in one district. This, however, is but a partial, though necessary, exception to the rule that each county is entitled to its own representative. See Chief Justice Lyon, in *State, Atty. Gen., v. Cunningham*, *supra*. Each county, and each district consisting of two or more counties, and being the least number having a population equal to the numerical unit for representation in the general assembly, is entitled, absolutely, to one member in the legislature. *Ibid.* See also *Parker v. State, Powell*, *supra*. It is therefore apparent that in all the double districts formed by the act of 1895, although any one of the three counties so joined did not have a voting population equal to the ratio for a member in the general assembly, yet that any two of such counties being adjacent, and having together such sufficient population, were quite as much entitled to their senator or representative as any single county with such population would be. The Constitution protected those with such population from being overwhelmed by the unfriendly population of another county.

It may be urged that cases might arise where double districts would be necessary, in order to secure approximate equality in proportionate representation. It is certain, however, as we are satisfied, that other methods, less obnoxious to the requirement of the Constitution, can be resorted to in such extreme and exceptional cases, should they arise. In case of counties having a less voting population than the ratio of representation, and also in case of fractions of population left after giving the county the representation to which it is itself entitled, great discretion must, of course, be left to the legislature, in grouping such counties for representation. But in no case can a county having less than the ratio be so grouped with other counties as to have a voice in the election of more than one member of the general

assembly, whenever it is possible to avoid it. And in disposing of such counties with population less than the ratio, and also in disposing of the fractions of excess of population over the ratio or ratios in other counties, as said by Chief Justice Morse in *Houghton County Supers. v. Blacker*, 92 Mich. 638, 16 L. R. A. 432: "There can be no legislative discretion, under the Constitution, to give a county of less population than another a greater representation." As in the apportionment for members of Congress, when the several counties have been given the representation to which they are severally entitled by reason of their full ratios, then the largest excesses over such ratios should receive first consideration. These are salutary rules, to be applied in every case where it is practically possible to do so.

But it may be said, when the legislature, in the exercise of its best judgment and discretion, has formed the several counties into single senatorial and representative districts, there may still remain large excesses of population over the ratios unrepresented. To this it may be answered, as said in *Parker v. State, Powell*: "When it is found that exact equality cannot be attained, where the integrity of the counties is preserved, approximation becomes a rule as binding upon the general assembly as any other rule fixed by the Constitution. . . . The Constitution requires that the state shall be reapportioned every six years according to the male inhabitants over the age of twenty-one years in each county. It contemplates the formation of districts, each embracing as nearly as possible an equal number of the electors of the state. But the rule requiring an approximation to equality forbids the formation of districts containing large fractions unrepresented where it is possible to avoid it, while other districts are largely over-represented." This rule of approximation, thus prominently set out in *Parker v. State, Powell*, as it is also repeated and insisted upon in this case, must, of course, be understood as entering into every rule laid down in relation to apportionment. As said by Webster, when the exact requirement of the Constitution cannot be observed, then the obligation of observing such requirement as nearly as possible becomes, itself, of binding force under the Constitution.

It is further urged against the apportionment law of 1895 that it violates sections 2, 3, and 7 of article 4 of the Constitution, by placing in districts having "holdover" senators certain counties which, under former apportionment, voted four years previously for senators, and should vote at the next election for successors to such senators, but which, under this apportionment, could not vote until two years later for senators; thus depriving the electors of such transferred counties from voting for senators oftener than once in six years, whereas they are entitled, under the Constitution, to vote for senators every four years. There can be little doubt that the transfer of counties from districts which would have elected senators at the next election thereafter to districts which would not elect until two years thereafter

might become a source of great abuse of legislative discretion; and if it appeared that such abuse of discretion were gross or wanton, or indulged in merely to disfranchise voters of certain counties, allowing them to vote for senators but once in six years, while voters in other counties were permitted to vote for senators once in two years, the apportionment thus made might be declared invalid. While it cannot be said, as an abstract proposition, that such transfer of counties into "holdover" senatorial districts is, in itself, unconstitutional, because, if it were so held, it might be quite difficult, or even impossible with a due observance of other provisions of the Constitution, ever to rearrange the senatorial districts in any six-year period, yet, on the assumption that such an outrageous act of injustice had been attempted and carried out in an apportionment, merely to give to the people of one set of counties an undue advantage over the people of other counties, we could find no words too strong to express our condemnation of such abuse of legislative discretion, and for this reason alone would not hesitate to declare such a law invalid. But, having found it necessary to pronounce the act before us unconstitutional for reasons that admit of no uncertainty or doubt, we deem it unnecessary to further consider the abuse here suggested.

Some further unfair features of the act of 1895 are quite noticeable. For example, the county of Marshall, with a voting population of 6,150, or 640 over the ratio, is given but one representative, while the counties of Noble, Gibson, Daviess, and Hamilton, each with a population less than that of Marshall, are yet given, not only one representative, but also a voice in the election of another; thus violating the principle that a county of less population than another should not be given a greater representation. It need hardly be added that such favoritism and injustice should be avoided wherever possible. In the case of Daviess county, the additional representative was secured at the sacrifice of at least two other elements of a fair apportionment. The small excess in that county, 331, is merely to make contiguous, and so control the vote of, Knox and Dubois counties. Yet Dubois alone had nearly enough population to be entitled to a representative, and, with the excess in Knox, had more than enough to give the two counties such representative. The placing of Daviess with those two counties, being itself already assigned one representative, and throwing it between those counties, in a forced union, so as to control the election of a second representative, has in it no element of justice or fairness, provided only such result could possibly be avoided. A like wrong is done in thrusting Gibson between Pike and Vanderburgh, which could be justified only on the plea of absolute necessity. Other instances may be found, not so objectionable, perhaps, but which would be absent from a perfectly fair apportionment. Thus, it may be noted that the county of Tippecanoe had one full ratio, for which it was given a representative, with an excess of 4,340, for which it was given another representative, while the

county of Tipton, with 4,886 voting inhabitants, was refused a separate representative.

The unconstitutionality of the apportionment act of 1895 being therefore evident from the provisions of the Constitution, and from the principles established by the courts, and particularly by this court in the case of *Parker v. State, Powell, supra*, it remains, in order to determine whether the relator was entitled to the relief demanded by him, to inquire as to the constitutionality of the act of 1893.

The unconstitutionality of this act is readily apparent, both from what we have said as to the act of 1895, and also from the decision in the case of *Parker v. State, Powell*. In the first place, there are two double representative districts. Neither Dubois, Martin, Orange, nor Lawrence county had a population equal to the ratio for a separate representative, yet each of them, by being joined in one district, was given voice in the election of two representatives. By simply applying the principles and arguments urged by counsel for appellee against the double districts formed by the act of 1895, we could but make a like holding as to the unconstitutionality of this double representative district formed by the act of 1893. The district of Adams, Jay, and Blackford is even more objectionable. Neither Adams nor Blackford was alone entitled to a representative, though both together would have been entitled to one, while Jay alone was entitled to a representative, yet all these were joined, and given two representatives. So, in the senatorial apportionment, the county of Clark, which did not have a voting population equal to the ratio for one senator, was yet joined in one district to Scott and Jennings, and in another to Jefferson, and thus given a voice in the election of two senators. This act, also, as does that of 1895, offends against the principle that a county of less population than another should not be given a greater representation, unless it should be absolutely necessary to do so. The county of Shelby, with a voting population of 6,545, being 1,035 over the ratio, and the county of Dearborn, with a voting population of 6,382, being 872 over the ratio, are each given one representative, and also a voice in the election of another, while the counties of Randolph, Delaware, Boone, Wabash, Huntington, and Grant, each with a greater voting population than either Shelby or Decatur, are given each one representative only. A graver violation of this principle is found in the case of the counties of Harrison, Ripley, Franklin, Sullivan, Putnam, and Tipton, each having a voting population less than the ratio, but each of which is given a representative, being all that they could be entitled to; yet each of those counties is also given a voice in the election of an additional representative. The district consisting of Ripley, Franklin, and Union is the most objectionable of this class, for the reason that Union, the only county of the district not already fully represented, had only 1,976 voters, and could not, therefore, by its own slight population, uphold the representative.

The offense of the legislature of 1893, as also of the legislature of 1895, against the commands of the Constitution, is the more reprehensible from the fact that the decision of this court in *Parker v. State, Powell*, had then been made, and many of the violations of the Constitution made in both those acts are shown to be such in that decision. Much, therefore, of what we have said as to the assumption of unlawful power by the legislature of 1895 is equally applicable to the legislature of 1893.

To all the objections thus made to the constitutionality of the apportionment act of 1893, counsel for appellee make but one reply. They gravely contend that the constitutionality of the act of 1893 has been adjudicated, and the act declared constitutional. This contention is based upon the judgment of the Marion circuit court in the case of *Wishard v. Lenhart*, to which we have heretofore referred and the appeal from which judgment (No. 17,385) was dismissed in this court, on motion of the appellant, November 27, 1894. The purpose of that action was to test the constitutionality of the apportionment act of 1893; and by the judgment of said circuit court, rendered upon demurrer to the complaint, the act was, in effect, held to be a valid law. At furthest,—and we should hesitate to give it that force without special plea,—that decision could be controlling only within the jurisdiction of the court making it, and between the parties to that suit. The binding force of such a decision, as said in 5 Chicago L. J. 863, quoting from Judge Cooley, goes only to this extent, namely: "A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies;" and again: "The doctrine of *stare decisis*, however, is only applicable in its full force within the territorial jurisdiction of the court making the decision." Indeed, it is by no means clear how it was intended by counsel that the judgment here referred to should be treated as a former adjudication of the questions at issue in the case at bar. In the first place, the judgment has not been set out in the complaint, nor has it been in any way specially pleaded. Neither has it been pleaded on appeal, even if such plea could be made on appeal. *Eckert v. Binkley*, 134 Ind. 614, 623. But, even if such judgment were pleaded, it would seem that there could be no question of former adjudication entertained, as counsel urge. "Before the rule of former adjudication can be invoked it must appear that the thing demanded was the same; that the demand was founded upon the same cause of action; that it was between the same parties, and found for one of them against the other in the same quality. The party must not only be the same person but he must also be suing in the same right." *Kitts v. Willson*, 140 Ind. 604. See the learned work of Judge Van Fleet on Former Adjudication (chap. 11), and generally. It is enough, on this feature of the question, that in the case in the circuit court, Albert W. Wishard was the party plaintiff, while in the case at bar 31 L. R. A.

the plaintiff was the state of Indiana, on the relation of Ferd. E. Basler. The parties plaintiff were not the same, and for this reason alone the rule of former adjudication cannot apply. See *Glenn v. State, Clore*, 46 Ind. 368; *Maple v. Beach*, 43 Ind. 51. In the former of these cases it was held that a judgment in an action brought by Margaret Close against William Glenn could not be considered as a former adjudication of the issue in an action brought in the name of the state of Indiana, on the relation of Margaret Close, against William Glenn, although the facts were precisely the same in both cases. In the two cases now under consideration, it will be remembered that Albert W. Wishard, the plaintiff in the former action, is not a party, nor even a relator, in the case at bar. Neither do we think there is any estoppel here, as in the case of *Vickery v. Hendricks County Comrs.* 134 Ind. 554, to which we are referred. There, the party bringing suit to enjoin a levy of taxes to pay for bonds issued on purchase of a toll road, had waited until he received the benefit of the bonds before asking the court to declare unconstitutional the law under which they were issued. Here, while there may be some question of private or personal benefit, yet the issue before the court is much broader. The action concerns all the people of the state, in their most enlarged and sacred relations of citizenship and government, and the case cannot be tied up with the purely private rights of any one. It is true that an action to test the constitutionality of the law, if brought at all, should have been pressed to a final determination in the first place, and before the election of the present legislature, which is but a *de facto* body, in case the law of 1893, under which it was chosen, is invalid. Yet the people of the state, in their sovereign capacity, cannot for such reasons be estopped from asking for a determination of the validity of a law under which it is now proposed that they shall elect their next legislature. When the people of the state appear at this bar with such an issue, there can be no question of estoppel. The inquiry is one reaching to the foundations of government. While, then, all respect will be given to the judgment of the circuit court in this, as in every other, case, yet we cannot seriously entertain the contention that such adjudication of a constitutional question is of binding force in this court. More than this, no property right or contract between the parties being involved, it will not be considered that the rule of *stare decisis* requires that, in deciding so grave a matter as that of the constitutionality of an act of the legislature, we should be bound by even our own former decisions. In such a case, as forcibly said by Chief Justice Bleckley in *Ellison v. Georgia R. & Bkg. Co.* 87 Ga. 691, the maxim for a supreme court, "supreme in the majesty of duty as well as in the majesty of power," is not *stare decisis*, but *fiat justitia*. Let this decision be right, whether other decisions were right or not. In *Walsh v. State, Soules*, (at last term) (Ind.) 41 N. E. 65, involving the constitutionality of the fee and salary act of 1891, this court did not

hesitate to overrule its own decision, as to the validity of the same law, in *State Board of Comrs. v. Boice*, 140 Ind. 506, when satisfied that the decision first rendered was erroneous. See further *Robinson v. Schenck*, 102 Ind. 307; also, the exhaustive discussion of this subject in *State, George, v. Aiken*, 42 S. C. 222, 26 L. R. A. 345, and authorities there cited.

We are therefore of opinion that both the apportionment act of 1895, and also that of 1893, are unconstitutional and void, and, consequently, that the appellee was not entitled to the relief demanded by him in his complaint, and which was awarded him by the decision of the trial court. This court, in the case of *Parker v. State, Powell*, while deciding that the apportionment acts of 1891 and 1879 were both invalid, yet expressly held that the constitutionality of the intermediate act of 1885 was not before the court for adjudication, and accordingly refrained from making any decision in regard to it. Neither has the constitutionality of the apportionment act of 1885 been questioned in the case at bar. Consequently, that act is the last, and perhaps the only, expression of the legislative will upon the subject of apportionment, and under which senators and representatives may be chosen at the general election of 1896, unless the governor should see fit to call a special session of the legislature to pass a new apportionment law.

The judgment is reversed, with instructions to the circuit court to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Hackney, Ch. J., concurring:

While giving my full concurrence to the conclusion of the principal opinion, it is my purpose to add one or two thoughts to what my associate has well said:

This suit, in form and effect, disaffirmed the constitutionality of the apportionment act of 1895, and affirmed the constitutionality of that of 1893. The decree of the lower court, by forbidding steps under the act of 1895, and commanding that such steps, towards the biennial election of this year, be taken under the act of 1893, held the law of 1895 to be void, and that of 1893 to be valid. The question of the correctness of this holding of the trial court, thus involving both of said laws, is before this court. The act of March 5, 1895, repealing that of 1893, and the other act of that date, reapportioning the state, have been considered in the principal opinion—and properly, in my judgment—as one act, since by the Constitution it was not contemplated that the general assembly could, by repealing an apportionment act, deprive the people of the right to choose their representatives, and could not supplant an apportionment act, properly enacted, excepting at the sexennial periods. The two acts mentioned were passed concurrently, and could have been separated only in the hope that, if the second should not stand, the first should have the effect to repeal the law of 1893, and require the next general assembly to be chosen under some prior law, or under some law which might

be enacted by a special session made necessary by the absence of any apportionment law. The only remaining alternative would be that the people should be without a law under which to choose the next general assembly,—an alternative probably not contemplated when these acts were passed, and one which the framers of the Constitution certainly never intended should arise. That it was intended to carry down the act of 1893 at all hazards is manifest, not only from the express repeal of that act, but also from the language of the preamble to the repealing act. It is declared therein that the act of 1893 is unconstitutional, and was intended by the general assembly which passed it to be unfair, unequal, in violation of the Constitution and in disregard of a decision of this court. While thus assuming the judicial function of declaring an act of the general assembly unconstitutional, and while assuming the effect of that declaration to carry down the law of 1893, it is, by the last paragraph of the preamble, expressly conceded and declared to be the province of the courts to pass upon the constitutionality of laws. The effect of this preamble is the question in this case. It voices the conclusion of its authors that the power to enact an apportionment law, out of the sexennial period, depends upon the nonexistence of a constitutional law apportioning the state; hence, the express declaration that the law of 1893 was unconstitutional. There is but one other possible construction of the preamble, and that is that its authors desired simply to challenge the integrity of those who had preceded them in the high office of legislators, and who had taken an oath to support that Constitution, which is said by this preamble to have been wilfully violated. This latter construction is not essential to the principal object,—the passage of a new apportionment act. The former construction was regarded as essential to that end, and stands in this case as the justification for reapportioning the state before the period contemplated by the Constitution. As said in the principal opinion, and as practically conceded by the closing paragraph of the preamble, the declaration that the law of 1893 was void was beyond the authority of the general assembly, was the exercise of judicial power, and is now without force. It is even more than this: It is a declaration that those who made it held their places as members of the general assembly alone by virtue of the very law declared by them to have been void and of no effect. These considerations are pertinent, not only to a decision of the question of the power of the general assembly to exercise judicial functions, but they are of moment in looking to the consequences which may follow such exercise of power, and the possible consequences of this proceeding. All tribunals of organized society accord to precedent respectful observance, and general obedience, unless such precedent is palpably at variance with justice, morals, or the fundamental law. Especially do the members of society owe this observance and obedience to the written laws. None rest under this obligation more fully than those who make and

those who execute the laws. It is the precedent established by this court in the *Parker Case*, 138 Ind. 178, 212, 18 L. R. A. 567, 579, which is urged by the appellants to overthrow the law of 1893, and by which, in a great measure, we are controlled in passing upon that and the act of 1895. No tribunal can maintain long the respect of society, if it may wantonly, or even with indifference, reverse to-day its action of yesterday. This is true whether that tribunal is judicial or legislative. The same rule which is certainly our guide should be the guide of other co-ordinate departments of the government. Finding the act of 1893 upon the statute books, and bearing in mind that no valid act could be passed at that period, in the absence of the conclusion that the act of 1893 was void, it was assumed and declared that such act was void. If this may be done in any case, it may be done in every case, and the legislature may be found repealing its enactments at each succeeding session. The spirit of the Constitution forbids this with reference to apportionments, and tolerates it only in the event that such conclusion is unmistakably correct.

One of the consequences of the law of 1895 was to require judicial investigation and decision as to which of two laws should be observed by the people. Both could not stand. The first being valid, there could be no authority for the second. Another consequence was that it supplanted a law no more objectionable, under the Constitution, than itself. Looking beyond the mere partisan advantage to be gained by the enactment of either law, what shall become of the principle of local self-government, and the prerogative of proportionate representation? It is a more than important question. It is, in view of the present situation, startling. There is, by the invalidity of the acts of 1893 and 1895, no apportionment law since that of 1885 which has not been found, upon judicial investigation, to have violated the Constitution. The law of 1879—the last before the act of 1885—was held, in the *Parker Case*, to be unconstitutional. When the acts of 1893 and 1895 fail, where shall the people look for the apportionment—a necessary prerequisite—upon which to elect the next general assembly? It may be said that the governor will convene the last-chosen general assembly in special session for that purpose. While the enactments of merely *de facto* legislators are generally upheld for the peace and good order of society, it may be seriously questioned whether one chosen under a void law is a *de facto* officer continuously for the mere purpose of keeping the office filled. A merely *de facto* officer is not usually entitled to hold for a full term, in an office whose functions are in continuous operation when a *de jure* officer is chosen during such term. *De facto* officers get no power or authority from the acts they perform, but the principle which supports the acts of such officers is that the public finding him in actual possession of the office, and dealing with him under circumstances of reputation and color which would lead men to suppose they were legal officers, such dealings are validated on 31 L. R. A.

the ground of public policy. But there are authorities, though we have no occasion to apply them in this illustration, to the effect that, when the want of authority in such officer to perform the acts in question becomes notorious, the reason for the *de facto* doctrine ceases. An essential feature of the doctrine would seem to be that it is considered only with reference to past acts, and not as justifying further acts, and the continued right to occupy the office, where the duties of the office are not in continuous exercise, but at the close of a session cease forever, unless specially called into action before new officers convene in regular session again. This would not only suggest the doubts arising to influence the governor in calling or declining to call together persons who had occupied *de facto* an office not in continuous operation, and one which, it has become notorious, they held without the sanction of law, but as suggesting also the possible right of the people to elect at the next election *de jure* senators to represent them, instead of those chosen under a void law. Another fact which might be influential upon the mind of the executive, as to his duty to call a special session of the general assembly, is the fact that at the regular session, while condemning the act of 1893 for its violation of the Constitution, another law was enacted as grossly violating the same principles of that sacred instrument. If the special session should repeat the disregard of existing enactments and the decisions of the courts, no relief would come, and it would be less anarchistic to deprive the people of a constitutional choice by affirmative legislation than by no legislation. But, I apprehend, the governor would be slow to call a special session when the act of 1885 stands upon the statute book unchallenged, and when this court, in the *Parker Case*, where the question was made, expressly declined to declare it unconstitutional, though the act of 1879 and that of 1891 were both held void. I should probably say, however, that the governor, in discharging his duty, has the same power, subject to the same limitations, to regard existing apportionment laws as constitutional or unconstitutional that the general assembly had.

It is insisted, however, that by the Constitution an apportionment law becomes, by the lapse of time, inoperative after six years, and that, therefore, all acts prior to 1891 have expired. There can be but little doubt that the command of the Constitution is mandatory and exclusive, in that it requires an apportionment at each six-years period, and forbids it at other times. It is no less clear, in my judgment, that, as maintained in the principal opinion, the duty enjoined is continuing, and may be discharged subsequently, if not discharged as commanded. This conclusion renders another conclusion inevitable, and that is that the choice of the people is a right to be exercised upon the rule of apportionment existing at the time the neglected duty should have been performed. If this were not so, there would never be a legislature following that which had neglected its duty to supply the basis for choosing the

next. I cannot believe that the framers of the Constitution contemplated the surrender by the people of the power to elect representatives to the general assembly at the expiration of a sexennial period, in the event of a failure to enact a law, or the enactment of an invalid law. If it had been intended to make the continuance of this power dependent upon legislative action, there was no reason for the mandatory provision of the Constitution as to apportionment. The whole subject would have been left with the legislative department of the government. Nor can I believe it intended that, in the absence of a new legislative apportionment, the reserved right to elect an assembly was to be exercised upon some basis to be determined by the masses. Such a rule would be simply a substitute for a constitutional provision, and its enforcement, where party spirit becomes so intense as it does with us, would be fraught with difficulties certainly never intended to be left unguarded by constitutional restrictions. The assembly of 1855 found no enumeration upon which to make an apportionment as then required, and in the election of 1856 the assembly was chosen upon the prior apportionment. The assembly so chosen, at its session in 1857, without enumeration, apportioned the state, and without question, and without further apportionment, the assemblies following that session were elected under that apportionment until Gov. Morton, in January, 1865, called the attention of the session then sitting to this long-continued failure of duty. At no time in the history of the state has an assembly been chosen upon a ratio adopted by common consent, further than that, where the legislature has failed to adopt an apportionment, elections have been held under the last preceding apportionment, without objection, thereby giving construction to the Constitution in accordance with the view now suggested, namely, that the act of 1865 is the last apportionment which stands unquestioned, and is that upon which the next election must be held, if that law remains unquestioned. That an apportionment does not lapse by the expiration of the six-years period, in the absence of a renewed valid apportionment, was, in effect, held in the *Parker Case*, where, as I have said, this court declared the act of 1891 unconstitutional, and passed back of the law of 1885, notwithstanding the rule that courts never passed upon constitutional questions when a case may be decided without doing so, and held unconstitutional the act of 1879, then standing through more than two periods of six years. Whether that act shall continue unquestioned; whether the people will follow the custom in such cases, and make their election under that law; or whether that custom will be abandoned, and public officers will refuse to follow it, and thereby defeat the constitutional object to convene an assembly in 1897,—depends upon the wisdom and patriotism of the people. I cannot believe that the governor would assume to declare the act of 1885 unconstitutional, to abandon the custom of the people construing the Constitution in like cases, and then, having done so, 31 L. R. A.

recall the last-chosen assembly, with doubts as to its further authority, for the enactment of a new law. If the act of 1885 should, in proper proceedings, be declared invalid, and no preceding valid act of apportionment should be found, the maintenance of the legislative branch of the state government would hang upon the doubtful proposition that the governor could convene in special session, from the members last chosen, a *de facto* general assembly. That such frightful consequences are possible from the character of legislation now under consideration would seem to demand serious reflection, and such patriotic submission to the welfare of the government as shall subordinate mere partisan advantage.

Jordan, J. :

I concur in much of the reasoning of the principal opinion of the court, and in the conclusion reached that the judgment below must be reversed. I also concur in the holding that the act of 1893, under the decision of this court in *Parker v. State, Powell*, 133 Ind. 178, 212, 18 L. R. A. 567, 579, is unconstitutional and therefore void. I am of the opinion that the formation of double districts should be condemned, and ought never to be resorted to by the legislature, in the enactment of an apportionment statute, unless in the sound discretion of that body, in some particular instance, on account of the situation of some counties and their voting population, it may become absolutely necessary to do so, in order to attain that equality of representation required by the organic law of the state. Or, in other words, I am not prepared to declare a "hard and fast rule" upon this question, from which the legislature can in no event depart.

BOARD OF CHILDREN'S GUARDIANS OF MARION COUNTY, *Appl.*,

r.

Gertrude SHUTTER.

(130 Ind. 268.)

1. A judgment is not necessarily void because the court bases it on a void statute, if the court has jurisdiction of the subject derived from other sources.
2. The guardianship, custody, and control of minors being within the jurisdiction of the circuit court in Indiana, its judgment committing an infant to the custody of a board of children's guardians is not void on collateral attack, although it assumes to act under an unconstitutional statute.
3. No notice to an infant under fourteen years of age is necessary in a proceeding for the appointment of a guardian of the person of such child.

(June 15, 1893.)

A PPEAL by defendant from a judgment of the Superior Court for Marion County liberating petitioner from its custody upon habeas corpus proceedings. *Reversed.*

NOTE.—As to state guardianship of children, see note to *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593.

The facts are stated in the opinion.

Messrs. W. P. Fishback, B. K. Elliott, W. F. Elliott, S. P. Davis, C. L. Hare, and C. Martindale for appellant.

Messrs. Frank McCray and Samuel Ashby for appellee.

McCabe, J., delivered the opinion of the court:

The appellee applied to the court below for a writ of habeas corpus against appellant, charging it with unlawfully restraining her of her liberty. An exception to the amended return to the writ by appellant was taken by appellee and sustained by the trial court, to which ruling appellant excepted, and failing to further amend its return, and electing to stand thereon without further pleading or action, it was adjudged that the alleged holding and detention of the appellee was without authority of law, etc.

The return, after reciting in detail the appointment of all the members of the Board of Children's Guardians by the circuit court of Marion county from the organization of the board to that time, giving the names of all the present members, as well as their predecessors, reads as follows:

That acting as such corporation as aforesaid of which the parties whose names have been hereinbefore set forth are members, said corporation, on the 1st day of March, 1893, in the January term for the year 1893 of the Marion circuit court filed in said court a petition as follows:

In the Matter of } Infant.
Gertrude Shutter. } Petition for Custody.

To The Honorable Judge of the Marion Circuit Court:

The Board of Children's Guardians of Marion county, a corporation existing under and acting by virtue of the laws of Indiana, respectfully petition the court and say that Gertrude Shutter is a female child, of thirteen years of age; that the father of said child is Shade A. Shutter, residing at Jeffersonville, Indiana; that the mother of said child is Bell Shutter, residing at 249½ W. South street, within Marion county, Indiana; that the child is in the actual custody and control of her mother, the said Bell Shutter; that the father of said child has abandoned his family; that said mother is in constant habits of drunkenness and low and gross debauchery; that said child is neglected and kept in associations which tend to her corruption and contamination.

Wherefore the Board of Children's Guardians of Marion county petitions the court to order that said child be committed to the custody and control of said board.

(Signed.) The Board of Children's Guardians,
By Nathaniel A. Hyde, President.

C. L. Hare,
Attorney for Petitioner.

This petition was duly verified.

The court, having inspected the petition, ordered that the writ for the custody of said child be issued thereon, and that the same be served upon Bell Shutter, the mother of said child, in Indianapolis, and Shade A. Shutter, at Jeffersonville, Clark county, Indiana, and 31 L. R. A.

directed that said minor child should be kept in the keeping of said board until the final order of the court upon said petition. Said writs were issued thereon and the said Gertrude Shutter was taken by the sheriff of Marion county on said writ, and delivered to the defendant said corporation. Said petition was set for hearing on the 11th day of March, 1893, and notice thereof was ordered to be given to said Bell Shutter and Shade A. Shutter, the parents of said child. And on the 4th day of March, 1893, by agreement of both parties, said Marion circuit court proceeded to hear and determine said cause on said petition, and having heard the evidence, and being sufficiently advised, said court entered in said cause the following order and decree, to wit: And afterwards, to wit:

On Saturday, the 4th day of March, 1893, the same being the 54th judicial day of the January term, 1893, of the Marion circuit court, the following additional proceedings were had in this cause:

"Comes the Board of Children's Guardians of Marion county, Indiana, by C. L. Hare, its attorney, and comes also Shade A. Shutter in person and by J. F. McCray, his attorney, and defendant, Bell Shutter, in person comes also, and now by agreement of all parties notwithstanding the return day of the writ issued herein, this cause is submitted to the court for trial, finding, and determination, and the evidence and argument of counsel having been heard, and the court having seen and inspected the petition herein, and being fully advised, finds that the allegations of said petition should be sustained; that said Gertrude Shutter is a female child of the age of thirteen years, and that she should be given to the custody of the Board of Children's Guardians.

"It is therefore considered and adjudged by the court that the said Gertrude Shutter be, and she is hereby, given to the custody of the Board of Children's Guardians of Marion county, Indiana."

The return further shows that there was a motion for a new trial of said cause overruled, and a motion to modify the order was also overruled. The return further shows this judgment of said circuit court remains in full force unmodified, unreversed, and not appealed from. If that judgment is valid, the return was good, and the superior court in general term erred in affirming the judgment in special term adjudging the return insufficient.

It is earnestly insisted by appellee that the judgment of the circuit court in awarding her custody and control to appellant was void because it is asserted the act approved March 9, 1889 (Acts 1889, p. 261), as amended by the act approved March 9, 1891 (Acts 1891, p. 365), as amended by the act approved March 3, 1893 (Acts 1893, p. 283), under which the circuit court proceeded, is in conflict with several provisions of the state Constitution. It is maintained with earnestness and ability for appellee that "all judgments had and rendered under a law that is unconstitutional are void, and are as if no proceeding or judgment had been had or rendered."

Conceding that proposition, and yet counsel's contention is not established. If the law which gives the sole power or jurisdiction to the court

to render the judgment is unconstitutional and void, and if without such a law in force the court would have no power to render the judgment in question, then the law being void, the judgment depending wholly on such void law would also be void. Where, however, the court has jurisdiction to adjudicate upon the subject, derived from other sources than the supposed void statute, even though it may attempt to follow that statute, it does not necessarily follow that its judgment is void. A judgment founded on a statutory bond depending for its validity wholly on the statute which is unconstitutional and void, is not void and cannot be collaterally impeached because the statute is unconstitutional and void. *Cassel v. Scott*, 17 Ind. 514.

If the circuit court had jurisdiction over the subject and the parties, though it committed the greatest irregularities and errors, its judgment cannot be collaterally impeached therefor as this proceeding attempted to do. *Davidson v. Koehler*, 76 Ind. 398; *Sauer v. Twining*, 81 Ind. 366; *State, Morrison, v. Morris*, 103 Ind. 161.

The circuit court was a court of general jurisdiction. If it was not clothed with all the jurisdiction of the English court of chancery, it is within a branch of the equity powers of the circuit courts of this state that they have the superintendence of infants, idiots, and lunatics. *McCord v. Ochiltree*, 8 Blackf. 15.

The power to appoint guardians for infants, idiots, and lunatics conferred by the statute is merely declaratory of the power they already possessed. *Gardner v. Gordon*, 41 Ind. 92; *Child v. Dodd*, 51 Ind. 484; *Nealis v. Dick*, 72 Ind. 374; *Lagrange County Comrs. v. Rogers*, 55 Ind. 297; *Erskine v. Whitehead*, 84 Ind. 357; *McKenzie v. State, Dickinson*, 80 Ind. 547; *McGlennan v. Margowski*, 90 Ind. 150; *Bryan v. Lyon*, 104 Ind. 227.

We therefore hold that the circuit court had ample power to deal with and adjudicate upon the subject of the guardianship, custody, and control of minors. The circuit court therefore had jurisdiction of the subject. It is earnestly contended that the circuit court acquired no jurisdiction over the person of the appellee, the minor whose custody and control were determined by the adjudication. If that is true, the judgment would be void the same as if jurisdiction over the subject was wanting. The ground upon which this contention is based is, that there was no notice or process served on the infant notifying her that such an adjudication affecting her was to take place. No notice appears to have been served upon her except taking her into custody by the appellant before the hearing of their petition. But there was process served on her mother and father, and a full opportunity afforded them to be heard against the granting of the petition, and they appeared at the hearing. But it is ably contended that that is not sufficient to confer jurisdiction over the person of the child. In some of the states no other notice than notice to parents, or if no parents, next of kin, is required to enable courts to appoint a guardian. Counsel for appellee have referred us to a large number of cases holding that a summons must be served on an infant the same as

an adult, or the judgment will be void as to such infant. And in that class of cases it will be equally so if the infant was but a week old, and would be as unconscious of the reading of the summons to it as a block of wood, and yet the law imperatively requires the service of such summons on such an infant in that class of cases as much as upon an adult, or the adjudication will be void for want of jurisdiction over the person. But the class of cases they have referred us to, and that we have been discussing, is such only as where the judgment sought or the adjudication to be had is to deprive the infant of some property or right or to injuriously affect such minor in its rights of property. In that respect its rights are precisely the same as an adult; hence it must have the summons read to it precisely the same as an adult, though it does not understand a word of it. Its right to control its own actions is not like an adult. It is subject to either parental control, the guardian's control, or the control of the court or chance, or, in the absence of parent or guardian, on account of its lack of discretion and knowledge sufficient to guide its own actions for its own best interests. Hence, in a proceeding for the appointment of a guardian for it, the principle of the cases above referred to has no application whatever where it is under fourteen years of age. Such an appointment does not deprive it of any of its rights of property or injuriously affect its rights in that regard. It is but an officer of the court appointed to wield the power of an arm of a court of equity, and no notice to the infant is required. *Kurtz v. St. Paul & D. R. Co.* 48 Minn. 339; *Re Gibson*, 154 Mass. 378; *Reynolds v. Howe*, 51 Conn. 472.

We therefore conclude that the circuit court had jurisdiction of the person of the infant and the subject matter of the adjudication. It may have erred in every step of those proceedings; we do not decide that it did, or did not, because such errors and irregularities cannot be inquired into on a writ of habeas corpus. *Rev. Stat. 1881, § 1119; Wentworth v. Alexander*, 66 Ind. 39; *Kinney v. Dickey*, 125 Ind. 180; *Turner v. Conkey*, 132 Ind. 248, 17 L. R. A. 509; *Smith v. Hess*, 91 Ind. 424; *Louery v. Howard*, 103 Ind. 440; *Davis v. Bible*, 134 Ind. 108.

Such errors, if any were committed, must be relieved against just as in any other adjudication—by appeal, bill of review, or any method known to the law for relief against an erroneous judgment.

The conclusion we have reached not only finally disposes of this case in this court, but also in the court below without deciding anything whatever about the constitutionality of the statute so ably and exhaustively discussed by counsel on both sides. Under such circumstances, our duty does not require us to enter upon that field of investigation. *Cummings v. Stark*, 138 Ind. 94.

The judgment is reversed, and the cause remanded, with instructions to overrule the exceptions to the amended return.

Petition for rehearing overruled November 15, 1894.

City of INDIANAPOLIS, *Appt.*,

v.

Judson A. WANN, Receiver of Sun Vapor Street-Light Company.

(.....Ind.....)

1. A contract for street lights for five years at a certain price per light per year payable monthly, made by the executive department of public works when no appropriation for the purpose had been made except for a month or two in advance, is void, where the statute provides that no executive department shall bind the city by a contract, agreement, or in any way to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose, and that all contracts and agreements, expressed or implied, and all obligations of any and every sort beyond such existing appropriations, are absolutely void.

2. Subsequent appropriations for instalments coming due on a contract made by city authorities in violation of statute, prohibiting contracts for which appropriations had not already been made, cannot operate as a ratification of the contract so as to make it binding.

(February 13, 1896.)

APPEAL by defendant from a judgment of the Superior court for Marion County in favor of plaintiff in an action to recover the contract price for light furnished to the city of Indianapolis. *Reversed.*

The facts are stated in the opinion.

Messrs. J. E. Scott and James B. Curtis, for appellant:

The contract sued upon is void, because prohibited by the statute.

Kiichli v. Minneapolis Brush Electric Co. 58 Minn. 418 (1894); *Garrison v. Chicago*, 7 Biss. 480; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 404; *Superior v. Norton*, 24 U. S. App. 59, 63 Fed. Rep. 357; *Bladen v. Philadelphia*, 60 Pa. 464; *Philadelphia v. Flanigen*, 47 Pa. 21; *Johnson v. Indianapolis*, 16 Ind. 227; *Jonas v. Cincinnati*, 18 Ohio, 318; *Wallace v. San José*, 29 Cal. 181; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Niles Waterworks v. Niles*, 59 Mich. 311; *Coulson v. Portland*, Deady, 481; *Pullman v. New York*, 49 Barb. 57; 1 Dill. Mun. Corp. §§ 181-184, note; 1 Beach. Pub. Corp. § 244.

No contract can be made which is expressly prohibited by the statute, whatever may be the consequences.

1 Dill. Mun. Corp. 447; *Indianapolis v. Indianapolis Gaslight & C. Co.* 66 Ind. 405; *Valparaiso v. Gardner*, 97 Ind. 6, 49 Am. Rep. 416.

Our present city charter has expressly conferred ample power upon the corporation to procure necessary public light by methods other than through the exercise of the limited power to contract therefor, vested exclusively in the board of public works.

Rev. Stat. 1894, 3830.

Even if powers had not been expressly conferred, and public lights could not be procured except by contract for a period of years, there would be inherent power in the corporation to make such necessary contract.

1 Dill. Mun. Corp. 4th ed. 89, 450; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268.

All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation, and of its officers, to make the contract. The city is not estopped.

15 Am. & Eng. Enc. Law, p. 1100 note, and cases; *Union School Twp. v. First Nat. Bank*, 102 Ind. 464; *Detroit v. Robinson*, 38 Mich. 108; 2 Beach. Pub. Corp. 1328, note 5; *Milford v. Milford Water Co.* 124 Pa. 610, 3 L. R. A. 122; 1 Dill. Mun. Corp. 447, note, 448, 457; *Pine Civil Twp. v. Huber Mfg. Co.* 83 Ind. 121.

Messrs. Miller, Winter, & Elam for appellee.

McCabe, J., delivered the opinion of the court:

The appellee as receiver of the Sun Vapor Street-Light Company, sued the appellant to recover the sum of \$552.75, as an instalment due from the city for vapor lights furnished it for the month of January, 1895, under the terms of an alleged contract, and seeking certain injunctive relief. The superior court overruled a demurrer to the complaint, and, the defendant (appellant) refusing to plead further, judgment was rendered upon demurrer in favor of appellee.

The only error assigned calls in question the ruling upon the demurrer. It appears from the complaint that the executive department of public works of the city on September 18, 1893, entered into a contract with the Sun Vapor Street-Light Company, by which such company covenanted that it would furnish to said city a certain number of Sun Vapor street lights for a period of five years from said date at a certain price per light per year, payable in monthly instalments, and the city covenanted to pay accordingly: and, among other things, the contract contained the following mutual covenants: "To each of the provisions, conditions, and stipulations of this contract, the undersigned, each for itself, hereby covenants, agrees, and binds itself, its successors and assigns." Upon the part of the city the contract is executed in the name of the city, by its board of public works, with the city seal affixed, and the contract is also signed by the mayor. It further appears that the appellee was duly appointed receiver of said light company, and as such he had secured the permission of the court appointing him to bring this suit. It is also shown that the monthly instalment for which the suit was brought was due and unpaid. The ground on which it was sought to defeat the action in the trial court, and to reverse its judgment in this court, is that the contract sued on was and is

NOTE.—The limitation in the above case on municipal liabilities is so strong as to present a clear distinction between this case and those which turn on provisions against "debts" or "indebtedness." As to these, see note to *Beard v. Hopkinsville* (Ky.) 31 L. R. A.

23 L. R. A. 403; also *Carter v. Thorson* (S. D.) 24 L. R. A. 734; *Linn v. Chambersburg* (Pa.) 23 L. R. A. 217; *Saleno v. Neosho* (Mo.) 27 L. R. A. 769; *Kelly v. Minneapolis* (Minn.) 30 L. R. A. 281.

absolutely void, because made in violation of the statute. At the date of the contract the appropriations by the common council to the several executive departments of said city for the current expenses of the fiscal year had not been made. The prior fiscal year had expired August 31, 1893. For that year the council had, on September 26, 1892, appropriated to the board of public works a certain sum for public light; and by said ordinance said appropriation continued and carried to October 1, 1893, unless the appropriation ordinance for the fiscal year ending August 31, 1894, was sooner passed by the council. The appropriation ordinance for the fiscal year ending August 31, 1894, was passed September 21, 1893, and carried an appropriation to said department for public light of \$76,000 for said year. So far as appears by the complaint, this appropriation was not more than sufficient to meet the expenses during the fiscal year for which the appropriation was made, for public light of all kinds, including gas and electric light, upon existing contracts then in force. Upon September 18, 1893, being the day and date upon which the contract sued on was entered into, there remained unexpended of the sum appropriated to said department for public lights for the fiscal year ending August 31, 1893, the sum of \$15,000, which sum was sufficient only to meet the expense of lighting the city by gas, electricity, and vapor light for and during the months of September and October, 1893. In other words, the complaint shows that upon the date of the execution of the contract the appropriation to the department of public works was only sufficient to pay upon existing contracts for the current and succeeding month; and even this sum was not available after October 1, because upon that date the appropriation, by its terms, lapsed. Subsequent appropriations were made to the department of public works for public light, as appears by the complaint; but at no time did the common council authorize the execution of said contract, or take any action to confirm or approve the same. In the last appropriation ordinance (being Exhibit G of the complaint), there is an express provision in § 8 that the appropriation for vapor lights by item 28, under heading "Department of Public Works," is not to be taken or deemed as a ratification of any contract "heretofore entered into by the department of public works of said city which may not have been authorized by previous appropriations therefor." It is further shown that the board of public works on December 19, 1894, notified appellee in writing, that said city was not bound by said contract, that the same was illegal, and that it would not pay for any lights furnished under said contract by appellee after December 31, 1894. The appellee nevertheless continued to furnish them for the month of January, 1895, and now seeks, in the complaint, to recover therefor upon said contract.

The board of public works, by the act commonly known as the "City Charter" for said city, is an executive department of said city government, with certain powers conferred to contract on behalf of the city, subject to certain limitations therein prescribed. Rev. Stat. 1894, §§ 3812-3819, among which powers is

the power: "To contract for the furnishing of gas, either natural or artificial, water, steam or electricity, light or power, to said city or the citizens thereof, by any company or individual, and in such contract to fix the price to be charged for the same in such city, subject to ordinances of such city, in relation to consumption by private consumers," provided that such powers can only be exercised pursuant to an ordinance specifically directing the same. Rev. Stat. 1894, § 3830, top page 359. The board of public works assumed to act under this power in entering into the contract sued on. This power is subject to the limitations expressed in the statute already mentioned, wherein it is provided that "the legislative authority of the city shall be vested in a common council." Rev. Stat. 1894, § 3780. "All ordinances, orders, resolutions, and motions for the government or regulation of such city, and all ordinances for the appropriation of money, shall originate in the common council. No appropriation shall be made for the payment of money otherwise than by ordinance, specifying by items the amount thereof and the department for which such appropriation shall be made." Rev. Stat. 1894, § 3789.

Sections 50-52, 62, of the act read as follows:

"50. It shall be the duty of each executive department, before the commencement of each fiscal year, to submit to the joint meeting of the heads of the departments and of the various boards hereinbefore provided for in § 45, an estimate of the amount of money required by their respective departments for the ensuing fiscal year stating with as great particularity as possible each item thereof. The comptroller shall at the same time submit a statement or estimate of city expenditures for other purposes, for the ensuing year, over and above the moneys proposed to be used by various executive departments, giving with as great particularity as possible each item thereof. After such meeting, and reports and consultation, the city comptroller shall thereupon proceed to revise such estimates for the ensuing year, and the comptroller shall then prepare a report to the mayor of the various estimated amounts required in said comptroller's opinion for each executive department, and for other city expenses, together with an estimate of the necessary per cent of taxes to be levied. The mayor shall at the next meeting of the common council present such report with such recommendations as he may see fit. It shall be the duty of the committee of finance of said common council thereupon to prepare an ordinance fixing the rate of taxation for the ensuing year, and also an ordinance making appropriations by items for the use of the various executive departments and other city purposes for the ensuing year. Said ordinance may reduce any estimated item for any executive department, from the figures submitted in the report of the city comptroller, but shall not increase the same unless recommended by the mayor. Such appropriation ordinance shall thereafter be promptly acted upon by the common council. If at any time after the passage of such ordinance an emergency shall arise for further appropriations for the use of any department as certified by such

department as hereinbefore provided, or other purposes during the year, such additional appropriations may be made on the recommendation of the comptroller by a two-thirds vote of the council.

"51. No executive department, officer, or employee thereof, shall have power to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort, beyond such existing appropriations, are declared to be absolutely void.

"52. Any city official who shall issue any bond, certificate, or warrant for the payment of money which shall purport to be an obligation of such city, and be beyond the unexpended balance of any appropriation made for such purpose, or who shall attempt to bind such city by any contract, agreement, or in any other way, to any extent beyond the amount of money at the time already appropriated by ordinance for such purpose, and remaining at the time unexpended, shall be liable on his official bond to any person injured thereby, and shall be fined in any sum not more than \$1,000 and imprisoned in the county jail not more than six months, either or both."

"62. All the expenses incurred or authorized by such board of public works shall be payable out of the general funds of such city appropriated to the use of such board and available for the particular purpose, except where this act specifically directs that the same is to be paid for by assessments against property holders." Rev. Stat. 1894, §§ 3821-3823, 3833 (Acts 1891, p. 137).

The full meaning of the provisions already quoted will be better apprehended by considering in connection therewith the following portion of § 54:

"Sec. 54. It shall be the duty of the comptroller: . . . To keep separate accounts for each specific item or appropriation made by the council to each department, and require all warrants to state specifically against which of said items the warrant is drawn. Each account shall be accompanied by a statement in detail in separate columns of the several appropriations, the amount drawn on each appropriation, the unpaid contracts charged against it, and the balance standing to the credit of the same. He shall not suffer any appropriation to be overdrawn or the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers authorized by ordinances." Rev. Stat. 1894, § 3825.

It will be seen that by § 50, and those preceding it, the common council is the local legislative and governing body; has exclusive power to levy taxes and to appropriate the revenues, and thereby authorize their disbursement. By §§ 51, 52, 62, the power of the executive departments to bind the city by contract is limited to the revenues for which the levy for the ensuing fiscal year is made, and which has been appropriated to the several de-

partments for the specific purposes by the council, as it is advised the same is necessary. It is conceded in the complaint and appellee's argument that there was no revenue appropriated and available for the specific purpose involved in the contract, beyond what would be required to pay the instalment on such contract for the current month and the ensuing month of October. And yet it is contended by the learned counsel for appellee that such contract is not a violation of the statutory provision that "no executive department, officer, or employee thereof shall have power to bind such city by any contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void." Rev. Stat. 1894, § 3822. The instalment sued for here is that for the month of January, 1895,—far beyond the amount appropriated at the time the contract was entered into. It is only attempted obligations beyond existing appropriations that the statute makes void. And if it has not done so, then language cannot be employed strong enough to accomplish that manifest object and intent. Counsel cite and rely on three cases in this court to uphold their contention that the contract is not in violation of the statutory provision quoted. The first is *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. It was sought in that case to enjoin the letting of a contract to a waterworks company for supplying the city with water for a period of twenty years at an annual expense to the municipality of \$6,000. It was alleged that the corporate indebtedness then exceeded 5 per centum of the assessed value of the taxable property of the city, and that there was no money in the treasury. The ground on which it was sought to maintain the action was that the proposed contract would be in violation of article 13 of the Constitution adopted March 14, 1881, which provides that "no political or municipal corporation in this state shall ever become indebted, or for any purpose to an amount in the aggregate exceeding 2 per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation shall be void." Rev. Stat. 1881, § 220 (Rev. Stat. 1894, § 220). It was held that this inhibition was against the creation of an indebtedness or debt of the municipality beyond the limit therein prescribed. But it was held that the compensation of the contractor was not a debt, within the sense of this provision, until the service was performed and the contractor was entitled to be paid, and in that view it did not run the debt beyond the constitutional limit. The pivotal point on which the decision turned was the word "indebted," as used in the Constitution. The next case cited is *Crowder v. Sullivan*, 128 Ind. 486, 13 L. R. A. 647, which simply reaffirms the same principle. The next case is *Foland v. Frankton* (Ind.) 41 N. E. 1031. That case simply reaf-

firmed and applied the same principle declared in the two previous cases. In this latter case it was sought to enjoin the letting of a contract by the town, by which it was to pay \$800 a year for a certain number of street lights, for a period of five years; and it was averred that no petition had been signed by a majority of the resident owners of the taxable real estate of said town to contract said debt for lighting the streets, or any debt. It was claimed that such a contract would be in violation of § 27 of the act of 1852, reading as follows: "No incorporated town under this act shall have power to borrow money or incur any debt or liability unless a majority of the resident owners of the taxable real estate of said town shall petition the board of trustees to contract such debt or loan." Rev. Stat. 1894, § 4377 (Rev. Stat. 1891, § 3342). It was justly held in the case last referred to that it was a debt or loan only that was prohibited without a petition, and, following the two former cases, that "the agreement to pay for the lights to be furnished did not create a debt, within the meaning of the section quoted. But here we have a very different prohibitory provision to deal with. The exclusive law-making power of the state, speaking of the powers of the executive departments of the city government of appellant, of which the board of public works is one, has said: 'No executive department, officer, or employee thereof shall have power to bind such city by contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose of such department, and all contracts and agreements, express or implied, and all obligations of any and every sort beyond such existing appropriations, are declared to be absolutely void.' Rev. Stat. 1894, § 3822. Appellee's learned counsel gravely urge that this prohibition is against the creation of a "debt," or an "indebtedness," according to the definition given that term in the cases cited, and does not prohibit the creation of other obligations. But, if this court may fritter away the plain language of the statute in that way, it is hardly worth the while to have another lawmaking power called a "legislature." To do as counsel gravely urge us to do would be to usurp the power to both make and unmake laws. If the judiciary may do that, a legislature would be an appendage to government neither useful nor ornamental. The language quoted deprives the board of public works of the power to bind the city, by any contract, agreement, or in any way, and to any extent, beyond the amount of money already appropriated by ordinance for the purpose of such department; and all contracts, express or implied, and all obligations, of any and every sort, beyond such existing appropriations, are declared to be absolutely void. If language could be so framed as to make such a contract absolutely void, this language has certainly accomplished that result. If it has not, then it is because the English language is utterly incapable of conveying that idea to the understanding. But it is earnestly insisted that this court, in construing the above language, ought to presume that the legislature employed it with the full knowledge of the de-

31 L. R. A.

cisions in the *Valparaiso Case* and the *Sullivan Case*, and that they supposed from those decisions that the language they employed, above quoted, would mean indebtedness in the sense ascribed to that term in those cases. There would be much plausibility, and even force, in the contention if the word "debt" or "indebtedness," had been used in the provision now under consideration. But no such word is used, but the language employed is so broad and sweeping as to carry down obligations of all kinds. It may be conceded that the presumption arises that the language in question was employed in view of the holding in those cases. But that concession militates against counsel's contention. The extraordinary strength of the language employed, doubled, tripled, and quadrupled, as it is, to avoid such a construction as is contended for, seems to point with unerring certainty to the fact that the legislature meant just what it has said. Similar statutory regulations for city governments are not new. Such statutory restrictions, very much like those now before us, have been enacted in the states of Minnesota, Illinois, Pennsylvania, California, Ohio, Michigan, and Oregon, and such statutes have received by the courts of those states the same construction we have placed upon the statute here involved. *Küchli v. Minneapolis Brush Electric Co.* 58 Minn. 418; *Garrison v. Chicago*, 7 Biss. 480, Fed. Cas. No. 5,255; *Superior v. Norton*, 12 C. C. A. 469, 63 Fed. Rep. 357, 24 U. S. App. 59; *Bladen v. Philadelphia*, 60 Pa. 464; *Philadelphia v. Flanigen*, 47 Pa. 21; *Jonas v. Cincinnati*, 18 Ohio, 318; *Wallace v. San José*, 29 Cal. 181; *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641; *Niles Waterworks v. Niles*, 59 Mich. 311; *Coulson v. Portland*, Deady, 481, Fed. Cas. No. 3,275; *Pullman v. New York*, 49 Barb. 57.

It is contended by appellant that there are two lines of decisions on the questions before us,—one supporting appellant's contention, and the other supporting appellee's contention. But we do not so understand the cases. The ones that are in point at all are against appellee's contention, and support appellant's contention. There are cases in other states like the Indiana cases cited by appellee above mentioned, but we do not think they or the Indiana cases have any application to this case.

The learned counsel for appellee concede that there can be no enforcement of this contract until there is an appropriation of the revenue for that specific purpose; contending that whenever such appropriations are made the contract lays hold on them, and their payment may be enforced by action. This is a concession that if no appropriation is ever made therefor the contract can never be enforced. That amounts to a concession that when made it was not a contract, because contracts, when validly executed, do not depend for their validity on the subsequent assent of one or both of the contracting parties. If validly made, it received the assent of both parties in its execution, and may be enforced against either party, when he is derelict, without again obtaining his assent. 1 Parsons, Cont. 5th ed. 475; *Carlmet v. Newton*, 79 Ind. 1. If the contract is, as appellee's learned

counsel concede, ineffective, it is because it is made in violation of the statute. Such a contract is absolutely void, and is as if it had never been made. *State Bank v. Coquilard*, 6 Ind. 232; *Cassaday v. American Ins. Co.* 72 Ind. 95; *Davis v. Barger*, 57 Ind. 54; *Reynolds v. Stevenson*, 4 Ind. 619; *Link v. Clemmens*, 7 Blackf. 479; *Pate v. Wright*, 30 Ind. 476, 95 Am. Dec. 705; *Heller v. Crawford*, 87 Ind. 279; *Heavenridge v. Mondy*, 34 Ind. 28; *Case v. Johnson*, 91 Ind. 479; 15 Am. & Eng. Enc. Law, pp. 1102, 1103. If the contract had never been made, a subsequent appropriation could not have the effect of making it a contract. The contract, being illegal, was incapable of being subsequently ratified so as to make it binding, without making it a new contract. *Henry v. Heeb*, 114 Ind. 275, and

authorities there cited. All persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation, and of its officers, to make the contract. 15 Am. & Eng. Enc. Law, p. 1100, and cases there cited; *Union School Twp. v. First Nat. Bank*, 102 Ind. 464; *Detroit v. Robinson*, 38 Mich. 108; 2 Beach, Pub. Corp. 1228, note 5; *Milford v. Milford Water Co.* 124 Pa. 610, 3 L. R. A. 122; 1 Dill. Mun. Corp. 447, 448, 457; *Pine Civil Twp. v. Huber Mfg. Co.* 83 Ind. 121. We are therefore of the opinion that the complaint did not state facts sufficient to constitute a cause of action, and that the superior court erred in overruling the demurrer thereto.

The judgment is reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint.

NEBRASKA SUPREME COURT.

NORWEGIAN PLOW COMPANY, *Appt.*,

Reuben BOLLMAN *et al.*

(.....Neb.....)

* 1. A party cannot predicate error upon a ruling which he procured to be made.

*Headnotes by NORVAL, J.

2. The transcript of appeal is the exclusive evidence of the proceedings in the trial court.

3. A court of equity will not enjoin a judgment at law, upon the ground of fraud, where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.

(February 18, 1896.)

NOTE.—Injunctions against judgments for defenses existing prior to their rendition.

I. Failure of consideration.

a. Generally.

b. In judgments for purchase money.

1. Insolvency.
2. Nonresidence.
3. Rescission.
4. Mistake.
5. Title bonds.
6. Defective title generally.
7. Deficiency in amount of land.
8. Fraud.
9. Res judicata.
10. No cause of action for injunction.
11. Sales by executors and administrators.
12. Summary judgments.
13. Court sales.

c. Judgments in favor of purchasers.

II. Fraud.

a. Where the defense is forgery or non est factum.

b. In obtaining a contract.

c. Generally.

III. Public policy.

a. Generally.

b. Debt for confederate money.

c. Gambling debts.

d. Usury.

IV. Set-off.

a. Failure to assert, at law.

b. Parties.

c. Unliquidated damages.

d. Trial at law.

e. No set-off.

f. Insolvency and nonresidence.

g. Accounting.

h. Equitable set-off.

i. In matters of an estate.

j. Mutual agreements.

V. Payment.

a. Failure to defend.

b. Defense made.

c. Equitable defenses.

d. Summary proceedings.

e. Pleading bill of discovery.

VI. Conditions.

VII. Partition and dower.

VIII. As to party.

IX. Title to property.

X. Nonliability in general.

I. Failure of consideration.

a. Generally.

In *NORWEGIAN PLOW Co. v. BOLLMAN* an injunction was refused against a judgment on an indemnifying bond given to a sheriff in order to induce him to make a levy, where the judgment was for property levied on by the sheriff, and for which he had been held liable to the execution debtor, when in fact the sheriff had converted a large part of the property to his own use and there was a failure of consideration, and the judgment was therefore fraudulent, on the ground that such a defense should have been made before judgment where no excuse was given for negligence in failing to make the defense. Besides the bill of complaint did not give the value of the goods converted by the sheriff. This is in accord with the general doctrine whether it is regarded as a failure of consideration, or as a fraud on the complainant in the injunction suit.

Generally an injunction will not be granted on the ground of failure of consideration if a good excuse is not given for not using the same as a defense at law, where some peculiar equitable ground is not shown, or such remedy is not provided by statute. *Williams v. Jones*, 10 Smedes & M. 108; *Megget v. Lynch*, 8 La. Ann. 6; *Brooks v. Whitson*, 7 Smedes & M. 513; *Miller v. McGuire*, *Morris* (Iowa) 150.

So, an injunction for failure of consideration was refused where the defense was also that in an action between other parties it was held that there was no consideration, as this was no defense. *Garrison v. Cobb*, 106 Ind. 245.

APPEAL by plaintiff from a judgment of the District Court for Madison County in favor of defendant in an action to enjoin the collection of a judgment which had been recovered by Bollman against H. A. Pasewalk *et al.* *Affirmed.*

The facts are stated in the opinion.

Messrs. H. C. Brome and R. A. Jones for appellant.

And, where the judgment was obtained on a transcript from another state and it was contended that in the state in which the judgment was originally obtained a party was not concluded by the judgment from pleading failure of consideration. *Minor v. Stone*, 1 La. Ann. 283.

So, an injunction on the ground of failure of consideration was refused on account of complainant's negligence in not defending at law, where no equitable ground was shown. *Elston v. Blanchard*, 3 Ill. 420; *Raburn v. Shortridge*, 2 Blackf. 480; *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463; *Marsh v. Edgerton*, 1 Chand. (Wis.) 198; *Parker v. Morton*, 5 Blackf. 1.

And where Tenn. Code, § 1806, allowed a defense of failure of consideration. *Ragsdale v. Gossett*, 2 Lea, 729.

And an injunction was refused where a summary judgment was upon a note obtained by plaintiff at law in good faith for value before maturity. *Taylor v. Bowles*, 28 La. Ann. 294.

And where the defense was failure of consideration, and was sought on the ground that complainant was unable to testify at law, as the same rules in regard to evidence apply in equity. *Robinson v. Wheeler*, 51 N. H. 380.

And where the bill did not state whether the defense of failure of consideration was made at law or not, as such defense could have been made in the suit at law as in equity. *Dickson v. Richardson*, 16 Ark. 114.

And where the defense was made of failure of consideration. *Thomas v. Hearn*, 2 Port. (Ala.) 262.

But an injunction on the ground of failure of consideration will be granted if a statute authorizes equitable interference, or if the failure to defend at law is excused, or if the injunction is asserted against a summary judgment, or if it is asked on equitable ground.

So, an injunction was granted on the ground of failure of consideration where such defense was not made at law, but W. Va. Code, chap. 128, § 5, provided equitable jurisdiction on the ground of failure of consideration, fraud in the procurement of a note, and breach of warranty of title to personal property; and section 6 expressly gave the right to make a defense at law or omit that and go to equity as the debtor preferred, without giving any excuse for not defending at law. *Jarrett v. Goodnow*, 39 W. Va. 602, 32 L. R. A. —.

And where the defense was that a defeasance to the bond on which judgment was obtained had not been performed, which defeasance was lost, and was on a valid consideration because of mutual stipulations. The loss of the defeasance was sufficient to give equity jurisdiction even if defense was not made at law. *Wilson v. Davis*, 1 A. K. Marsh. 219.

And where a sale was under a summary order of seizure on a mortgage note. *Greenwell v. Roberts*, 7 La. 63. See *Taylor v. Bowles*, *supra*.

And where the judgment was on bonds given by a maker of a note to indemnify an indorser, and such indorser did not pay the note and was insolvent, the failure of consideration could not be set up as a defense at law in the suit on the bonds, and the maker of the note could not have set off the amount paid to the bank on his note. *Scott v. Shreeve*, 25 U. S. 12 Wheat. 605, 6 L. ed. 744.

31 L. R. A.

Messrs. D. A. Holmes and Robertson & Wigton for appellees.

Norval, J., delivered the opinion of the court:

This was a suit to enjoin the collection of a judgment of the district court of Madison county, rendered in an action at law where-in Reuben Bollman was plaintiff, and H. A.

For failure of consideration, see also *Howell v. Motes*, 54 Ala. 1, *infra*, IV. a, and *Johnson v. Smokey* (Miss.) 4 So. 788, *infra*, II. b.

b. In judgments for purchase money.

1. Insolvency.

In cases of insolvent vendors injunctions are usually granted against judgments for purchase money if the title to real estate is not what was agreed to be conveyed, or if there is a deficiency in the amount, or if there are outstanding liens which the vendor should remove, or if there is an eviction by a claimant under a superior title. Insolvency of the vendor in such a case is usually recognized as equitable ground for interference.

So, an injunction was granted against a purchase-money judgment in the case of an insolvent vendor where the conveyance was with covenants of seisin and right to convey, and the vendor had no title. The suppression of the fact that he had no title was held to be a fraud on the purchaser. The court said that the right to an action at law upon a covenant of the deed would repel the complainant from a court of chancery, but that the vendor was "admitted to be utterly insolvent, and a judgment against him would be worthless." *Ingram v. Morgan*, 4 Humph. 63, 40 Am. Dec. 626.

And where encumbrances existed at the time of the sale, and the vendor had warranted the title to be free from encumbrances, although complainant knew when he bought the land that they existed; but having paid them off he was entitled in equity to a deduction even if the judgment was in favor of an assignee. *Stockton v. Cook*, 3 Munf. 68, 5 Am. Dec. 504.

And where the title to that part of the land which was the chief consideration was defective it was held that "the defectiveness of title to part of the property, and the inability of defendant, through insolvency, to compensate the deficiency, are the grounds of equity set forth by complainants, and are sufficient of themselves to entitle them to the injunction." *Yonge v. McCormick*, 6 Fla. 308, 63 Am. Dec. 214.

And where the title was defective although the time for obtaining a conveyance had not arrived. *Kelly v. Kelly*, 2 Duv. 363.

And where the judgment was in favor of an assignor of a title bond against his assignee, where there was a deficiency in the amount and title of the land, the assignee's prayer for a rescission was denied in the absence of any fraud or warranty by the assignor. Relief against the maker of the title bond who had conveyed to the assignee with warranty was denied although he was insolvent, on the ground that there was a remedy at law. *Moredock v. Rawlings*, 3 T. B. Mon. 73. (*Quere*, what remedy? The case shows that he was insolvent, and unless the prayer for a rescission of the contract with the assignor was the one referred to there, there does not seem to be any relief asked against the maker of the bond.)

And an injunction was granted where the vendor died insolvent and his estate was wholly unable to remove an outstanding lien, although the injunction suit was not for a rescission, as "in such a case it is competent for a vendee to go into equity, without intending to rescind the contract, to pro-

Pasewalk and others were defendants, which judgment was affirmed by this court at the January, 1890, term, the opinion being reported in 29 Neb. 519. The injunction case was dismissed, and plaintiff appeals.

The order of dismissal is as follows: "The *Norwegian Plow Co. v. Reuben Bollman et al.* Now, on this 17th day of December, 1892, this cause came on to be heard on the mo-

tion of the plaintiff for judgment of dismissal upon the issues presented by the pleadings herein filed, and the court, being fully advised in the premises, sustains said motion, and said cause is dismissed at plaintiff's costs, to all of which rulings and judgment of the court plaintiff at the time excepted," etc. It will be observed from the foregoing that plaintiff has appealed from an order

cure the appropriation of the purchase money to removing the encumbrance, and on this ground alone can this bill be held tenable." No question was made as to defense at law. *Morrison v. Beckwith*, 4 T. B. Mon. 73, 16 Am. Dec. 136.

And where the judgment was obtained by an assignee on a purchase-money note, and the purchaser held under a bond to convey, and the vendor was insolvent and was unable to make a good title, and Mo. Stat. 1835, p. 105, §§ 3, 5, provide that the maker of a note might make any defense against the same in the hands of his assignee that he might have made against the assignor, and that the assignee should not obtain a greater title to any bond or note than the person from whom he acquired it. It was held there was a total failure of consideration and a court of equity could not turn the parties round to a suit at law, even were it obvious that such suit would be of any avail. *Barton v. Rector*, 7 Mo. 524.

And where the judgment was for the price of the land which was supposed to be exempt from the grantor's debts, but was liable on account of the unconstitutionality of the Georgia homestead act. The case does not show whether this defense was available at law or not. *Willington v. Thornton*, 49 Ga. 384.

And where there had been a mutual contract of exchange of land and the plaintiff at law was unable to perform his part of the contract and never conveyed the land. *Hamlin v. Berry*, 1 Overt. (Tenn.) 39.

And where an injunction had been granted for an eviction and dissolved, and the judgment reversed, and since the decree in the injunction suit the vendor had become insolvent. "L had been actually evicted from the entire tract by a paramount title, and his warrantor had become, or was then ascertained to be, insolvent and irresponsible; and consequently, as there was no available remedy at law on the warranty, L's only relief was in a court of equity," and as the cause for injunction did not exist at the date of the decree in the first injunction suit, that was not a bar. *Lockett v. Triplett*, 2 B. Mon. 39.

And where the vendor was insolvent and the title was defective and a judgment had been rendered against the administrator of the vendee in damages for an eviction of a remote grantee, and all the heirs consented to the use of such judgment against the judgment for purchase money, the vendee had a covenant to refund in case of an eviction which was binding on the vendor although not in the deed. It was said that "if the appellees had a legal right to the damages for which relief is sought by them, the admitted insolvency of the appellant gave jurisdiction to the chancellor." A question was made as to failure to defend at law, but the court held that such objection should not prevail. *Jones v. Waggoner*, 7 J. J. Marsh. 144.

And where complainant was a purchaser, and the creditor of his vendor was attempting to sell the land and to collect the purchase money also by garnishment. The equitable grounds were that it would be inequitable to sell the land vacating the purchaser's title and at the same time require the purchaser to pay the purchase money, and as the 31 L. R. A.

vendor was insolvent there could be no remedy against him. *Gunn v. Thornton*, 49 Ga. 380.

In *Taylor v. Lyon*, 2 Dana, 276, it was said that the unexpected insolvency or removal of the vendor, and imminent danger of eviction, would authorize an injunction against the enforcement of a judgment for the purchase money until the purchaser could have the question of doubtful title settled.

In *Simpson v. Hawkins*, 1 Dana, 303, where the grounds for injunction against a judgment for purchase money were warranty and defective title, and inability of vendor to remunerate for loss, and there was no eviction, it was held that before an injunction will be granted the claimants of title must be made parties, and their title determined. If the claimants are nonresidents the vendor will be required to give a bond to protect the vendee or a decree quieting title will protect them after seven years shall have elapsed.

In *Oldfield v. Stevenson*, 1 Ind. 153, it was said that an outstanding mortgage upon the land purchased might be ground for a temporary injunction out of chancery against the collection of the purchase money where the mortgagor was insolvent.

In *Addleman v. Mormon*, 7 Blackf. 31, it was said that an injunction against a judgment for purchase money would be granted where there were prior encumbrances which the vendor had agreed to remove, and the surety on a bond to remove such encumbrances was insolvent. But the injunction was dissolved because there was not a release of errors indorsed on the bill.

But an injunction was refused where the vendor was insolvent, and the purchaser did not establish deceit in the sale and was guilty of laches. *Hambrick v. Dickey*, 48 Ga. 578.

For purchase money, see also *infra*, IV. 1.

2. Nonresidence.

The rule in case of nonresident grantors is similar to that in case of insolvent grantors, and an injunction will be granted where the title is defective or the quantity is deficient.

So, an injunction was granted in case of a nonresident vendor where he had died and the purchaser held a deed of general warranty, and the vendor had no title to a large tract, which was held by a claimant whose title by possession was unsalable. The purchaser could have sued the administrator on the covenants, but he might have been met by a plea of nothing to administer, and if he sued the heirs, they might have pleaded *riens per descent*, and as there was an entire failure of consideration as to the tract containing 300 acres, it was against conscience to allow the judgment to be enforced. *Richardson v. Williams*, 3 Jones, Eq. 116.

And where the vendors obtained a judgment on a purchase-money bond and had no title to the land which they had conveyed under a general warranty although the purchaser had a cause of action on the covenant. It was said: "As they (vendors) are nonresidents and had no property within the state, this court will not permit the defendants to recover the purchase money for the land the title of which was admitted to be defect-

sustaining his own motion to dismiss the cause. He having expressly invited this decision to be made, if erroneous, it is his own error, and not the error of the court, and he is thereby precluded from assailing the ruling. *Omaha F. Ins. Co. v. Maxwell, S. & R. Co.* 38 Neb. 358; *Weander v. Johnson*, 42 Neb. 117. It may be said that the journal entry is incorrect wherein it is stated that

the motion to dismiss was made by the plaintiff; that, in fact, it was defendant's motion. There is nothing in the record to show that such a mistake was made. The motion is not included in the transcript, and the journal entry contains the written approval of the attorneys for the respective parties indorsed thereon, as well as authenticated by the certificate of the clerk of the trial court.

ive, leaving to the defendant the precarious remedy of suing in the courts of another state for the purpose of getting back the same by way of damages in action for breach of the covenants of warranty." *Green v. Campbell, 2 Jones, Eq. 446.*

And where the title was defective and complainant was deceived by false representations of the vendor, and the defect of title was not discovered until after judgment at law. *Fitch v. Polke*, 7 Blackf. 564.

And where the action was by an assignee of a bond who had notice that the vendor had not complied with the bond or conveyed the land he had agreed to convey. *Gray v. Overstreet*, 7 Gratt. 346.

In *Golden v. Maupin*, 2 J. J. Marsh. 236, an injunction granted against a purchase-money judgment on the ground of deficit in quantity and defective title, and nonresidence of vendor, was dissolved on the vendor filing a bond to indemnify the vendee for any loss which might accrue, where it was doubtful if there was a deficit in title or quantity.

In *Taylor v. Lyon*, 2 Dana, 276, it is said that an injunction will be granted against a judgment on a purchase-money note where there was a warranty and the vendor is a nonresident, and there is reasonable ground of apprehending danger from a superior outstanding title; but the holders of the same must be made parties, and the question of their title determined.

In *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 562, an injunction was granted against a judgment on a purchase-money note where there was a mistake in the amount of the land conveyed, part being claimed by others and no warranty except as to title, and the vendor was a nonresident, as there was no remedy at law. But complainant was required to make the claimants of title parties so that their title could be passed upon, as there was no eviction, as it would be unjust for complainant to hold the deed and also to have an injunction against the judgment for the purchase money.

See also *Lucas v. Chapeze*, 2 Litt. (Ky.) 31, *infra*, I. b, 10; *Payne v. Cabell*, 7 T. B. Mon. 196.

3. Rescission.

If the complainant is entitled to a rescission on account of the title or where the sale has been rescinded, an injunction will be granted against a judgment for purchase money.

So, an injunction was granted against a judgment for purchase money on a rescission of the contract of purchase where the purchase was conditional, and complainant on the failure of the condition tendered back the deed, and the defendant in the equity suit was in possession of the property and was insolvent. *Odell v. Reed*, 54 Ga. 142.

And where the consideration wholly failed and complainant had withdrawn his plea at law reserving his rights in equity. *Vanscoy v. Stinchcomb*, 29 W. Va. 263.

So, an injunction was granted against a judgment for purchase money in a suit for rescission where the sale of the land was fraudulent in conveying inferior land, although an unsuccessful defense at law had been attempted, as adequate relief could not be had at law. *Calloway v. McElroy*, 3 Ala. 406.

31 L. R. A.

And where the defense was fraud in the sale of the land, and the remedy at law was inadequate. *Boyce v. Grundy*, 28 U. S. 3 Pet. 210, 7 L. ed. 655.

And where the same was obtained by an assignee, and the grounds were that the vendor and wife made a general warranty deed to the complainant but it passed no title from the wife who owned the land, and the husband had only a life estate, and the statute of limitation would not cure this defect as long as the vendor lived. *Renick v. Rentck*, 5 W. Va. 201.

And where the purchaser had not accepted title under a bond to convey, and the title was defective to the most valuable part. It was said that it would be otherwise if a title was accepted under a warranty deed as the remedy would be on the warranty. *Buchanan v. Alwell*, 8 Humph. 516.

And where the grounds were that the vendor had never conveyed the land as required by the title bond and was unable to make title, although the note had been assigned, as Ark. Rev. Stat. chap. 11, § 8, provides that all discounts and offsets may be made either in law or equity notwithstanding an assignment. It was said that if the suit was to avoid payment of a single note, defense should have been made at law. *Black v. Bowman*, 9 Ark. 501.

In *Miller v. Palmer*, 55 Miss. 323, it was said that if a purchaser at administrator's sale was not evicted, and the title was bad, he may defend against the purchase money, or may proceed to annul the sale; but if he knew of the defect and failed to plead at law, he will be precluded from relief in chancery unless such failure is excused. But in this case the defect in the title was claimed to have been discovered after judgment, but the time was not stated, and an injunction was granted on a rescission and an accounting by complainant of the rents and profits.

For rescission, see *Jackson v. Norton*, 6 Cal. 187; *Markham v. Todd*, 2 J. J. Marsh. 354; *Patterson v. Miller*, 4 Jones, Eq. 451, *infra*, I. b, 6; *Edwards v. Strode*, 2 J. J. Marsh. 506, *infra*, I. b, 10.

4. Mistake.

The purchaser will be entitled to equitable relief by injunction where there has been a mistake in the conveyance as to description, or in other essential matters.

So, an injunction was granted against a judgment for purchase money where, through mistake of the draftsmen, the agreement of sale omitted the crops, and plaintiff at law failed to put complainant in possession of the same. *Booth v. Kesler*, 6 Gratt. 350.

And where the defense to a purchase-money note was that the grantor had executed the deed when under twenty-one years of age, suppressing the fact as to his age, and had refused to make a new deed when he became of age. *Bryan v. Primm*, 1 Ill. 33.

But an injunction was refused where the grounds for the same were, mistake in the description, and inability of the vendor to make a good title, as provided by title bond, but the allegations in regard to inability to make title and solvency of vendor were not definite and specific. *Long v. Brown*, 4 Ala. 622.

It is well settled that the transcript of appeal is the sole and exclusive evidence of the proceedings in the court below. *Weander v. Johnson, supra; Dryfus v. Molins, M. & S. Co.* 48 Neb. 233; *Davis v. Snyder*, 45 Neb. 415.

The same result is reached upon a ground less technical. Conceding that plaintiff did not ask the order of dismissal to be made,

as counsel in their briefs assume to be the case, yet there must be an affirmance upon the merits, as we shall proceed to show. Before doing this, a statement of the issues presented by the pleadings will be necessary to a proper understanding of the case, since the decision was predicated upon them alone.

The petition alleges, in substance, that the defendant Bollman was sheriff of Knox

See also *Thompson v. Tilton*, 34 N. J. Eq. 306, *infra*, I. c; *Wiley v. Fitzpatrick*, 3 J. J. Marsh. 582, *infra*, I. b, 2.

5. Title bonds.

Relief will generally be granted where the vendee holds under a title bond, and the vendor is unable to make a conveyance of such title as he contracted for owing to the want of title or encumbrances.

So, an injunction against a judgment for purchase money was granted where the judgment was on a bond to make title and defendant had no title and could not make one. In such a case the burden was on the vendor to show that his title was good. *Moredock v. Williams*, 1 Overt. (Tenn.) 325.

And where the defense was that a deed had not been made, for which the bond in judgment was given, but that the grantor conveyed the land to another party. This defense of failure of consideration may be made either in law or in equity, but the failure to defend at law will not prevent equitable interference. *Ludington v. Tiffany*, 6 W. Va. 11.

And where the vendor on a title bond failed to procure the title of other joint owners, although complainant had procured their title by another contract with them. *Jaynes v. Brock*, 10 Gratt. 211.

And where the suit was on a bond to make title, and the grantor had no title, and had died, and it was doubtful if title could be obtained. *Cox v. Jerman*, 6 Ired. Eq. 526.

And where the defense was that the grantor was unable to make title. But on title having been obtained and deed tendered, the injunction was dissolved. No question was made as to defense at law. *Fishback v. Williams*, 3 Bibb, 342.

And where the title was defective and the defendant in the equity suit offered a deed from a third party, as complainant would not be required to accept any deed, but a warranty from his vendor, where a contract for such a deed was made. *Moore v. Cook*, 4 Hayw. (Tenn.) 84.

And where there was a subsequent suit by a claimant to recover the property, and the vendor had filed his deed in the clerk's office and levied on the lot; as complainant was entitled to recover the value of the lot with improvements at the time of the breach on his bond, and unless injunction was granted the deed would cancel his bond for title, and the measure of damages on the deed would only be the purchase money with interest, under Ga. Code, §§ 2097, 2098. *Seago v. Bass*, 49 Ga. 9.

And injunctions were granted against judgments for purchase money in cases of defective title in which the purchaser held by title bond where the vendor was a nonresident. *Gray v. Overstreet*, 7 Gratt. 346.

And where there was a deficiency in the amount of the land. *Hilleary v. Crow*, 1 Harr. & J. 542; *Nelson v. Matthews*, 2 Hen. & M. 164, 3 Am. Dec. 620.

And where there was a contract for an abatement of the price. *Humphreys v. McClenachan*, 1 Munf. 493.

And where there was fraud in the sale. *Lee v. Vaughan, Sneed* (Ky.) 238.

And where the vendor was insolvent. *Barton v. Rector*, 7 Mo. 524; *Hamlin v. Berry*, 1 Overt. (Tenn.) 39; *Kelly v. Kelly*, 2 Duv. 363.

31 L. R. A.

And where the injunction suit was for a rescission. *Buchanan v. Alwell*, 8 Humph. 516; *Black v. Bowman*, 9 Ark. 501.

For title bond, see *Amick v. Bowyer*, 3 W. Va. 7, *infra*, I. b, 10; *Long v. Brown*, 4 Ala. 622, *supra*, I. b, 4; *Brittain v. McLain*, 6 Ired. Eq. 166, *infra*, I. c, 11.

6. Defective title generally.

There is some conflict of authority as to the right to an injunction against a purchase-money judgment, claimed solely on the ground of defective title. Such relief has been granted in some cases where the vendor was unable to make a conveyance of such title as he contracted for owing to want of title or encumbrances.

So, an injunction against a judgment for purchase money was granted where there was a dower claim against the land, which the vendor promised to have released by his wife in order to induce complainant to accept the deed. *McKoy v. Chiles*, 5 T. B. Mon. 259.

And where complainant held under an agreement of warranty of title, and the title was defective on account of the vendor's wife having a dower interest in the land. In this case the vendor was a nonresident, but that question was not discussed. *Sexton v. Pickering*, 3 Rand. (Va.) 468.

And where encumbrances against the property were in judgment which had been enjoined in an action by the vendor, but was still pending on appeal. The purchase-money judgment was enjoined until the vendor should reduce the encumbrances outstanding to a sum not exceeding that of the purchase money due. *Arnold v. Curl*, 18 Ind. 339. See *Kicker v. Pratt, infra*.

In *Koger v. Kane*, 5 Leigh, 806, it was said that a judgment for purchase money will be enjoined where there is a general warranty and the title is clearly shown to be defective.

In *Buell v. Tate*, 7 Blackf. 55, it was said that an injunction may be granted against the collection of a purchase-money note until the vendor shall procure a release of an encumbrance against the property, but the vendee cannot defend at law on the ground of failure of consideration, as the encumbrance may never injure him.

But some cases have refused injunctions on failure of title on the ground that the remedy by defending at law the action for purchase money, or a remedy on the covenant of title, or an adequate remedy at law, or the failure to offer to rescind, precluded equitable relief.

So, an injunction was refused against a judgment where the defense was that the action was for the recovery of rents for an improvement on public land, which had not been in plaintiff's possession and was sold by the government to another party, as this defense should have been made at law. *Rooks v. Williams*, 13 La. Ann. 374.

And where the defense to a purchase-money mortgage note was encumbrances existing at the time of the warranty, and was not made, as Ind. Civ. Code, § 56, chap. 3, provided that in the action to foreclose the defendant may set up all his defenses, whether legal or equitable. Prior to the Code injunctions were granted on equitable grounds. In this case even if complainant could not defend at law he should have sought for an in-

county, and Rothwell was his deputy; the other defendants, Tyrell and Losey, are, respectively, the clerk of the district court and sheriff of Madison county; that the plaintiff recovered certain judgments before a justice of the peace of Knox county against one Fred Fisher, and caused executions to be issued thereon, which were delivered to said Rothwell for collection; that, on the same day, plaintiff caused to be executed and delivered

to Rothwell an undertaking signed by H. A. Pasewalk, J. S. McClary, and A. P. Pilger, as sureties, for the purpose of indemnifying the sheriff on account of the levy of said executions upon certain goods and chattels, then in the possession of Fisher, but claimed by Deere, Wells, & Co. and others. (A copy of this bond, as set forth in the petition, is set out in the opinion in 29 Neb. 519, and need not be here given.) The

junction before judgment. This provision of the Code changed the rule in Indiana, and now the injunction should be sought by cross bill in the foreclosure suit. *Ricker v. Pratt*, 48 Ind. 73.

But without any reference to the Code, in *Fehrle v. Turner*, 77 Ind. 530, which was a suit to enjoin an action on purchase-money notes, it was held that in Indiana, "in a suit to foreclose a mortgage on land conveyed by the mortgagee to the mortgagor, a defect of title will be no defense to the suit, for the reason that if the mortgagor has no title, the foreclosure cannot injure him," and an injunction was granted because the mortgagor was insolvent and the mortgage embraced land other than that mortgaged for purchase money. (Overruling *Strong v. Downing*, 34 Ind. 300, so far as it conflicts with this case.)

In *Wimberg v. Schwegeman*, 97 Ind. 528, the court says the rule established in *Fehrle v. Turner* is that "an injunction may be maintained to restrain the collection of a purchase-money judgment in a proper case, but it is not decided that an injunction will lie in all cases where covenants are broken by a total failure of title. We do not decide just what facts must be alleged in order to entitle a grantee to an injunction; we do decide that one of the material facts that must appear is the insolvency of the grantor. In holding that where insolvency is alleged the grantee may restrain the collection of the purchase money, we do not adopt a doctrine new to this court, for the principle was laid down long since in the cases of *Fitch v. Polke*, 7 Blackf. 564; *Addleman v. Mormon*, Id. 31; *Buell v. Tate*, Id. 55; *Arnold v. Curl*, 18 Ind. 339. These cases seem to have been overruled in both *Strong v. Downing*, and *Fehrle v. Turner*, *supra*."

In *Gillett v. Sullivan*, 127 Ind. 327, where the injunction was sought by cross bill in the injunction suit, insolvency of warrantors and an outstanding lien on the property were held sufficient to entitle to an injunction. Although the purchaser could have paid off the lien, and used it as a set-off, she was not required to do so. The court said: "To permit the appellant to enforce the collection of her judgment in this case by execution would be permitting the appellant to make an unfair use of the legal forum, and leave the appellee remediless. There are some decisions of this court in harmony with this theory. See *Ricker v. Pratt*, *Arnold v. Curl*, and *Fehrle v. Turner*, *supra*."

An injunction was refused where the defense was encumbrances against a decree for purchase money; but the grounds existed prior thereto and the same would have been a valid defense if asserted in that action. *Buchanan v. Lorman*, 3 Gill, 57.

And where the defense was that the note was given for a certain claim upon United States land, void on account of a prior claim and failure of consideration, and was refused for negligence in not defending at law. *Faulkner v. Campbell*, *Morris (Iowa)* 148.

And where the grounds were warranty of title and that the title of the land was in the United States at the time of sale. In order to obtain equitable relief insolvency of grantor and diligence of

complainant in prosecuting a suit on the covenants of the deed must be shown. *Swain v. Burnley*, 1 Mo. 404.

And where the purchaser was in possession under a deed with covenants of warranty alone, and no fraud or eviction was shown, and the title was defective. The remedy should be on the covenants of the deed. *Senter v. Hill*, 5 Sneed, 505.

And where there was a covenant of warranty that the vendor was seised in fee, and had a good title and right to convey, and that the land should not be subject to encumbrances, and there were judgments against the vendor but he had other land and was not insolvent. *Wamsley v. Stalnaker*, 24 W. Va. 214.

And where the complainant had an adequate remedy on the covenant of warranty for a deficiency in the title, and the vendee was not insolvent. *Wilkins v. Hogue*, 2 Jones, Eq. 479.

And where the complainant knew that his grantor only had a life estate at the time of the purchase and was solvent, as equity will leave him to his remedy on his warranty. *Henry v. Elliott*, 6 Jones, Eq. 175.

And where there was no charge of insolvency, although it was alleged that the title to the land had failed, but the remedy was to set this up in the action as a defense or sue on the covenant. *Allen v. Thornton*, 51 Ga. 564.

And where the ground was the discovery of want of title in vendor after judgment for the price of land, and there was a remedy by appeal or action of nullity, as the matter was *res judicata*. *Morrison v. Crooks*, 3 Rob. (La.) 273.

And where the grantor had no title, but complainant was still in possession, and the fact that a suit in ejectment had been commenced against him would not entitle him to an injunction, as complainant could not avoid the payment of the purchase money without offering to rescind the contract and return the possession. *Jackson v. Norton*, 6 Cal. 187.

And where the title was defective, but complainant did not sue for a rescission or for a good title. *Markham v. Todd*, 2 J. J. Marsh. 364.

And where the vendor held under a warranty, and it was alleged that a lawsuit on the title was anticipated, but there was no offer to rescind or special equity shown. *Patterson v. Miller*, 4 Jones, Eq. 451.

An injunction to restrain a judgment on an independent note given in consideration of a contract to obtain release of vendor's husband and quitclaim of title, on the ground that such release and quitclaim had not been tendered, was refused, as the purchaser had his remedy by action of specific performance, and no special ground for equitable interference was shown. *Peck v. Kirtz*, 15 N. Y. S. R. 598.

In *Patton v. Taylor*, 48 U. S. 7 How. 132, 12 L. ed. 637, an injunction was refused where the vendor was insolvent and the deed contained covenants for further assurance, and of warranty, and the grantee was in possession, and the grantor had no title, holding "that if there is no fraud, and no covenants to secure the title, he is without remedy; as the

petition further avers that the deputy sheriff levied these executions upon, and sold, certain property then in the possession of Fisher (described in Exhibit A, attached to the petition), and applied the proceeds arising from such sale to the payment of plaintiff's judgments; that, at the same time, Bollman and Rothwell fraudulently and unlawfully, and for the purpose of cheating and defrauding plaintiff, and without his knowledge or

consent, or that of the sureties upon the indemnifying bond, took into their possession, and converted to their own use, certain other property claimed by Deere, Wells, & Co. (described in Schedule B, attached to the petition); and that no accounting has ever been made to the plaintiff or said sureties for the property so taken and converted by said sheriff and his deputy. It is further alleged that subsequently Deere, Wells, &

vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed."

7. Deficiency in amount of land.

Some cases grant an injunction against purchase-money judgments where there is a deficiency in the amount of land conveyed.

So, an injunction against a judgment for purchase money was granted where the vendor in a title bond only conveyed to complainant one half the property sold, and misrepresented the size of the tract. *Lee v. Vaughan, Sneed (Ky.)* 238.

And where the vendor in a title bond had not delivered possession of all the land sold at the time agreed upon, and a set-off was allowed complainant for damages for failure to deliver possession. *Hilleary v. Crow*, 1 Har. & J. 542.

And where the injunction suit was for a specific performance by the purchaser, and there was a deficiency in the amount of the land, for which a deduction was decreed. *Humphreys v. McClenahan*, 1 Munf. 493.

And where there was a deficiency in the quantity of land sold by title bond, and the sale was with a warranty. The question as to the failure to defend at law was not discussed. *Nelson v. Matthews*, 2 Hen. & M. 164, 3 Am. Dec. 620.

And where land was sold by the acre, and there was a deficiency, and compensation was allowed for the deficiency, estimated by the average value of the tract. *Nelson v. Carrington*, 4 Munf. 332, 6 Am. Dec. 519.

In *Koger v. Kane*, 5 Leigh, 606, it was said that a judgment for purchase money will be enjoined on the ground of deficiency in quantity of land, where the sale was by the acre.

But an injunction was refused where the sale was by metes and bounds and the quantity sold was "more or less," and there was a deficiency. *Grantland v. Wight*, 2 Munf. 179.

For deficiency, see *Strodes v. Patton*, 1 Brock. 223, *infra*, I. b. 13; *Chambliss v. Miller*, 15 La. Ann. 718, *infra*, I. b. 12; *Davis v. Millaudon*, 14 La. Ann. 881, *infra*, I. b. 12.

8. Fraud.

Fraud as to title in the sale of land has been held sufficient to authorize an injunction, although some cases refused relief on account of failure to defend at law.

So, an injunction was granted against a judgment for purchase money where the title was defective and complainant was deceived by false representations of the vendor, and sufficient excuse was given for not defending at law. *Fitch v. Polke*, 7 Blackf. 564.

And where the defense was fraud in making a sale of the land which the vendor had conveyed to another party, and no objection was made to the jurisdiction in equity. *Endicott v. Penny*, 14 Smedes & M. 144.

And where the defense was that the sale of personal property was made on false representations that there was no encumbrance on the same. It was said that a defense against an action on a real estate purchase-money note, could not be made at

law where there was no eviction, but could be in equity; and the rule is the same in regard to personal property. *Poe v. Decker*, 5 Ind. 150.

But an injunction was refused against a judgment for purchase money where the defense was that the vendor was insolvent and that the note was procured by fraudulent representation of title, which the vendee was compelled to purchase from a third party, as relief will not be given in equity where complainant was negligent and defense was not made. *Howell v. Motes*, 54 Ala. 1.

And where damages for fraud in the sale were claimed as a set-off, and the vendor was insolvent, and the complainant through negligence failed to use his set-off in the action at law. *Hall v. Clark*, 21 Mo. 415.

For fraud, see also *Fitch v. Polke*, 7 Blackf. 564, *supra*, I. b. 2; *Lee v. Vaughan, Sneed (Ky.)* 238, *supra*, I. b. 7; *Calloway v. McElroy*, 3 Ala. 408; *Boyce v. Grundy*, 28 U. S. 3 Pet. 210, 7 L. ed. 655, *supra*, I. b. 3.

9. Res judicata.

An injunction will be denied where the matter has become *res judicata*. *Moore v. Hill*, 50 Ga. 760.

So, an injunction was refused against a judgment for purchase money where some of the breaches were litigated in the suit at law, and complainant was negligent in not litigating all of them. And Ga. Code, § 2989, provides for such defense. *Desvergers v. Willis*, 58 Ga. 388.

And where the defense against a judgment on a purchase-money bond given to court commissioners was that the title was defective and in another person, but who was a party to the suit in which the sale was ordered. *Shields v. McClung*, 6 W. Va. 79.

10. No cause of action for injunction.

Injunctions are refused against judgments for purchase money if there was no warranty, or covenant, or fraud, or if the objections to the title are not well founded, or if complainant is guilty of laches and has not complied with his contract.

So, an injunction against a judgment for purchase money was refused where the objections to the title were not valid. *Porter v. Scobie*, 5 B. Mon. 387.

And where the alleged defects in the title were not established and there was no danger to be apprehended. *Allen v. Philips*, 2 Litt. (Ky.) 1.

And where the vendor was a nonresident and complainant did not show affirmatively defects in the title, and his possession was undisturbed. *Cantrell v. Cobb*, 43 Ga. 193.

And where the cause for injunction, that there was a superior outstanding title, was not established, and complainant held possession under a warranty, although the grantor was a nonresident, but his removal was known to have been contemplated when the deed was accepted,—the remedy being on the warranty if complainant is evicted. *Payne v. Cabell*, 7 T. B. Mon. 198.

And where the vendee under a title bond claimed that there was an outstanding title, but he was in possession and the statute of limitation protected him from the adverse claimant. *Amick v. Bowyer*, 3 W. Va. 7.

Co. brought an action in the circuit court of the United States for the district of Nebraska, against said Bollman and the sureties on his official bond, for the conversion of all the goods so taken by the officer, and recovered therein a judgment against the defendants for the sum of \$3,416.65, damages and costs of suit, for the goods taken at the request, and appropriated to the use and benefit, of the plaintiff herein, as well as for

the goods described in said Exhibit B; that subsequently Bollman instituted an action in the district court of Madison county against said McClary, Pilger, and Pasewalk upon said indemnifying bond, for the purpose of compelling the plaintiff herein to pay for the property described in Exhibit B, and for and on account of the said judgment recovered by said Deere, Wells, & Co.; that Bollman, in his said action on said bond, for

And where there were judgments against a bank, and the vendor having the purchase-money judgments was a stockholder, but he had bank bills and other property sufficient to satisfy his liabilities, and offered a good bond to protect the vendee. *Collins v. Clayton*, 53 Ga. 649.

And where the purchaser under a general warranty was in possession and had never been evicted or threatened with a suit, and there were no fraudulent representations or concealment, and the vendor was not insolvent. *Beale v. Selverley*, 8 Leigh. 658.

And where complainant held under a general warranty and the sale was in gross and not by the acre, and there was no superior title shown, or eviction, and the alleged defects in the title did not appear to be real. *Yancey v. Lewis*, 4 Hen. & M. 380.

And where the defect in the title was not specified. *French v. Howard*, 3 Bibb. 301.

And where the bill of complaint did not show the consideration or contract of purchase, or disturbance of possession, or offer to rescind, and it was vague and indefinite. *Edwards v. Strode*, 2 J. J. Marsh. 506.

And where there was failure of title, but possession was unmolested, and there was no fraud or covenants of title. *Williamson v. Raney*, Freeman. Ch. (Miss.) 112.

And where the ground was failure of title, and a purchaser of school land from the county auditor was in possession, as a purchase-money mortgage cannot be resented on the ground that the county had no title in the absence of covenants and fraud, and there was no attempt to hold the complainant personally liable. *Cartright v. Briggs*, 41 Ind. 184.

And where the purchaser bought such title as the vendor had although the vendor held under a warranty from a prior grantor whose title was defective. *Koger v. Kane*, 5 Leigh. 606.

And where the purchaser at a sheriff's sale sold to complainant his bargain without recourse, and there was no fraud. *Carrico v. Froman*, 2 Litt. (Ky.) 178.

And where A made a verbal contract for the sale of a lot to B, who sold to C without any warranty, and A then made a warranty deed to C and the judgment was on the purchase-money balance due to B, and the defense was a change in the street location,—the remedy if any being on A's deed. *Price v. Ayres*, 10 Gratt. 575.

And where the complainant had agreed that the payment should not be withheld on the ground of the vendor not being able to convey them when the purchase money should become due, and the contemplated removal of the vendor from the state was understood at the time of the purchase. *Lucas v. Chapeze*, 2 Litt. (Ky.) 81.

And where the defense was that the same was not to be paid until a title in litigation was settled, but this agreement was not established, and the complainant in the injunction suit was to pay when a third party would make a deed, and the failure to obtain a deed was due to complainant's fault. *Alexander v. Baylor*, 20 Tex. 580.

And where there was no fraud or eviction, and the purchaser was in possession under a deed with 31 L. R. A.

covenants of general warranty and special warranty against a claim of A, for which claim of A complainant paid A \$1,000, and the plaintiff at law offered to abate the judgment to the extent of \$400, the value of land claimed by A at the time of sale. A vendee in possession under a deed with covenants of special warranty is entitled to no equitable relief on account of outstanding encumbrances or adverse title. *Elliott v. Thompson*, 4 Humph. 99, 40 Am. Dec. 630.

And where the defense was that the vendor had died, but the purchaser neglected to pay the purchase money during his lifetime and obtain a conveyance. If the complainant made the heirs parties to the injunction suit, a temporary injunction would be granted until their claim of title was determined. *Prout v. Gibson*, 1 Cranch, C. C. 389.

11. Sales by executors and administrators.

Injunctions have been granted against judgments on administrators', executors', and guardians' sales where a good title could not be secured, but have been refused where the title was cured, and where such defense was held to be a legal one, and was not made at law.

So, an injunction was granted against a judgment for purchase money where the purchaser was unable to obtain the title to a pre-emption bought at administrator's sale. It was said that the objection to want of jurisdiction in equity was disposed of in *Pelham v. Wilson*, 4 Ark. 289, where a decree granting an injunction was reversed for want of proof. *Pelham v. Floyd*, 9 Ark. 530.

And where the bond to pay purchase money and the bond to make title were concurrent acts, and the vendor did not tender a valid title, and the defendant as executor had no power to sell or convey. *Brittain v. McLain*, 6 Ired. Eq. 186.

But an injunction was refused against a judgment for purchase money where the ground was that the title of the vendor was not clearly shown to be good and the vendor was in possession and the executors tendered a deed of special warranty and no specific objection was shown to the title. The executors selling under a power given by a will are not bound to make a deed of general warranty, where there is no contract to that effect. *Grantland v. Wight*, 5 Munf. 285.

And where the property was sold by an executor at public sale as of doubtful title but on representations that such vendor would give his personal warranty against an eviction, which he did, and was solvent. *Merritt v. Hunt*, 4 Ired. Eq. 406.

And where the defense was not made at law that the sale by administrators was invalid, because certain heirs were not made parties, and a deed of the heirs was tendered in the injunction suit, and complainant had uninterrupted possession. *McLaurin v. Parker*, 24 Miss. 509.

And where the defense was, that it was given for property bought at administrator's sale, which sale was void, as this was a legal defense and was not made or excused. *Garrett v. Lynch*, 45 Ala. 204.

And where the sale was to pay the debts of a testator, and the defense of failure of consideration on account of title was not made in the action at law. *Latimer v. Wharton*, 41 S. C. 508, overruled.

the purpose of cheating and defrauding the Norwegian Plow Company, unlawfully and fraudulently averred that the said judgment of Deere, Wells, & Co. was recovered on account and for goods taken by Bollman upon said executions, although in fact said judgment was not obtained for such purpose, as Bollman well knew at the time of bringing his suit, but on account of and for the goods described in Exhibit B, as well as for the

goods mentioned and set forth in Exhibit A. The petition further charges that Bollman prosecuted his said action to final judgment, recovering therein, against Pilger, McClary, and Pasewalk the sum of \$8,797.87, for the value of the goods, including those converted by him; that the undertaking was for the use and benefit of plaintiff, and that the latter is liable to the sureties for any and all moneys they may be compelled to pay Boll-

ing Rogers v. Horn, 6 Rich. L. 361, to the effect that a defense could not be made at law against a sale made on order of court.

And where the defense against a purchase-money note on a guardian's sale was failure of consideration from defect of title, and such defense was not made at law, and there was no offer to rescind. Shipp v. Wheelless, 33 Miss. 646.

For sales by administrator, see Miller v. Palmer, 55 Miss. 323, *supra*, l. b. 3.

12. Summary judgments.

The rule seems to be that injunctions will be granted against sales under summary judgments, where the purchaser is unable to obtain a good title.

So, an injunction against a judgment for purchase money was granted where the order of sale was on a summary judgment and the vendor had stipulated that the title was to be perfected before payment could be enforced, and there was a prior mortgage on the property. Wade v. Percy, 24 La. Ann. 173.

And where there were mortgages on the land prior to purchase, a deficiency in the quantity, and set-offs, as La. Act 1826 provides that compensation may form the ground for injunction, and the sale was under an order *via executiva*. Johnston v. Hickey, 4 La. 232.

And where the grounds were that the United States did not confirm a location of the title sold to complainant, but on the contrary gave to the lines of survey a different direction diminishing the quantity, and substituting in its stead low swamp land of inferior value. Barrow v. Cazeaux, 5 La. 72.

And where the defense was that a suit was pending against the vendee by a claimant of superior title. Exnicios v. Weiss, 3 Mart. N. S. 460.

And where an action by the vendee was pending against the vendor for failure of consideration of the purchase-money mortgage, and was instituted prior to an executory action on the mortgage. The sale under the latter was enjoined until the former was determined. Walker v. Cucullu, 15 La. Ann. 689.

And where there was a deficiency in the quantity of land sold under a warranty it was held that a claim for compensation was not in the nature of a set-off, but was a failure of consideration. Davis v. Millaudon, 14 La. Ann. 881.

But a purchaser was entitled to an injunction against a sale for purchase money of land on a summary order only to the extent of an encumbrance thereon, where the vendor had failed to have the same erased according to his agreement. Walker v. Cucullu, *supra*.

And a vendee of land is not entitled to an injunction against a sale on a summary order on a purchase-money mortgage given by his vendor where the vendee does not show that he is entitled to be subrogated to the rights of his vendor on account of a deficiency in the amount of land sold to his vendor. Chambliss v. Miller, 15 La. Ann. 713.

13. Court sales.

Injunctions have been granted against purchase-
31 L. R. A.

money judgments where the sale was under order of court and the title was defective, but have been denied where there was a remedy by resisting confirmation of the master's report, or where the title could be perfected.

So, an injunction against a judgment for purchase money was granted where the purchase was on execution sale and the defendant in the execution had no title to the property. This case does not show whether defense could have been made in the proceedings on the sale bond. Bartlett v. Loudon, 7 J. J. Marsh. 641.

And where the sale was of land of an estate, made by court commissioners of three tracts sold under title deeds at buyer's risk as to quantity and title, but as to one tract there was neither title nor possession, and a deficiency existed as to the other tracts, and the terms of the order did not authorize such a sale. The injunction was on the ground of want of authority or for mistake. Strodes v. Patton, 1 Brock. 223.

And an injunction was granted against the enforcement of a sale bond which was of the same effect as a judgment, where the sale was made by order of the execution creditor, and the defendant in the execution had no title to the same. Brummel v. Hurt, 3 J. J. Marsh. 709.

But an injunction against a judgment for purchase money was refused where there were no objections by the vendee to the title of the vendors, no allegation of fraud, and possession was taken and ability of the vendor and a desire to make title and to confirm the sale were shown, although the purchase was made under a decretal sale which was irregular and erroneous. Lampton v. Usher, 7 B. Mon. 57.

And where the property was bought at judicial sale and the title was defective, but complainant had a remedy by resisting confirmation of the sale upon the return of the commissioner's report. Threlkelds v. Campbell, 2 Gratt. 198, 44 Am. Dec. 384. See also Shields v. McClung, 6 W. Va. 79, *supra*, l. b. 9, and Dickinson v. Chism, 2 T. B. Mon. 145, *infra*, IV. 1.

c. Judgments in favor of purchasers.

An injunction was granted against a judgment where the same was on a breach of warranty of deed, for reimbursement of growing crops recovered by a tenant from the grantee, where the grantor reserved such crops in the sale, but by mistake of the scrivener the reservation was omitted from the deed. Thompson v. Tilton, 34 N. J. Eq. 306.

A judgment for the purchase money obtained on a covenant of seisin after the covenantor died was enjoined where the title was perfected by the personal representative and a conveyance was tendered on a suit for specific performance, as the administratrix could not defend the action at law, as a court of law had no means of compelling the acceptance of the title. Reese v. Smith, 12 Mo. 344.

An injunction was granted against a judgment where the recovery was by a purchaser on a title bond for failure to convey, and the representative of the vendor tendered a conveyance conformable to the title bond, and the vendee at the time of the

man on account of the giving of said undertaking; that the judgment obtained by Bollman is in full force and unpaid; that plaintiff is now and at all times has been, ready and willing to account to Bollman for all property taken upon said executions, and to indemnify and save him harmless for all costs and damages resulting from such seizure, and is ready and willing and offers to pay into court for his benefit all moneys justly

due Bollman on account thereof, together with all costs and expenditures incurred by him, which plaintiff ought equitably and fairly to pay on such account; that Bollman and Rothwell are insolvent; that the former has caused execution to be issued upon his judgment, and placed the same in the hands of said defendant Losey, as sheriff, who threatens to levy the same upon the property of Pilger, McClary, and Pasewalk. The

purchase knew that a part of the land was held by another and failed to bring an action to prevent such possession ripening into a good title. *Willbanks v. Duncan*, 4 Desauss. Eq. 536.

But an injunction was refused where the judgment was in favor of a purchaser in an action of covenant on a title bond for a forfeiture, and the forfeiture was negligent and voluntary. The chancellor cannot relieve merely because the holder of a broken covenant elects to seek his relief at law. *Oldham v. Woods*, 3 T. B. Mon. 48.

II. Fraud.

Non est factum and forgery, or fraud in obtaining the contract on which the judgment is founded, or fraud in the consideration, are a legal defense; and usually injunctions for such causes have been denied where such defense was made or might have been made at law. But injunctions have been granted where the failure to defend was excused, and in some cases on the ground of fraud alone, and where the remedy at law was doubtful.

a. Where the defense is forgery or non est factum.

An injunction will be refused where defense of *non est factum* is not made at law. *Haden v. Garden*, 7 Leigh, 157.

So, an injunction was refused where complainant in the injunction suit was negligent in not making a defense of *non est factum* at law. *Mershon v. Bank of the Commonwealth*, 6 J. J. Marsh. 438.

And where the defense against an execution on a replevin bond was that the name of the surety was forged, and an affidavit of illegality would have been a sufficient defense. *Rounsaville v. McGinnis*, 83 Ga. 579.

And where the defense was that the bond sued on was obtained by fraud, and also a defense of *non est factum*, and no excuse was made for failing to make a defense at law, although courts of equity and law have concurrent jurisdiction in such matters. *Haden v. Garden*, 7 Leigh, 157.

But an injunction was granted where the obligor in a bail bond never executed the same and an office judgment was taken, although he made no defense at law after information that his name was on the bond. The injunction was granted on the ground that the remedy at law was doubtful. *Spotswood v. Higgenbotham*, 6 Munf. 313.

And where the defense was that the bill in suit was a forgery, and the excuse for not defending at law was that there was a similar genuine bill which was believed to have been the one in suit, and which was not discovered until after judgment. *Ferrell v. Allen*, 5 W. Va. 43.

And where the same was obtained on a forged assignment of a bond, and was for the use of an assignee, thereby preventing a defense that the same had been settled by a prior garnishment suit. *Jameson v. Deshields*, 3 Gratt. 4.

And where the defense to an action of trover was that it was on a bill of sale which was written over a blank signature after the obligor's death, and was fraudulent. *Crawford v. Crawford*, 4 Desauss. Eq. 176.

And where a judgment was obtained by fraud 31 L. R. A.

without notice on a forged note, although there was a concurrent remedy at law which was not used at law and did not prevent equitable jurisdiction. *Douglass v. Joyner*, 1 Baxt. 82.

See also for forgery, *Key v. Knott*, 9 Gill & J. 342, *infra*, II. c.

b. In obtaining a contract.

An injunction was refused because the defense could have been and was not made at law, where the defense was that a note had been obtained by fraud, although complainant in the injunction suit alleged that the trial court held that "none of the matters set forth in this bill were proper and legal defenses to the said action." *Stockton v. Briggs*, 5 Jones, Eq. 309.

And where the defense that an agreement in suit had been obtained by fraud was excluded on the trial as not a legal defense, as the remedy was by writ of error. *Edmanson v. Best*, 57 Fed. Rep. 531, 18 U. S. App. 288.

And where the defense was that an insurance policy was obtained by fraud, but the complainants were not prevented from using such a defense at law by any acts of the plaintiffs at law. *Marine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 332, 3 L. ed. 362.

And where it was claimed that the note in suit had been obtained by fraud when complainant was delirious, and that there was a want of consideration. *Peyton v. Rawlens*, 4 Hayw. (Tenn.) 77.

And where the defense to an action of ejectment was that the plaintiff at law had practiced fraud in procuring warrants for the land which belonged to complainant, and might have been used on the trial of the caveat. *Noland v. Cromwell*, 4 Munf. 155.

And where the ground was fraud in obtaining the contract on which the judgments were founded, and negligence in not making such defense at law was not excused. *New York v. Brady*, 115 N. Y. 599.

And where the defense to an action on a sealed bill was that it was obtained by fraud and imposition, but the charge of fraud was not sustained, and sufficient excuse was not given for negligence in not defending at law. *Powers v. Butler*, 4 N. J. Eq. 465.

An injunction was refused because the defense was tried at law, where the defense was that the obligation in suit was obtained by fraud. *Hendrickson v. Hincley*, 58 U. S. 17 How. 443, 15 L. ed. 123; *Phillips v. Pullen*, 45 N. J. Eq. 5.

Where the defense was fraud in obtaining a note and failure of consideration. *Johnson v. Smokey* (Miss.) 4 So. 788.

And where the defense was fraud and release from royalties for cutting wood under a lease, but the same was or might have been tried in a former suit. *Amey v. Calkins* (N. J.) 19 Atl. 388.

And where an injunction was sought against an action on a judgment obtained in another state, and it was claimed that the note on which such action was based was procured by fraud, as the matter was *res judicata*. *Smedes v. Isley*, 68 Miss. 560.

And where the defense against a judgment in

petition contains other averments, which will be adverted to further on. The defendants, for answer, admit that Tyrell is clerk of the district court and Losey is sheriff of Madison county; that Bollman was sheriff of Knox county, and Rothwell was his deputy; admit the recovery of the judgments in the justice's court by the Norwegian Plow Company, the levy of the execution by the deputy sheriff upon the goods in the possession of

Fisher, the recovery of the judgment by Deere, Wells, & Co. in the circuit court against Bollman, the institution of the suit by the latter, and the recovery of the judgment against the sureties on the bond; and deny all other averments of the petition. The defendants also allege that, at the time the suit was commenced by Deere, Wells, & Co., the plaintiff herein was notified thereof, and employed counsel to defend the same,

trespass for levying on goods in the hands of a trustee was that the deed of trust was void and fraudulent. *Cailland v. Estwick*, 2 Anst. 381.

And where the defense was fraud in procuring the signature to a note in judgment, evidence of which was offered in a motion for a new trial, although not one of the grounds for a new trial, and the same was held to be *res judicata* and complainant was negligent in not making a defense at law. *Swain v. Sampson*, 6 La. Ann. 799.

An injunction was refused where the action was on county warrants, claimed to be fraudulently issued through a conspiracy. But these warrants were not identified with the fraudulent ones, and complainant was negligent in not defending, and delayed seeking relief in equity. *Brown v. Buena Vista County*, 95 U. S. 157, 2 L. ed. 422.

And where the judgment was obtained against a third party on a note taken by force from complainant, who delayed seeking relief until an action for tort was barred by limitation. *Hays v. Crquhart*, 63 Ga. 323.

But an injunction was granted where it was doubtful if a defense could have been made at law that the bond sued upon was obtained by fraud, and defense at law was not made. *West v. Wayne*, 3 Mo. 16.

And where the grounds were that it was on a bond obtained by false representations and assigned to a confederate before maturity so as to cut off defenses at law, and the payee of the bond and the assignee were both nonresidents of the state. *Hauser v. Mann*, 1 Murph. 410.

And where the ground was fraud in obtaining the note sued upon, and a showing was made of insolvency of plaintiff at law and fraud in the consideration of the note and irreparable damages, although the right to the remedy by injunction was doubtful. *Tenn. Code*, §§ 3946, 4434, providing that injunctions may be granted, do not control the discretion of the judges. *Flippin v. Knaffle*, 2 Tenn. Ch. 238.

And where a note indorsed for accommodation to be used in a particular manner, was used in another way and was given to another party subject to equities, and the fraud was not known at the time of judgment, the maker believing the note to have been properly used. *Hickerson v. Raiguel*, 2 Heisk. 329.

And where the action was on a note procured by fraud, by a son-in-law from his father-in-law, imposing on his ignorance, age, and confidence. But the judgment was allowed to stand as a security for what might be due in a settlement of complicated accounts. *Hadley v. Rountree*, 6 Jones, Eq. 107.

c. Generally.

An injunction was refused because complainant might have defended at law but failed to do so, where the defense was fraud. *Haughy v. Strang*, 2 Port. (Ala.) 177, 27 Am. Dec. 648.

And where the defense was fraud and breach of warranty. *Robinson v. Gilbreth*, 4 Bibb, 183.

And where the defense was fraud in a contract on which the suit was founded and complainant did not show that a defense was made or that complainant was not negligent in not making the same at law. *Parker v. Morton*, 5 Blackf. 1.

Under the Texas Constitution, providing that a 31 L. R. A.

suit shall be tried without any regard to any distinction in law and equity, a judgment will not be enjoined where the legal defenses of failure of consideration and that the notes sued upon were procured by fraud, were abandoned at law supposing a more ample defense would be allowed by resorting to equity. *Prewitt v. Perry*, 6 Tex. 290.

An injunction was refused where the defense was fraud in the consideration of the debt, and negligence in not defending at law was not excused. *Le Guen v. Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121.

In *Muscatine v. Mississippi & M. R. Co.* 1 Dill. 536, it was said that matters such as fraud or failure of consideration which should have been pleaded as a defense, are not sufficient grounds, after judgment, upon which to apply for an injunction against the same.

An injunction was refused where the defense was fraud and failure of consideration and there was a trial at law. And *W. Va. Code*, chap. 126, § 5, provided that where the defense was an equitable one and was made at law it should be barred in equity, unless upon such a ground as would entitle the party to relief in equity against the judgment in other cases. *Bias v. Vickers*, 27 W. Va. 456.

In *West v. Wayne*, 3 Mo. 16, it was said that in matters of concurrent jurisdiction for a defense of fraud, if a defense was made at law, an injunction would not be granted.

An injunction was refused where the judgment was on a note held by an assignee before maturity for value and without notice, and the ground was an equitable defense of failure of consideration and fraud in the sale of the article for which the note was given. *Donelson v. Young*, Meigs, 155.

And where the ground was fraud of the obligee in regard to a contract, but which was not part of the same transaction as the note in suit, although *Va. Code* 1873, chap. 168, §§ 5, 6, provided for equitable relief from contracts procured by fraud. *Barnett v. Barnett*, 53 Va. 504.

And where complainant participated in the fraudulent execution of the writing in suit, which was to be used to deceive others. *Ibid.*

But some cases in which the defense of fraud was not made at law granted injunctions on the ground that the remedy in equity was more ample, and other cases, that the failure to defend at law was excused.

So, an injunction was granted where the defense was fraud and was not made, as equity could afford more adequate relief. *Boyce v. Grundy*, 28 U. S. 3 Pet. 210, 7 L. ed. 655.

And where the defense was that the action was upon a single bill and the consideration was a forged post note on a bank, which defense of failure of consideration could not be pleaded at law. *Key v. Knott*, 9 Gill & J. 342.

And where there was fraud in the consideration of the note in suit, and the failure to defend at law was excused and the indorsee who obtained judgment on the note in action had notice of such fraud. *Vathir v. Zane*, 6 Gratt. 246.

And where the defendant in a mortgage foreclosure decree had been imposed upon and prevailed upon to give a bond for double the amount of the debt and for which such decree was taken,

and had exclusive control of the defense therein; and that, upon the institution of the said suit against the sureties, the Norwegian Plow Company was notified of the fact, employed counsel to defend it, and had full control of the defense, and paid all the expenses in connection with the defense of said action. For reply, plaintiff admits that it was advised of the fact of the com-

mencement of the actions referred to in the petition; denies all other allegations of the answer; and alleges that at the time of the commencement of the action in the circuit court, and at the time of the rendition of the judgment, plaintiff had no notice or knowledge that Bollman or his deputy had converted to their own use a large portion of the property for the value of which said suit was

and the injunction was granted on the ground of fraud in the consideration. *Scriven v. Hursh*, 39 Mich. 98.

In *Appleton v. Harwell, Cooke* (Tenn.) 242, it was held that where the defense was fraud and the trial at law was not fairly had, an injunction should be granted.

For fraud see *supra*, I. b. 8; *Calloway v. McElroy*, 3 Ala. 406, *supra*, I. b. 3; *Boyce v. Grundy*, *supra*, *supra*; *Lee v. Vaughan, Sneed* (Ky.) 238, *supra*, I. b. 6.

For fraud and mistake, see *note to Griggs v. Docter*, 89 Wis. 161, 30 L. R. A. 380, "*Injunctions against judgments in garnishment proceedings*."

For injunctions on the ground of fraud, see also *note to John V. Farwell Co. v. Hilbert*, 91 Wis. 437, 30 L. R. A. 235, "*Injunctions against judgments entered on confession*," *subd. III*.

III. Public policy.

a. Generally.

That a contract is contrary to public policy is a legal defense and must be made at law or excused. Some cases have refused the injunction on the ground that this is a legal defense, some on the ground that complainant is *in pari delicto*, and some on the ground that there is a remedy by other proceedings. There are a few exceptional cases in the early reports that granted injunctions for this cause.

As to confederate money, gambling, and usury, see next subheads.

An injunction was refused for failure to defend at law where the grounds were, first that the contract was for slaves imported from another state and was illegal; second, that the complainant was a surety on the note sued upon and was released by indulgence; third, that the slaves were unsound, but complainant had united in a forthcoming bond after a levy of execution. *Creath v. Sims*, 46 U. S. 5 How. 192, 12 L. ed. 110.

And an injunction was refused for negligence in not defending at law, where the defense was that the debt and contract for the importation of slaves were contrary to public policy; but the complaint was *in pari delicto*, and afterwards gave a forthcoming bond. *Sample v. Barnes*, 55 U. S. 14 How. 70, 14 L. ed. 330.

And where the defense was that the debt was for the importation of slaves and contrary to public policy. *Thomas v. Phillips*, 4 Smedes & M. 358; *Green v. Robinson*, 5 How. (Miss.) 80; *Glidewell v. Hite*, *Id.* 110.

And an injunction was refused against a judgment where the defense was that the consideration was the purchase of slaves contrary to the Constitution of the state of Mississippi, but the defense was not made at law, because complainant was ashamed to urge it. *Truly v. Wanzler*, 46 U. S. 5 How. 141, 12 L. ed. 85.

And where the defense against costs at common law was maintenance. If it was a defense it was a legal matter and one for the common law to deal with. *Elborough v. Ayres*, L. R. 10 Eq. 367, 39 L. J. Ch. 601, 23 L. T. N. S. 68, 18 Week. Rep. 913.

And where attorney's fees were included in the judgment and the contract for such fees was contrary to public policy and void, and there was a remedy by motion to set aside, or by writ of error. *Morgan v. England*, *Wright* (Ohio) 112.

L. R. A.

Where the debt in judgment was on a contract for prison labor, and was claimed to be contrary to law, and complainants had received the benefit of the services, and had violated the contract by neglecting to pay for services rendered after the judgment. It was held that if the contract was illegal the remedy was at law, and if not illegal there was no ground for an injunction. *Young v. Beardsley*, 11 Paige, 93.

And where the grounds were that the debt was contrary to public policy and was to compound a crime, an injunction was refused for neglecting to defend at law. The injunction was also refused on the further ground that the note given to make good an embezzlement was not to compound a crime. *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 284.

And where the defense against a foreclosure was that the mortgage was owned by a national bank, but the prohibition against dealing in mortgages did not apply as this mortgage was owned by a state bank prior to its organization as a national bank. *Scotfield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412.

But an injunction was granted where the ground was that the consideration was a bill of exchange given for the promotion of complainant to a lieutenantancy, but that as soon as promoted he was removed by the defendant in the injunction suit, and that the debt was contrary to public policy, and complainant also prayed for a discovery. It was held that the rule *pariceps criminis* did not apply, and that in the case stated equity had jurisdiction although defense was not made at law. *Whittingham v. Burgoyne*, 3 Anst. 900.

And where the action was on a bond for failure to marry, and was granted on the ground of public policy or want of mutuality in the contract. *Cock v. Richards*, 10 Ves. Jr. 429.

And where the consideration was three notes given to an occupier of the same parish, who was interested in defending another acting against complainant as rector, and who had advanced money for that purpose and promised that no improper use should be made of the notes, but soon afterwards put them in suit, which was contrary to good conscience. *Chednel v. Churchman*, 3 Bro. Ch. 16, *note*.

And where the action was on a bond for indemnity for costs, conditioned to pay plaintiff at law one half the value of the property recovered, and plaintiff at law was at no expense, and the consideration was unconscionable. *Tooley v. Jasper*, 2 Hayw. (N. C.) 383.

b. Debt for confederate money.

In Texas when the consideration of confederate money was held to avoid a judgment on the ground of public policy, injunctions were granted, but subsequently such consideration was held to be valid to the extent of the value of the confederate notes. In Louisiana the failure to make a defense where such was the consideration prevented equitable interference.

An injunction was granted against a judgment where it was rendered on a receipt for confederate money, as the same was contrary to public policy and illegal, and the judgment was void. The question of failure to defend at law was not discussed,

brought, and had no knowledge of such conversion until after the recovery of the judgment sought to be enjoined herein.

Judgment having gone against the plaintiff in the case at bar upon the pleading, in reviewing the decision of the trial court we must regard as true every fact well pleaded in the petition, and that every allegation of the answer put in issue by the reply should

be taken as not true. In other words, if the facts set up in the petition, taken in connection with the admission of the plaintiff in the reply that it had notice at the time of the pendency of the action of Deere, Wells, & Co. against Bollman, and that of Bollman against the sureties on the indemnifying bond, were insufficient to entitle the plaintiff to enjoin the enforcement of the judgment in ques-

though insisted upon in the briefs. *Fox v. Woods*, 34 Tex. 220. (But this was in effect overruled as to such consideration avoiding the contracts, in *Mathews v. Rucker*, 41 Tex. 636.)

In *Thompson v. Bohannon*, 38 Tex. 241, an injunction was granted against a judgment where the debt was confederate money although no defense was made at law, as the court erred in rendering a default judgment without requiring the plaintiff at law to show that he had a good cause of action. (This case is not referred to in *Roller v. Wooldridge*, *infra*, but the doctrine in regard to such judgments is regarded as changed by the decision in the United States Supreme Court.)

In *Thompson v. Bohannon*, *supra*, it was held that in actions on contracts made by administrators, trustees, and guardians, for confederate money, such contracts may be enforced for the benefit of heirs, legatees, and creditors to the extent of the actual value of the consideration, changing the former rule of court; but on individual contracts the same will be enjoined even after twelve months from judgment.

In *Mathews v. Rucker*, 41 Tex. 636, and *Roller v. Wooldridge*, 46 Tex. 485, it was held that confederate money may be a consideration for a contract, overruling *Fox v. Woods*, 34 Tex. 220; *Shepard v. Taylor*, 35 Tex. 774; *Scott v. Atchison*, 36 Tex. 76; *McGar v. Nixon*, Id. 289; *Lacy v. Clements*, Id. 661; *Grant v. Ryan*, 37 Tex. 37; *Lane v. Thomas*, Id. 157; *Kyle v. House*, 38 Tex. 155; *Vance v. Burtis*, 39 Tex. 88; *Dittmar v. Myers*, Id. 295; *Sutton v. Sutton*, Id. 549.

In *McManus v. Scott*, 48 Tex. 601, which was not an injunction suit, the change in the line of decisions in Texas in regard to confederate money is noted as conforming to the decision of the Supreme Court of the United States in *Thorington v. Smith*, 75 U. S. 8 Wall. 1, 19 L. ed. 361.

In *Thorington v. Smith*, *supra*, which was not an injunction suit, it was held that under a contract for payment in confederate treasury notes a recovery could only be had for the actual value at the time and place of contract, in lawful money of the United States.

In *Schroeder v. Fromme*, 31 Tex. 602, the court took no notice of a petition to enjoin a judgment, where the consideration was claimed to have been a treasonable loan of confederate money.

An injunction was refused where the defense was that the debt was payable in confederate currency, but the failure to defend at law was not excused. *Butman v. Forsbair*, 21 La. Ann. 165.

c. Gambling debts.

Where the consideration was a gambling debt which is declared void by the statute, injunctions have been granted. Some cases have refused injunctions in the absence of such a statute, on the ground that such a defense should have been made at law, or where such consideration was not established, or where the same had been used on the trial, or where the element of estoppel entered into the judgment.

So, an injunction on the ground that the consideration was a gambling debt and was granted against a judgment where the Virginia statute declared judgments given on a gaming consideration were utterly void. And it was further held that the 31 L. R. A.

failure to defend at law need not be excused. *Skipwith v. Strother*, 3 Rand. (Va.) 214.

And where the consideration was a gambling debt, and Va. Rev. Code, chap. 147, p. 561, taken from 9 Anne, chap. 14, rendered the gaming transaction unlawful and avoided all judgments for money won at play, and was granted on the ground of surprise at the testimony of one of complainant's witnesses. It was said that a party may defend at law or may obtain relief in equity if it does not defend at law,—the case of a gaming promise being an exception to the general rule in regard to defenses at law. *White v. Washington*, 5 Gratt. 645.

And where the judgment was against a sheriff for damages for defective levy of an execution under a judgment as a gambling bond, as Va. acts 1748, chap. 25, and 1779, chap. 42, provided that all promises or other contracts, judgments, etc., for money won at gaming, shall be utterly void, and this statute was held to apply even if the gaming bond had passed to an assignee without notice. The failure to defend at law was not discussed in the opinion. *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612.

And where the defense could have been made at law but was not, as the Mississippi statute make the note and contract void. *Lucas v. Waul*, 12 Smedes & M. 157.

And where the consideration was a gambling debt, as Clay's (Ala.) Dig. 350, gives the right to defend against a note on a gaming consideration at law, or, if a party neglects to do this, to assail the judgment afterwards on that ground by a bill in equity. But as complainant neglected for seven years to take any steps he was required to pay all costs. *Paulding v. Watson*, 21 Ala. 279.

And in *Mallett v. Butcher*, 41 Ill. 332, where no defense was made at law, as *Scates's* (Ill.) Comp. Stat. chap. 66, § 1, provides that all promises, judgments, etc., for money won at gaming shall be void, and § 3 provides that such judgments may be set aside by any court of equity, and § 4, that no assignment shall affect the defense or remedy in such a case. This is an exception to the general rule that a legal defense must be made at law. (Overruling *Abrams v. Camp*, 4 Ill. 290, to that extent.)

And in *Beveridge v. Hewitt*, 8 Ill. App. 467, where the consideration was a gambling contract on a grain deal, and the failure to defend at law was excused, as gambling contracts in grain are prohibited by Ill. Crim. Code, § 130, providing that contracts on grain options to sell or buy in the future are void, and the supreme court of Pennsylvania in *Brud's Appeal*, 55 Pa. 294, held that a contract to purchase shares of stock without the intention to receive them was a gaming contract. (But see *Smith v. Kammerer*, *infra*.)

And where defense was not made at law, as Ky. act 1798 provides that all promises, agreements, notes, bills, bonds, judgments, etc., won at gaming are void. The remedy was either at law or in equity. *Clay v. Fry*, 3 Bibb. 248, 6 Am. Dec. 654.

And where the action was upon a bond held by a bona fide holder without notice, although no defense was made at law, as *Statute Anne*, chap. 14, providing that such notes, judgments, etc., are void, was in effect in Maryland. *Emerson v. Townsend*, 73 Md. 224.

So, under 9 Anne, chap. 14, providing that all notes, bills, bonds, judgments, mortgages, or other

tion, the order of dismissal was properly entered.

It is too well settled by the courts of this country to require the citation of authorities in support thereof that, in a proper case, equity will grant relief against a judgment fraudulently obtained, when a meritorious cause of action or defense is shown. An exception to this general rule is that a judgment at law obtained through the fraudulent conduct of the

judgment creditor will not be enjoined where the defense could have been made at law. Stated differently a court of equity will not interfere because of fraud alone, but the person aggrieved must make it appear that a good reason existed why the defense was not interposed in the original suit. As stated by Mr. High in his valuable work on Injunctions: "Where defendant has allowed a suit to proceed to judgment without any attempt on his

securities or conveyances whatsoever, given for a gambling consideration, shall be utterly void. This was held not to be repealed by Md. act 1813, chap. 84, providing that such securities shall not be demandable or recoverable before any court of justice, and which act only rendered them voidable. The fact that complainant alleged that the party to whom the note was given did not win, but that complainant was the winner, will not prevent equitable relief. *Gough v. Pratt*, 9 Md. 523.

And where the consideration could not be pleaded at law, although the master of rolls had held that complainant by appearing to a *sci. fa.* instead of pleading to the same could have no relief. *Lord Cremorne v. Bruen*, 2 Molloy, 496, 12 Eng. Ch. 573.

In *Nelson v. Armstrong*, 5 Gratt. 354, an injunction was granted against a judgment where the consideration was a gambling debt. But it was said that if the holder of the draft in suit was induced to take the same by complainant's representation that the consideration was good an injunction would be denied. The question as to failure to defend at law was not discussed.

An injunction was granted against a judgment where the defense was not made at law, as Mo. Stat. gaming act, § 1, says that all moneys, notes, bonds, judgments, etc., made, given, granted, etc., where the whole or any part of the consideration thereof shall be for money won at gaming, or playing at cards, dice, or any other game, shall be void and of no effect. The second section provides that all judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, or other acts, deeds, securities, or conveyances, given, granted, drawn, or executed contrary to the provisions of this act, may be set aside and vacated by any court of equity. And it is further held that this statute applied notwithstanding the act respecting chancery practice provided that in all cases where adequate relief cannot be had at law, the several courts shall have the power to proceed according to the rules in equity. *Collins v. Lee*, 2 Mo. 16.

But in *Wilkerson v. Whitney*, 7 Mo. 296, it was held that "the Missouri act of December 30, 1824 (Rev. Code 1825, p. 410), declared that all judgments, mortgages, assurances, bonds, notes, bills, specialties, etc., given, granted, drawn, or executed contrary to the provisions of that act, might be set aside and vacated by any court of equity, upon bill filed for that purpose by any person so granting, giving, and entering into, or executing the same. The act of March 9, 1835 (Rev. Code 1835, p. 290), merely declares that all judgments, conveyances, bonds, bills, notes and securities when the consideration is money or property won at any game or gambling device, shall be void. The act further provides that any defense under it may be specially pleaded or given in evidence under the general issue. The judgments spoken of in the act of 1825 (1824) I understand to be judgments by confession, or warrant of attorney. The words given, granted, executed, entering into, could hardly be applicable to a judgment upon plea or by default. And though the act of 1835 has omitted these words, and speaks generally of judgments, bonds, notes, and other assurances, yet it is plain that no other

judgments were embraced in this provision than judgments by confession;" and it was held that the failure to make a defense at law that the consideration of the judgment was a gambling debt prevented an injunction where the judgment was not by confession. This construction of this statute in effect overrules *Collins v. Lee*, 2 Mo. 16, although that case is not referred to and does not appear to have been noticed in any subsequent decision in the supreme court.

In *Thomas v. Phillips*, 4 Smedes & M. 358, it was said that equitable interference against judgments on gaming contracts are granted where the statute provided that such agreements are void.

In *OWENS v. VAN WINKLE GIN & M. Co. (Ga.)* 23 S. E. 416, an injunction was refused against a judgment on a gambling debt because in that state there was no statute making such judgments void, and the right to defend at law prevented an injunction. This is in accord with the general doctrine.

An injunction was refused against a judgment where the consideration was a gambling debt and no excuse was given for not defending at law. *Giddens v. Lea*, 3 Humph. 130; *Dunn v. Holloway*, 1 Dev. & Eq. 322.

In *Graves v. Houlditch*, 2 Price, 147, an injunction was refused against a default judgment on a bill of exchange given for a gambling debt, where defense was not made at law.

An injunction was refused against a judgment where the consideration was a gambling debt and complainant had advised the holder of the same to purchase it, and the purchaser had no notice of any equity against it. *Hoomes v. Smock*, 1 Wash. (Va.) 389; *Buckner v. Smith*, Id. 296, 1 Am. Dec. 463.

And where the defense in Pennsylvania was that the debt was a gambling transaction in Chicago in wheat, and that the mortgage on which a *sci. fa.* had been issued was a collateral to secure that debt in judgment, and was refused because of proceedings in another court to open the judgment, and on the further ground that Ill. Crim. Code, § 130-132, making a gambling contract void, did not apply, as this was an executed contract, and that complainant was *in pari delicto*. *Smith v. Kammerer*, 152 Pa. 198. But see *Beveridge v. Hewitt*, 8 Ill. App. 467.

And where the defense was made at law that the debt was a gaming one. *Moffett v. White*, 1 Litt. (Ky.) 325.

And where the consideration was a gambling debt, and defense was or might have been made at law. *Jones v. Jones*, N. C. Term Rep. 110.

In *Abrams v. Camp*, 4 Ill. 290, an injunction was refused against a judgment where the consideration was a gambling debt, and a defense was made at law, and the failure to defend successfully was due to complainant's negligence. Under Ill. Rev. Law (Gale Stat. 320), providing that all notes given in consideration of money won at play are void, relief will not be granted in matters of concurrent jurisdiction after a trial at law. And it was said that relief would not be granted after a failure to defend. But this last proposition was overruled in *Mallett v. Butcher*, 41 Ill. 382.

An injunction was refused where the defense was a gaming consideration, but the same was not

part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transactions on which the suit was founded. So, where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained." 1 High, Inj. § 194.

Applying the principles already stated to

established by the evidence, the judgment having been assigned and the assignee having denied all knowledge of the consideration, although the assignor did not answer the bill. *Timberlake v. Cobbs*, 2 J. J. Marsh. 136.

d. Usury.

In regard to injunctions on the ground of usury the general rule is that injunctions will be refused where the bill of discovery was not filed in time, or if there is a failure to make a defense at law, or if the usury is not established, or if no tender is made, or if the bill of complaint does not put usury directly in issue, or if the complainant is not the party entitled to plead usury. Some cases have granted injunctions without regard to the failure to make a defense at law, and some on the ground that the bill of complaint was for an accounting, and some where the defense was embarrassed, and where the statute provided for such relief, and where the same was in the nature of a penalty against which equity grants relief.

As to usury in judgments on confession, see *note to John V. Farwell Co. v. Hilbert* (Wis.) 30 L. R. A. 235. *Injunctions against judgments entered on confession.*

Generally an injunction on the ground of usury will be refused for the failure to make such defense at law where such failure is not excused, or if a bill of discovery is not filed before judgment. *Robb v. Halsey*, 11 Smedes & M. 140; *Teague v. Russell*, 2 Stew. (Ala.) 420; *Barrows v. Doty*, Harr. Ch. 1; *Smith v. Walker*, 8 Smedes & M. 131; *Day v. Cummings*, 19 Vt. 496; *Yeizer v. Burke*, 3 Smedes & M. 439; *McRaven v. Forbes*, 6 How. (Miss.) 569.

So, an injunction on the ground of usury was refused against a judgment because the same was a legal defense and the failure to make the same was not excused where the defense was that the note in suit was executed for a previous judgment which contains usury, and it was a compromise of the prior suit, and the note was assigned to another party. *Standifer v. McWhorter*, 1 Stew. (Ala.) 532.

And where the defense was not made at law, on account of a mistake at law. *Jones v. Watkins*, 1 Stew. (Ala.) 81.

And where complainant in the injunction suit was a surety. It was further held that 1 N.Y. Rev. Stat. 772, § 8 (Stat. 1837, p. 477, § 4), providing that a "borrower" seeking relief need not pay any interest or principal, did not apply to a surety. *Vilas v. Jones*, 1 N. Y. 274.

And where Ky. Civ. Code, § 14, provided that a judgment obtained in an action by ordinary proceedings shall not be annulled by equitable proceedings except for a defense which has arisen or been discovered since the judgment was rendered and this modified Ky. Rev. Stat. p. 420, § 3, providing for equitable defense for usury. *Chinn v. Mitchell*, 2 Met. (Ky.) 92.

An injunction on the ground of usury was refused for negligence in not making a defense in law, which was not excused. *Berry v. Thompson*, 17 Johns. 436. *Affirming Thompson v. Berry*, 3 Johns. Ch. 365; *Moran v. Woodyard*, 8 B. Mon. 537; *Crawford v. Wingfield*, 25 Tex. 414; *Perrine v. Carlisle*, 19 Ala. 686; *Smith v. Powell*, 50 Ill. 21.

81 L. R. A.

the case made by the pleadings, it is plain that plaintiff is not in a position to invoke the aid of equity to prevent the enforcement of the judgment obtained against the sureties upon the ground of fraud. The act of fraud imputed to Bollman and his deputy consisted in converting to their own use certain property of Deere, Wells, & Co. at the time of the levying of the executions against Fisher, and in suing for and recovering the value thereof against the sureties

And an injunction was refused on the same ground where Illinois interest law of 1845, § 6, provided for a suit in equity to recover usury that has been paid, as this did not change this rule. *Lucas v. Spencer*, 27 Ill. 15.

And where the complainant in the injunction suit was an executor. *Cantey v. Blair*, 1 Rich. Eq. 41.

And where the laws of Ohio did not render usurious contracts void. It was said that if such a contract was void, an injunction would not be granted where there was negligence in not defending at law. *Morgan v. England*, Wright (Ohio) 112.

And where no reason was given for negligence in not making such defense at law, or for delaying until after judgment before asking for relief. *Lansing v. Eddy*, 1 Johns. Ch. 49.

An injunction on the ground of usury was refused where no excuse was given for failure to defend at law. It was further held that a bill for discovery should have been filed before judgment at law. *Jones v. Kirksey*, 10 Ala. 579; *Mallory v. Matlock*, Id. 595; *McCollum v. Prewitt*, 37 Ala. 573, 1 Ala. Sel. Cas. 498.

And where complainant suffered a verdict at law when he might have pleaded the statute of usury, or upon certain terms obtained the aid of a bill of discovery and neglected to use such defense. *Thompson v. Berry*, 3 Johns. Ch. 395. *Affirmed Berry v. Thompson*, 17 Johns. 436.

And where the Virginia statute against usury, § 3, provided that the borrower may compel the disclosure in chancery on oath of usury, and there was no reason given why such disclosure was not sought before judgment. The statute does not apply if the same could be established by other evidence than probing the conscience of the plaintiff at law. *Brown v. Swann*, 35 U. S. 10 Pet. 497, 9 L. ed. 508.

Some cases have refused injunctions against judgments containing usury because there was no tender of the amount justly due, as he who seeks equity must do equity. *McRaven v. Forbes*, 6 How. (Miss.) 569; *Hill v. Reifsnider*, 39 Md. 429; *Topping v. Van Pelt*, Hoffm. Ch. 545; *Neurath v. Hecht*, 62 Md. 221.

An injunction will not be granted if the bill of complaint does not show that there is usury in the judgment, or if the alleged usury is not established.

So, an injunction was refused against a judgment where the bill did not allege with any exactness the amount of usury or tender the principal. *Neurath v. Hecht*, *supra*.

And where the usury was not established. Compound interest is not usury. *Hale v. Hale*, 1 Coldw. 233, 78 Am. Dec. 490.

And where the bill did not put usury directly in issue. *Bloss v. Hull*, 27 W. Va. 503.

And where the only allegation of the bill was that since the death of the obligee his widow had been paid \$100 for extra interest, and there was no statement that this was in pursuance of the original agreement, as it might have been for delay of payment and then it would not have affected the note; and the denial of the answer was not contradicted by the evidence. *Brown v. Toell*, 5 Rand. (Va.) 543, 16 Am. Dec. 759.

upon the indemnifying bond. It is true that both in the reply and in one place in the petition it is stated that plaintiff had no knowledge of such conversion until after the rendition of the judgment in favor of Bollman and against the sureties; but such allegation is inconsistent with the following averment of the petition: "Plaintiff further alleges that prior to the bringing of said action against said Pilger, McClary and Pasewalk, and against this plain-

tiff, the Norwegian Plow Company offered to account to and pay said defendant Bollman for all the property levied upon by him or by said defendant Rothwell on said judgment in favor of this plaintiff and against said Fisher, together with all damages, costs, or other expenditures occasioned or incurred by said Bollman or Rothwell, or either of them, on account of, and for the seizure and sale of, property claimed by Deere, Wells, & Co., under

And where the grounds were that it was obtained by fraud and was usurious, and the complaint failed to set forth the sum actually due with legal interest. *Hill v. Kelfsnider*, 39 Md. 429.

And where it was only shown that the holder of the notes paid less than their nominal amount for them, as this was not usury. *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125.

And where complainant had agreed to pay the face of a mortgage containing usury, as a part of the consideration of his purchase of property. *Hough v. Horsey*, 36 Md. 181, 11 Am. Rep. 484.

And where the transaction was held to be a conditional sale with a privilege of purchase, and not a loan and mortgage. *Spence v. Steadman*, 49 Ga. 133.

In *Gee v. Southworth*, 10 Paige, 297, it was said that an injunction will not be granted against a judgment on the ground of usury, unless complainant waives the forfeiture in his bill and permits the defendant to collect the principal and legal interest; but if complainant insists upon the forfeiture, he must bring the money into court to abide the event of the suit.

An injunction on the ground of usury was refused on account of complainant not being the party entitled to any relief, where he was a junior creditor and alleged usury in a prior judgment, as Ga. Code, §§ 3536, 3538, providing that creditors or bona fide purchasers may attack a judgment for defects on the face of the records rendering it void, or for fraud or collusion whenever it interferes with their rights, does not apply. *Gatewood v. City Bank*, 49 Ga. 45.

And where a junior judgment creditor claimed a sale was about to be made under a senior judgment containing usury, as a defense of usury was a personal privilege and could not be made the ground of injunction by another party where there was no fraud. *Phillips v. Walker*, 48 Ga. 55.

An injunction on the ground of usury was refused where the defendant had voluntarily waived his defense and the judgment was entered upon a warrant of attorney, and the judgment was attacked by a subsequent purchaser with notice of the judgment. *French v. Shotwell*, 5 Johns. Ch. 555. And on exceptions to the master's report the same was affirmed in 6 Johns. Ch. 235, and was affirmed on exceptions in 20 Johns. 668. (Shufelt v. Shufelt, 9 Paige, 137, 37 Am. Dec. 381, referring to 20 Johns. 668, says the reporter erred in supposing there was an appeal from the chancellor's decision upon the rehearing of the plea; the only appeal was from the order overruling exceptions to the defendant's answer.)

And where complainant's property was sold under a power of sale in a usurious mortgage, to the holder of the mortgage for a small amount, and the judgment was obtained against him for the balance,—as the remedy under N. C. Code, § 133, providing for setting aside the same on motion was sufficient. *Walker v. Gurley*, 83 N. C. 429.

And where complainant in the injunction suit did not tender the principal and interest, and had pleaded the general issue at law and made default at the trial. No relief can be had after a judgment *in invitum*, under N. Y. act May 15, 1837, § 8, pro- 81 L. R. A.

viding in effect that a borrower filing a bill merely for discovery of usury need not pay any interest, but must pay the principal, and a borrower filing a bill for relief where he had no opportunity of defense at law need not pay the principal but must pay the interest. *Topping v. Van Pelt, Hoffm. Ch.* 545.

And where the complainant in the injunction suit delayed for nine months after judgment seeking relief in equity. But it is said that relief may be granted against usury where defense was not made at law. *Hitch v. Fenby*, 6 Md. 218.

But an injunction was granted against a judgment where the defense was usury, although such defense was made in a justices' court, but a trial on appeal was prevented by irregularities of the justice or clerk. In cases of concurrent jurisdiction the trial at law will usually prevent relief in equity. *Cave v. Davis*, 5 T. B. Mon. 368.

And where the defense was usury and the borrower had paid the principal and lawful interest. The case does not discuss defense at law. *Ennis v. Ginn*, 5 Del. Ch. 180.

In *Brockway v. Clark*, 6 Ohio, 45, where the defense was that the action was on a note for a greater amount than due, with a provision in the note that on the payment of the amount due with interest the same would be discharged, an injunction was granted on the ground that equity will regard this as a penalty and relieve against it. This case is noted in *Greenleaf's Overruled Cases*, citing several subsequent cases. But the case of *Brockway v. Clark* refused to hold that a contract for usury was void, which was the same doctrine held in the subsequent Ohio cases.

In *Chaney v. Cooke*, 5 T. B. Mon. 248, it was said that a judgment of debt on a chattel mortgage will be enjoined for usury on a bill for an accounting if complainant tenders the amount due.

In *Thomas v. Phillips*, 4 Smedes & M. 358, it was said that injunctions are sometimes granted in cases of usury where the judgments were on confession, and in some cases are granted without regard to any special circumstance giving jurisdiction; but other courts refuse to interfere unless excuse is given for not defending at law.

In *Brown v. Toell*, 5 Rand. (Va.) 543, 16 Am. Dec. 759, it was said that even after the judgment at law equity will give relief for usury without requiring any reason for failing to defend at law.

In Tennessee the cases hold that, except during the time of the existence of Tenn. act 1844, relief cannot be had in equity unless the question of usury involves intricate and embarrassing matters of account.

So, an injunction was granted against a judgment where the defense was usury paid by one of the complainants, although relief might have been had at law; but it was not plain and unembarrassed and the Tennessee statutes contemplated equitable relief against usury. *Coleman v. Childress*, 6 Yerg. 286 (1834).

And where the defense at law would be embarrassed, owing to the complex nature of the accounts. *Frierson v. Moody*, 3 Humph. 561 (1842).

But an injunction was refused against a judgment where the defense was usury and was not made at

and by virtue of said executions; and that said defendant Bollman unlawfully and fraudulently and for the purpose of cheating, wronging, and defrauding this plaintiff for property so taken and sold, but then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said defendants Bollman and Rothwell, and converted by them to their own private use." The foregoing quotation from the petition is

an admission, it seems to us, that plaintiff prior to the inception of the suit in which the judgment sought to be enjoined was pronounced, was fully cognizant of the alleged fraudulent conduct of Bollman and his deputy, of which complaint is now made. If that is not a fair inference to be drawn from said averment of the petition, we are at a loss to know why this plaintiff offered to pay merely for the property seized and sold under the executions, together

law, as Tenn. act 1835, chap. 50, §§ 4, 5, provided that a defendant who may be sued on a usurious contract may plead the usury on oath, to which the plaintiff may reply on oath and thus make an issue to be tried by a jury. It was said that if a defense at law was embarrassed relief would be given in equity. *McKoin v. Cooley*, 3 Humph. 559 (1842).

And where the defense was usury and complainant was negligent in not defending at law, and no embarrassing or complicated question was involved. *Buchanan v. Nolin*, 3 Humph. 63 (1842).

In *Brandon v. Green*, 7 Humph. 130 (1846), an injunction was granted where the defense was usury, under Tenn. act Jan. 26, 1844, providing for equitable relief on the ground of usury, where no defense was made at law or where the defense failed at law. It was said if it was not for this statute, relief would not be granted where the right to defend at law was unembarrassed.

In *Bumpass v. Reams*, 1 Sneed, 595 (1854), an injunction on the ground of usury was refused where complainant had made his defense at law, as Tenn. act 1850, chap. 53, authorizing discovery in a court of law, prevented equitable relief where the benefit of such defense was had at law. The act of 1844 gave relief in equity notwithstanding a trial at law. But since the act of 1850 a discovery obtained in an action at law was held *res judicata*. If no defense was made at law relief might be had in equity under act 1854, chap. 107.

In *Lindsley v. James*, 3 Coldw. 477 (1866), which was an action to enjoin an action at law on the ground of usury where it was claimed that Tenn. act 1844, chap. 167, conferring jurisdiction on courts of equity, was repealed by the Code, it was held that the act of 1835 conferred no new jurisdiction on courts of equity, and after a trial at law except on complicated matters equity would not give relief. But this was changed by Tenn. act 1844, chap. 167, and this was repealed by implication, if not directly, by Tenn. Code, § 41, and Tenn. act 1835, chap. 50, was substantially retained with the additional provision, § 4300, providing for concurrent jurisdiction, and the rule was therefore that the law involving jurisdiction of courts of law and equity stood precisely as it did prior to the passage of the act of 1844, chap. 167, and relief should be refused in equity unless a defense at law was embarrassed, and relief was denied on account of the bill for discovery not having been properly framed.

In *Parham v. Pullian*, 5 Coldw. 497 (1868), where usury was not established, it was said that chancery will not give relief on the ground of usury, against a judgment at law, where the debtor could have made his defense at law without embarrassment.

An injunction was granted where the defense was usury and the remedy at law was embarrassed by complication of renewals, as in Tennessee courts of equity and law have concurrent jurisdiction in regard to usury, and under the practice in that state a tender of the principal and interest was not necessary. It was said that the Tennessee act of 1844, providing for equitable relief notwithstanding a trial at law or failure to defend was not carried into the Code, and that the law stood as it

did before the passage of that act, and the act of 1835, chap. 50, §§ 4, 5, which enlarged the power of a court of law, left the jurisdiction of a court of chancery where it was before. *Chester v. Apperson*, 4 Heisk. 659 (1871).

An injunction was refused against a judgment where the defense was usury and was not made at law through negligence, as Tenn. Code, § 4300, which was the same as Tenn. act 1835, providing for concurrent jurisdiction of law and equity in regard to usury, repealed Tenn. act 1844, providing for relief in equity. *Greenfield v. Frierson*, 7 Heisk. 633 (1872).

For usury, see *Collins v. Clayton*, 53 Ga. 649, *infra*, IV. a.

IV. Set-off.

a. Failure to assert at law.

Injunctions on account of set-offs that should have been used at law as a defense to the action were refused where no equitable ground for relief was shown. *Cabell v. Roberts*, 6 Rand. (Va.) 580; *Donnell v. Parrott*, 13 La. Ann. 251; *Benton v. Roberts*, 3 Rob. (La.) 96; *Monroe v. McMicken*, 8 Mart. N. S. 510; *Lafon v. Desessart*, 1 Mart. N. S. 71; *Kennard v. Henderson*, 9 Rob. (La.) 165; *Cook v. Murphy*, 7 Gill & J. 282; *Standifer v. McWhorter*, 1 Stew. (Ala.) 532; *Risher v. Roush*, 2 Mo. 95, 22 Am. Dec. 442; *Carlyle v. Long*, 5 Litt. (Ky.) 167.

And where the defense was also failure of consideration of the notes sued upon. *Howell v. Motes*, 54 Ala. 1.

And where the defense was also illegality of plaintiff's demand. *Montgomery v. Griffin*, Walk. (Miss.) 453.

And where the defense of an accommodation indorser arose out of a trust and an equitable right to have trust funds applied in discharge of a bill of exchange in suit. *Foster v. State Bank*, 17 Ala. 672.

And where such set-off was notes of the plaintiff held by complainant before judgment was rendered. *Crow v. Watkins*, 12 La. Ann. 845.

And where the answer in the equity suit denied the allegations of the bill that plaintiff at law failed to use diligence in collecting collaterals, and the motion to dissolve the injunction was on the bill and answer, and negligence in not defending at law was not excused. *Cardin v. Jones*, 23 Ga. 175.

And where the action was on a note by an indorser, and the obligee of the note was an insurance company, and complainant in the injunction suit had tendered notes issued by it, but there was negligence in failing to make a defense at law. *Robbins v. Mount*, 3 Ga. 74.

And where the action was by trustees of a corporation against stockholders on their subscription, and the injunction suit was to procure an accounting, but nothing was alleged which might not have been set up in the action at law. But the court stayed the collection of the judgment until the account was taken where the trustee assented to such a decree. *Franklin Mill Co. v. Schmidt*, 50 Ill. 208.

And where the same was damages for breach of warranty on the sale of property and for money loaned. *Winchester v. Grovenor*, 48 Ill. 517.

with costs. He must have been apprised that property belonging to Deere, Wells, & Co. other than that applied upon the executions had been taken by the sheriff, and for which the latter claimed compensation; since the petition avers that, when the proposition of settlement was made by plaintiff, Bollman "then demanded that this plaintiff should account to and pay said defendant Bollman for the prop-

erty taken by said Bollman and Rothwell, and converted to their own use." The allegation of want of notice in the reply must be disregarded. As to the petition alone, we must look for the statement of the facts constituting plaintiff's cause of action. Two allegations of the petition in regard to notice or knowledge of the alleged fraud being inconsistent with each other, we must regard as true and

And where the judgment was for trespass and the complainant in the injunction suit had obtained title to the land before the judgment for trespass. *Peytavin v. Winter*, 8 La. 271.

And where the action was on a distress warrant. *Nicolson v. Hancock*, 4 Hen. & M. 491.

And where in three suits for \$488 each, the set-off was \$450, and usury \$900, and the jurisdiction of the court was \$500, as complainant could have used his set-off in one case and plea of usury in another. *Collins v. Clayton*, 53 Ga. 649.

And where the same was claimed because complainants in the injunction suit were prevented from using the same in the settlement in the probate court, by the advice of their counsel. *Duckworth v. Duckworth*, 35 Ala. 70.

And where the complainant failed to use the same on account of mistake of law as to jurisdiction to allow set-off. *Pearce v. Winter Iron-Works*, 82 Ala. 68.

And where La. Code of Pr. art. 367, provided that "the defendant may plead compensation or set-off at every stage of the proceedings, provided it be pleaded specially," and art. 368 provided that "it may be pleaded either in the answer to the principal claim, or by a distinct and separate demand." *De Lizardi v. Hardaway*, 8 Rob. (La.) 22.

And where the plaintiff in an execution from the supreme court was insolvent and the injunction suit was in the circuit court of the city of St. Louis, it was held in Missouri one court cannot even enjoin an execution from another court of co-ordinate jurisdiction, and no reason was given why relief could not be obtained in the supreme court. *Kinealy v. Staed*, 55 Mo. App. 176.

And where it was not shown that the demands attempted to be used were acquired at such a time that they could not be pleaded in the ordinary action. *Morgan v. Driggs*, 3 La. Ann. 124; *Todd v. Fisk*, 14 La. Ann. 13; *Hart v. Cannon*, 10 La. Ann. 721.

And where such set-off was or might have been tried at law, and it was impossible to ascertain which was the case. *Russ v. Wilson*, 22 Me. 207.

And where the sole ground for an injunction was that complainant in that suit did not assert his right at law. *Cook v. Murphy*, 7 Gill & J. 282.

In *Matta v. Gayle*, 10 La. Ann. 347, it was said that where the defense of intermeddling by plaintiff in an execution with the estate of her deceased husband existed before the judgment and might have been pleaded as a defense in a hypothecary action, the same would not be available to enjoin the execution.

But an injunction was granted against a judgment on a note given for an instalment due on a mortgage in Demerara until the plaintiff therein should give security that the defendant should not suffer loss by reason of the existence of grosse copies of the mortgage if in other hands. These grosse copies under the Dutch law are orders of court authorizing a mortgage to be made, and correspond to title papers, and are necessary in order to procure loans. No question was made as to asserting this defense at law. *Bentinck v. Willink*, 2 Hare, 1.

And an injunction on the ground of set-off was granted where, pending the suit, the debtor pur-

chased the plaintiff's interest in the debt sued upon at a judicial sale, although confusion of claims might have been pleaded to defeat the judgment, yet the complainant had the right to permit the debt to be litigated, treating the plaintiff at law as his trustee. *Eastin v. Dugat*, 4 La. 397.

And where the bond in suit was held by an assignee, who took the same subject to all the equities of the obligor, and Va. act 1748, chap. 27, § 7, provided that the plaintiff shall allow all discounts against the first obligee before notice of an assignment is given. The question of failure to defend was not discussed. *Norton v. Rose*, 2 Wash. (Va.) 233.

In *Fannin v. Thomasson*, 45 Ga. 533, it was said that the failure to plead at law a set-off will not estop the defendant from setting it up by a bill to enjoin the common-law judgment. (See *Radcliffe v. Varner*, 56 Ga. 222, next subd.)

b. Parties.

An injunction will not be granted on account of a set-off, if the allowance of the same would prejudice either party, or if the set-off does not exist against the party in interest.

So, an injunction was refused where a judgment was against a husband for purchase money of property of the estate sold by executors, and the set-off was a claim of the wife as distributee of the estate. *Dunnahoo v. Holland*, 51 Ga. 147.

And where the judgment was on a purchase note for goods bought by a creditor at a sale made by assignee for creditors. *Capehart v. Etheridge*, 63 N. C. 353.

And where the same had been denied at law because in different rights, and the plaintiff at law had assigned his judgment for value to a third party prior to the institution of the injunction suit, and the bill did not show when the insolvency of the plaintiff began or that it existed at the time of the assignment. *Davis v. Milburn*, 3 Iowa, 163.

And where the action was on a note given for purchase of horses and the set-off was breach of warranty, and the plaintiff at law was a nonresident. But the warranty in this case was made by an agent individually and not by the principal; and besides, another note still due protected the complainant in the injunction suit. *Overton v. Stevens*, 8 Mo. 622.

And where the judgment was in favor of a partnership and the set-off was against a member of the firm. *Collins v. Butler*, 14 Cal. 223.

And where the action was on a note held by an assignee after maturity, and the set-off was against the prior holder of the note. A set-off against a note is not an equity which attaches to it in the hands of a holder. (This proposition was affirmed in *Stannus v. Stannus*, 30 Iowa, 451.) *Way v. Lamb*, 15 Iowa, 79.

But an injunction was granted where a judgment was in favor of bank B on a note payable to bank A and bank B did not own the note or authorize the suit, and it was a fraudulent transaction to prevent a set-off against bank A in favor of the defendant. *Stovall v. Northern Bank*, 5 Smedes & M. 17.

And where the note in suit was fraudulently transferred to a party having no interest so as to

give effect to the one which is against the interest of the plaintiff. This is but an application of the rule that a pleading, when attacked by demurrer,—and such is the nature of the motion to dismiss,—is to be construed most strongly against the pleader. It does not appear that plaintiff exercised due diligence. Having notice of the alleged fraud he should have urged that as a defense to the suit on the

bond of indemnity. We know, although outside of the record before us, from the opinion in *Pasewalk v. Bollman*, 29 Neb. 522, which cannot properly be considered here, that the sureties in their answer interposed the defense that the judgment recovered by Deere, Wells, & Co. "was for the conversion of goods by plaintiff and his agents other than the goods taken by Rothwell under said executions."

prevents such a defense from being made, and this was not known in time to use as a defense. *Ibid.*

And where the judgment was in favor of a guardian for dividends due the ward, and the defendant had made payments improperly to the guardian on account of her not having given a statutory bond, and which funds were used for the necessities of the ward, as a defense could not be made at law because the ward was not a party to that suit. *Southwestern R. Co. v. Chapman*, 46 Ga. 557.

And under Ga. Code, §§ 3061, 3082, providing that an equitable defense may be set up at law, such defense must be made at law, but where good reasons exist why an equitable defense of set-off could not be made at law, as want of parties and want of power in the common-law court to make them, an injunction will be granted. *Radcliffe v. Varner*, 56 Ga. 222.

For party, see also *infra*, IV. j.

c. Unliquidated damages.

An injunction will be refused if the set-off is a demand which is not liquidated. *Webster v. Couch*, 6 Rand. (Va.) 519; *Smith v. Foster*, 5 La. Ann. 551; *Cox v. McIntyre*, 6 La. Ann. 471; *Harvard v. Stone*, 5 Mart. N. S. 126.

So, an injunction was refused for a set-off of unliquidated damages, where such set-off was damages in an action of slander then pending. *Parkinson v. Trousdale*, 4 Ill. 337.

And where such set-off was damages not connected with the judgment, although plaintiff was insolvent and a nonresident. *Jackson v. Bell*, 31 N. J. Eq. 554.

And where the same was asserted in Louisiana, as La. Civ. Code, § 2203, provided that compensation only takes place between debts which were equally liquidated and demandable. *Hereford v. Babin*, 14 La. Ann. 332.

And where the matter was cognizable at law and no ground for equitable relief was shown, and no discovery required or insolvency charged. *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 735.

And where the plaintiff at law was insolvent and the action was for assault and battery and the set-off was a similar claim but was not liquidated. *Barry v. Green*, 5 Hayw. (Tenn.) 67.

And where the plaintiff at law was a nonresident but was not insolvent and the set-off was a claim for unliquidated damages. *Smith v. Washington, Gaslight Co.* 31 Md. 12, 100 Am. Dec. 49.

In *Cabell v. Roberts*, 6 Rand. (Va.) 550, it was said that unliquidated damages arising out of the same contract on which the judgment sought to be enjoined was founded, cannot be set off in equity.

In *Wolcott v. Jones*, 4 Allen, 367, an injunction on the ground of set-off was refused where the same was not asserted, under Mass. Gen. Dig. chap. 118, § 28, providing for a set-off of debts due from an insolvent person against those which may be owing to him. Under this provision claims not liquidated may be used as set-off in the action at law.

For unliquidated damages see *Memphis & C. R. Co. v. Greer*, 87 Tenn. 698, 4 L. R. A. 858, *infra*, IV. f.

d. Trial at law.

* An injunction will be refused if there has been 31 L. R. A.

a trial of the set-off at law, or if it was attempted to be asserted and was refused, and there was a remedy by appeal or certiorari.

An injunction on the ground of set-off was refused on account of the same having been used in the action at law. *Hooper v. Rhodes*, 7 La. Ann. 137; *Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Burton v. Hynson*, 14 Ark. 32; *Harrison v. Nettle-ship*, 2 Myl. & K. 423, 3 L. J. Ch. N. S. 86, 8 Cond. Eng. Ch. Rep. 66; *Buckmaster v. Grundy*, 8 Ill. 626; *Scott v. State Nat. Bank*, 9 Neb. 316, 31 Am. Dec. 412.

And was refused in such a case where the defense was complicated set-offs. *Williams v. Sadler*, 4 Jones, Eq. 378, 75 Am. Dec. 424.

And where the same was mutual accounts not complicated. *Howell v. Stewart*, 17 Ala. 719.

And where the defense was that the warrant of the auditor in controversy was not a loan to complainant in the equity suit, but a payment on account. *Cunningham v. Caldwell, Hardin (Ky.)* 123.

And where complainant in the injunction suit failed in his trial of the same at law, and fraud in transferring the note in suit so as to prevent a set-off was not established. *Briesch v. McCauley*, 7 Gill, 180.

An injunction was denied, although the set-off has been refused at law, where the same was a debt accruing in a different right. It was said that if it was a set-off at law that would be no foundation for a bill in equity. *Menifee v. Ball*, 7 Ark. 520.

And where the same was presented on a trial before justice's court and complainant was negligent in not prosecuting the same. *Ewing v. Nickle*, 45 Md. 413.

And where the same was rejected improperly in the justice's court, and complainant failed to prosecute certiorari. *Halcomb v. Kelly*, 57 Tex. 618.

And where the equitable ground was that the adverse party was an administrator and that complainant could not testify at law, but the same disability existed in equity. *Robinson v. Wheeler*, 51 N. H. 398.

e. No set-off.

An injunction on the ground of set-off will not be granted where the right to such set-off is not established by pleading or proof.

So, an injunction on the ground of set-off was refused where the allegations in regard to such set-off were indefinite and there had been much litigation between the parties, and complainant had delayed asserting this claim. *Parks v. Spurgin*, 3 Fred. Eq. 153.

And where the petition for injunction did not meet the requirements of Tex. Rev. Stat. art. 2376, providing that it shall contain "a plain and intelligible statement of the grounds for such relief," and it alleged an indebtedness from the defendant to complainant in the injunction suit, and the answer specifically denied such indebtedness and intelligently averred facts excluding the possibility thereof. *Wheeler v. Gray*, 5 Tex. Civ. App. 12.

And where the bill was to settle the account between the parties, and did not allege that a balance was due. *Robinson v. Wheeler, supra*.

And where the judgment was obtained by a bank

Moreover, the petition herein is defective for another reason. It contains no averment as to the value of the goods not levied upon by the sheriff which it is claimed he converted to his own use. The petition refers us to Exhibit B for the value of the property, but it is not there stated, except a trifling sum appears opposite a few of the articles alone. For all that this record shows, they may have been of little or no value. It does not appear that the judg-

ment obtained by Bollman exceeded the value of the property sold, and applied on the executions in favor of the Norwegian Plow Company, including Bollman's damages and costs growing out of the transaction. For this reason there is no equity in the bill. *Scotfield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412.

Affirmed.

and the set-off was that the debtor had deposited notes with that bank for collection, as a depository to receive is not required to bring suit. *Crow v. Mechanics' & T. Bank*, 12 La. Ann. 602; *Fitzhugh v. Orton*, 12 Tex. 4.

And where the plaintiff at law was insolvent but the claim had been presented and rejected on the trial, and complainant had withdrawn his motion for a new trial, and an appeal was taken. *Miller v. Duvall*, 26 Md. 47.

And where complainant's demand was barred by limitation and no particular equitable ground was shown. *Brown v. Scott*, 2 Bibb. 635.

And where the plaintiff and defendant had mutual notes, and the day before complainant's notes expired by limitation the other party brought suit and obtained a judgment, and the agreement for mutual cancelation and exchange of the notes was not established. *Fletcher v. Warren*, 18 Vt. 45.

In *Rives v. Rives*, 7 Rich. Eq. 353, an injunction on the ground of set-off was denied where the set-off existing at the time of the decree was barred by limitation, and the defendant in the injunction suit was insolvent. It was said that in an old case cited in Francis' Maxims, p. 36, the court does seem to have given relief on this ground, but no other cases from the decisions of the English court of chancery and none of our own reports have been cited. Complainant could have obtained a judgment at law and by a *casus* have compelled an assignment of this decree, and was guilty of laches.

An injunction on the ground of set-off was refused where the assignor and maker of a note rescinded their contract after a judgment was taken on the note, and the assignor gave the maker his note for that amount, and after judgment was taken on the same the assignor sought to have this enjoined, claiming that he was still liable on his assignment of the other note and that the maker was insolvent, but the complainant had repudiated his liability and should have paid off his own note. *Hill v. Gordon*, 6 J. J. Marsh. 520.

And where the judgment was in favor of a city, and the set-off was based on a report in condemnation which was not approved by the common council, as the debt was not equally liquidated or demandable, and it could not be pleaded in compensation. *New Orleans v. Cordeviulle*, 10 La. Ann. 734.

And where it was claimed that the debt in judgment was not to be paid until a settlement of a partnership was had, but it was to be held subject to rebates ascertained on a settlement, and the evidence as to this was not clear, and complainant had other securities for indemnity. *Graham v. Gray*, 87 Ala. 440.

And where the judgment was on a note for a balance in settling a partnership account, and the set-off was that since the making of the note there might be, on an accounting, money coming to the defendant, as the account once liquidated must be paid unless a second account has been taken. *Preston v. Strutton*, 1 Anst. 50.

A defendant in an execution cannot obtain an injunction against the same on the ground that in another case before judgment money was paid under a mistake of law and afterwards such judgment was reversed.

When one voluntarily pays money to another with full knowledge of all the facts, but under a mistake of law, he cannot recover it, and cannot maintain a set-off on that ground. *Beard v. Beard*, 25 W. Va. 488, 52 Am. Rep. 219.

f. Insolvency and nonresidence.

The insolvency or nonresidence of the plaintiff at law will usually be sufficient ground for an injunction against the judgment, if complainant has a set-off which was not tried in the action at law.

So, an injunction on the ground of set-off was granted where the plaintiff at law was insolvent and the defendant in the equity suit did not show that the set-off, which was money paid by an indorser, existed at the time of the institution of the suit at law so that the defense at law could have been made, and objection to the jurisdiction of equity was not made by demurrer. *Brazelton v. Brooks*, 2 Head, 197.

And where the party against whom it was held was insolvent and he was the party in interest in the suit, although the set-off was ruled out as a defense at law. It was also said that the neglect to use a set-off at law would not prevent relief in equity. *Hubbs v. Duff*, 23 Cal. 598.

And where the judgment was on an insurance policy assigned with a knowledge of the set-off, which was for a premium on another policy, being a note made by an insolvent agent, and in the action on the policy in judgment the company had been enjoined by a court in Virginia from using the same as a defense, and the beneficiaries in both policies were the same. The injunction was also granted as a protection to the indorser of the note, and this on the ground that the agent had a lien on both policies for advancement of the premium. *Leeds v. Marine Ins. Co.*, 19 U. S. 6 Wheat. 565, 5 L. ed. 332.

And where the defendant in the injunction suit was insolvent and complainant's equity was multiplicity and complicity of accounts. But as to judgments obtained by assignees of notes, an injunction was refused where the assignor held sufficient claims to set off complainant's demands and there was no agreement for a mutual set-off of particular claims. *Anderson v. Mason*, 6 Dana, 217.

An injunction on the ground of set-off was granted where complainant held a judgment against plaintiffs at law, who were insolvent, although such set-off was not used as a defense at law, as this will not prevent the use of the same in equity. *Russell v. Conway*, 11 Cal. 93.

And where plaintiff at law was insolvent at the time of the judgment and had assigned the same to his wife, and he was indebted to the defendant. No question was made as to failure to defend at law. *Levy v. Steinbach*, 43 Md. 212.

And where complainant in the injunction suit had procured an assignment of a note against the plaintiff at law before the judgment in the action at law, and the plaintiff at law was a nonresident and insolvent, although plaintiff at law had assigned his judgment to a third party, complainant's equity being superior to that of the assignee of the judgment. *Dorsey v. Reese*, 14 B. Mon. 157.

And where complainant held judgments against

GEORGIA SUPREME COURT.

John S. OWENS *et al.*, *Piffs. in Err.*,
v.
VAN WINKLE GIN & MACHINERY COM-
PANY.

(.....Ga.....)

*A judgment regularly rendered, even by default, is binding upon parties and privies;

*Headnote by ATKINSON, J.

and that the cause of action was the failure to pay a promissory note founded upon a gaming consideration is no such exception to the general rule as will authorize a court of equity, after judgment, to interfere by injunction with its enforcement.

(June 15, 1895.)

ERROR to the Superior Court for Fulton County to review a judgment in favor of

the plaintiff at law which were dormant when the bill was filed but were revived, and the plaintiff at law had taken the benefit of the homestead exemption act which rendered him insolvent, and this made an equitable right to set-off. *Tomney v. Ellis*, 41 Ga. 280.

And where the suit was by a stockholder to enforce the liability of other stockholders on a judgment against a corporation. And Ill. Rev. Stat. chap. 22, §30, allowed a cross bill after an answer in chancery, and the defendant, a corporation, pleaded the complainant's liability as stockholder, and that complainant was a nonresident and insolvent. *Quick v. Lemon*, 105 Ill. 578.

And where complainant held a prior judgment and the plaintiff in the action at law was a nonresident and insolvent. No question was made as to failure to use the same at law. *Buckmaster v. Grundy*, 8 Ill. 226.

And where the plaintiff at law was insolvent, and as the Illinois statute of set-off was permissive and not compulsory, a party defendant was not bound to set off his demand in the action at law. "The occurring insolvency of the railroad company subsequent to the judgment affords ground for the exercise of the equitable jurisdiction here invoked." *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270. (But see next case.)

In *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55, it was said that a set-off may be allowed in equity as against a judgment at law where the plaintiff is insolvent, whether such insolvency occurred before or after the judgment, and it was not compulsory on the defendant to make a defense at law. And *Chicago, D. & V. R. Co. v. Field*, *supra*, indicating that insolvency must occur after judgment, is misleading.

And where complainant in the injunction suit held a judgment against A and B, and A thereafter obtained a judgment against complainant and assigned it to C. As *Iowa Rev. Stat. 1880, §§ 2764, 3328, 2880*, cl. 6, abrogated distinctions between joint and joint and several liabilities and authorized a set-off to be pleaded at law, and the insolvency of A gave an equitable right to a set-off although not pleaded at law. *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527.

And where plaintiff at law was insolvent, although the set-off had been denied on motion in the court at law. It was held that the exercise of the power by a court of law would not be *res judicata* in this case, as the application was on a summary motion, and such decision could not be thrown into the shape of a record and become the subject of review; and it was said that in the same court these decisions are not considered final or a bar to another discussion on the same question. *Simson v. Hart*, 14 Johns. 63, Reversing 1 Johns. Ch. 95.

And where the plaintiff at law had removed from the state, although such set-off was claimed and disallowed on the trial at law. *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751.

In *Memphis & C. R. Co. v. Greer*, 87 Tenn. 608, 4 L. 31 L. R. A.

R. A. 858, an injunction on the ground of set-off was granted at the instance of a railroad company where the conductor of a freight train recovered a judgment against the company for personal injuries, and there was a suit pending in another state for damages for injuries caused to a passenger at the same time, and the freight conductor had violated the rules of the company in allowing such person to ride on such a train, although such action was not yet determined and the claim was unliquidated damages. The bill was allowed as a *quia-timet* bill on account of the insolvency of the plaintiff at law.

But in *Sayre v. Harpold*, 38 W. Va. 553, an injunction on the ground of set-off was refused although the plaintiff at law was insolvent. It was said that insolvency alone was not recognized as a ground for relief in equity.

And an injunction was refused where the judgment was on a note payable to an administrator, and complainant had a claim for damages for an eviction from land which he had bought from the intestate, and for which damage he had obtained an assignment from some of the heirs of their claims against the administrator; but the complainant had a remedy on the administrator's bond, although the administrator was insolvent. *Cummins v. Bradford*, 16 Ky. L. Rep. 753.

And where complainant declined to plead the same at law reserving it for a further action, although plaintiff at law was a nonresident. *Hendrickson v. Hinckley*, 58 U. S. 17 How. 443, 15 L. ed 123.

And where such set-off was a cross-demand on a warranty growing out of the same transaction, and the plaintiff at law was a nonresident, as such set-off could have been used in the trial of the original action. *Beall v. Brown*, 7 Md. 393.

In *Waldrop v. Green*, 63 N. C. 344, an injunction on the ground of set-off was refused where the judgment was for the recovery of a horse, which the complainant in the injunction suit had taken from the plaintiff at law because he had previously made an exchange with him of horses and the title of the one he had received was not valid, and he had brought suit on an implied warranty of title against the plaintiff at law who was insolvent, which action was pending. The case only says the bill of complaint does not state a cause of action.

And an injunction will be refused if there is no allegation in the bill of complaint that the party against whom the set-off exists is insolvent or is a nonresident, or if no other equitable ground is shown. *Ponder v. Cox*, 26 Ga. 486; *Hudson v. Kline*, 9 Gratt. 379; *Markham v. Todd*, 2 J. J. Marsh. 364.

So, an injunction on the ground of set-off was refused where a judgment subjecting a homestead was assigned to a party employed by complainant to defend the action and a claim of damages was asserted for his negligence in not making defense. *Baker v. Ryan*, 87 Iowa, 708.

And where the judgment was in detinue and the set-off was damages for breach of warranty. *Ellis v. Gosney*, 1 J. J. Marsh. 346.

defendant in an action brought to enjoin collection of a judgment. *Affirmed.*

Defendant recovered judgment against J. H. Mountain on a promissory note which he had made and delivered to one Rexinger who indorsed it for value to defendant. During the progress of that suit J. S. Owens became his surety to dissolve a writ of garnishment. The suit was defaulted and judgment was entered against Mountain and Owens on the garnish-

ment bond. Subsequently this action was brought to enjoin the collection of that judgment on the ground that the note which formed the basis for it was given for a gambling consideration.

Messrs. Mayson & Hill, for plaintiffs in error:

A judgment based upon a note given for a gambling consideration may be enjoined, although plaintiff is an innocent purchaser,

And where the set-off was an independent transaction and there was no peculiar equity shown in the bill or insolvency charged and the demand was stale, and the remedy, if any, was at law. *Dade v. Irwin*, 43 U. S. 2 How. 383, 11 L. ed. 308.

And where the judgment was in favor of A against C, who had obtained an award against B, and A was a surety in the award, and he was not insolvent or a nonresident. *Hinrichsen v. Reinback*, 27 Ill. 296.

In *Brady v. Hancock*, 17 Tex. 361, an injunction was refused where complainant held a set-off which he could not plead because in excess of the justice's jurisdiction and there was no allegation of insolvency. It was said that the reporter's syllabus in *Fulgham v. Chevallier*, *infra*, would seem to make an injunction a matter of course where the plaintiff in the judgment rendered by a justice was indebted to the defendant in a sum above the jurisdiction of the justice; but this was not warranted by the statement of the case nor by the opinion of the court, and the statement of the case is defective in failing to show that the object of the plaintiff at law was to harass the defendant when the defendant did not owe him anything.

In *Fulgham v. Chevallier*, 10 Tex. 518, the ground of injunction was that a judgment had been obtained on three several notes before a justice of the peace, and on account of the jurisdiction of a justice's court the petitioner was not allowed to plead in reconvention the matters set forth in his petition and he prayed for an account and an injunction. It was held, that "if the facts contained in the petition are true, and they must be regarded as true, in deciding on the exception the plaintiff clearly showed good cause of action, and it was error to dismiss the suit on the exception."

Forset-off, insolvency, and nonresidence, see also *Hall v. Clark*, 21 Mo. 415, *supra*, I. b. 8; *Jackson v. Bell*, 31 N. J. Eq. 554, *supra*, IV. c; *Barry v. Green*, 5 Hayw. (Tenn.) 67; *Smith v. Washington Gaslight Co.* 81 Md. 12, 100 Am. Dec. 49; *Wolcott v. Jones*, 4 Allen, 387; *Kinealy v. Staed*, 55 Mo. App. 176, *supra*, IV. a; *Ellis v. Kerr* (Tex.) 23 S. W. 1050; *O'Neill v. Perryman*, 102 Ala. 522, *infra*, IV. b; *Pharr v. Reynolds*, 3 Ala. 521, *infra*, IV. g. See also *infra*, IV. i, j.

g. Accounting.

An injunction will be granted on the ground of set-off if an accounting is necessary to establish complainant's claim and such relief could not be had at law.

So, an injunction on the ground of set-off was granted where the suit for injunction was also for an accounting and a defense at law was not made, and the accounts were mutual and multifarious. *Power v. Reeder*, 9 Dana, 6.

And where an assignee in bankruptcy had obtained a judgment for money paid by a bankrupt after a secret act of bankruptcy, although such set-off was offered at law and disallowed and the action was for an accounting, and the verdict at law disallowing a set-off was not conclusive in equity in matter of contract and account. *Billon v. Hyde*, 1 Atk. 126, 1 Ves. Sr. 327.

And where the action was on a foreign judgment which was claimed to have been obtained by fraud,

and complainant filed a bill for accounting showing that the plaintiff at law was in reality indebted to him on account of credits. *Bowles v. Orr*, 1 Younge & C. Exch. 484-473.

And where the same was for meane profits in ejectment, and the equitable title of the property was in a stock company which was indebted to complainant, and the parties to the suit were stockholders, and the bill to enjoin sought to have an accounting. *Wells v. Strange*, 5 Ga. 22.

And where it was necessary to have an accounting and the plaintiff at law was insolvent and had left the state. *Pharr v. Reynolds*, 3 Ala. 521.

h. Equitable set-off.

If the set-off is an equitable one, or if for other reasons it is not available at the trial at law, because not a legal set-off or not due, or because the defense is prevented by fraud, an injunction will be granted.

So, an injunction on the ground of set-off was granted where the complainant had an equitable demand and paid into court the amount admitted to be due. *Greaves v. Stritho*, 2 Dick. 469.

And where such set-off was an equitable claim and was refused at law. *Farquharson v. Pitcher*, 2 Russ. Ch. 81.

And where the defendant at law acquired a note after the commencement of the suit and the plaintiff was insolvent, as such note could not be set up in the action at law. *Fields v. Carney*, 4 Baxt. 137.

And where the defense was that the action was upon a bond given for indemnity to an indorser, and that the consideration had failed and the indorser was insolvent, as there was no remedy at law. A contract of indemnity resting in damages not being the subject of set-off at law. *Scott v. Shreeve*, 12 U. S. 12 Wheat. 605, 6 L. ed. 744.

And where the judgment was for tort and plaintiff at law was insolvent, although the judgment was assigned to attorneys to secure their liens. The set-off could not be pleaded in the action of tort. *Marshall v. Cooper*, 43 Md. 46.

And where the judgment was assigned and complainant had a previous judgment against the assignor who was insolvent, as a court at law had no jurisdiction to grant a set-off in such a case, and an assignment of a judgment only vests an equity in the assignee, as a judgment was not assignable by statute or by the common law. The assumption of jurisdiction by courts of common law of the right to set off judgments did not oust equity of its jurisdiction. Besides the assignee was not a party to the suit at law so as to enable a court of law to dispose of his equity. *Merrill v. Souther*, 6 Dana, 305.

And where the debtor had to pay for plaintiff since the action began larger amounts than recovered, but which could not have been set up as a defense because not due, and the plaintiff at law was insolvent although the judgment was assigned. *Ellis v. Kerr* (Tex.) 23 S. W. 1050.

And where the defendant in an action at law obtained a judgment against the plaintiff on his ground of set-off, and the plaintiff at law had claims against the defendant which could not be set off as against the set-off at law, and the defendant at law was insolvent and complainant sued

where judgment was taken by default and the issue has not heretofore been heard.

High, Inj. § 235; *White v. Washington*, 5 Gratt. 645; *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612; *Skipwith v. Strother*, 3 Rand. (Va.) 214; *Clay v. Fry*, 3 Bibb, 248, 6 Am. Dec. 654; *Mallett v. Butcher*, 41 Ill. 382; *Given's Appeal*, 121 Pa. 260; *Fraser v. Moody*, 3 Humph. 561; *Lucas v. Nichols*, 66 Ill. 41; *Lindley v. James*, 3 Coldw. 477; *Buchanan v. Nolin*, 3 Humph. 63; *McKoin v. Cooley*, 3 Humph. 66; *Bonney v. Bowman*, 63 Miss. 166.

for an accounting between the parties. *O'Neill v. Perryman*, 102 Ala. 622.

And where complainant was only liable to plaintiff at law in contribution for a part of the judgment, and defense was prevented by fraud. *Markham v. Angier*, 57 Ga. 43.

i. In matters of an estate.

In matters of an estate, if there is no reason for collecting the judgment or if the plaintiff at law is insolvent, and the granting of the judgment will not prejudice the rights of other parties, an injunction will be allowed because of a set-off.

So, an injunction on the ground of set-off was granted where the judgment was in favor of an administrator, who was insolvent and was indebted to the complainant as distributee in a sum more than sufficient to pay the claim. *Carter v. McMichael*, 20 Ga. 96.

And where the judgment was in favor of an executor, and complainant was a legatee, and the amount due him was greater than the amount named in the execution, and the estate was free from debts, and the executors were insolvent. *Dobbs v. Prothro*, 57 Ga. 15.

And where complainant was a purchaser from commissioners, under Ky. act 1821 to sell the estate of decedents for his debts, and he had a judgment in his favor against the administrator of the estate with a return of no property. But if there were other demands entitled to precedence an injunction would not be granted. *Dickinson v. Chism*, 2 T. B. Mon. 145.

And where a sale was by administrators, and the purchaser filed a bill for settlement of the administrator showing that there was more coming to him on distribution than the judgment for purchase money, and that there were no debts against the estate. *Parker v. Britt*, 4 Heisk. 245.

And where the judgment was against a distributee in favor of the representative of the estate, and such distributee had a set-off of a share due from the estate, and no reason existed for the collection of the judgment. *Dorsey v. Simmons*, 40 Ga. 245.

In *Gregory v. Hasbrook*, 1 Tenn. Ch. 218, an injunction on the ground of set-off was granted where the judgment was in favor of an administrator and the estate was insolvent and no defense was made at law. It was held that *Brazelton v. Brooks*, 2 Head, 194 (*supra*, IV. f) did not lay down the rule that complainant could not obtain equitable relief without showing why he did not make defense at law.

In *Riddell v. Gormley*, 4 La. Ann. 140, an injunction on the ground of set-off was granted where the complainant as the legal representative of S.'s estate had a claim against a party who obtained a judgment, and which claim was not pleaded in that action; holding: "There having been mutual indebtedness between S.'s estate and G., and their respective claims being equally litigated, the debts up to the amount due by G. were extinguished by compensation before either were prescribed, and that compensation may now be pleaded by the 31 L. R. A.

That plaintiff was an innocent purchaser is no defense.

High, Inj. § 235; *Woodson v. Barrett*, and *Skipwith v. Strother*, *supra*; *Scott v. Pound*, 61 Ga. 579; *Porter v. Jones*, 6 Coldw. 324; 1 Story, Eq. Jur. 307; *Cunningham v. National Bank*, 71 Ga. 404, 51 Am. Rep. 266.

Messrs. Ellis & Gray, for defendant in error:

At common law and under the statutes which simply declare that gambling obligations shall be deemed to be given for an illegal

plaintiff." This case was criticised in *Todd v. Fisk*, 14 La. Ann. 13, and it was held that it could only be sustained on the theory that the court must have presumed that the compensation only took place when the representative consented, and that this must have been after the judgment.

An injunction on the ground of set-off was granted where complainant, an administrator, discovered evidence after judgment showing a mistake in the settlement of the accounts, and the statute of limitation did not affect this owing to the connection between the demands. *Terrill v. Southall*, 3 Bibb, 458.

And where the judgment was in ejectment in favor of heirs, and complainant had purchased the land from an heir who had bought the land at administrator's sale, and the purchase money had been applied to the debts and was divided among the heirs, as relief could not be had at law. *Brown v. Boynton*, 69 Ga. 754.

And where the judgment was against an administrator, and the set-off was not known in time to have used the same at law. *Terrill v. Southall*, 3 Bibb, 458.

And where no defense was made at law because the administrator, defendant therein, believed the set-off was barred by limitation, and he had no knowledge that the plaintiff at law had previously taken the benefit of the insolvent act in another state and had omitted this claim, and it was questionable whether the defense could have availed at law. *Hewlett v. Hewlett*, 4 Edw. Ch. 7.

But an injunction was refused where a surety of an administrator was compelled to pay a decree against the administrator in favor of an administrator *de bonis non*, and on the reversal of the decree obtained a judgment for the same against the administrator *de bonis non*, who claimed as ground of injunction that he had paid over the money to distributees who were insolvent and non-residents, and had obtained another decree against the administrator. There was no mutuality in the claims. *Simmons v. Williams*, 27 Ala. 507.

And where complainants were administrators and held judgments against the plaintiffs at law, who were administrators but the allowance of such set-off would have prejudiced prior judgments and devested them of their lien. *Clay v. Sheftall*, T. U. P. Charlt. (Ga.) 263.

And where such set-offs were judgments acquired against an estate by assignment after the assignee became the debtor of the succession by purchase at the administrator's sale, and the estate was insolvent, as his claim can only be paid contradictorily with the other creditors. *Dwight v. Carson*, 2 La. Ann. 459.

And where the execution was in favor of an administrator, and complainants were distributees and did not tender the amount due on the execution exclusive of their interests, and there were other distributees. *Gibson v. Carreker*, 92 Ga. 801.

And where the administratrix should have made a claim for the same on the settlement with the ordinary. But equitable jurisdiction was retained where the defendants in equity did not object and

consideration they are, if negotiable, valid and enforceable in the hands of bona fide holders.

8 Am. & Eng. Enc. Law, pp. 1018, 1019.

Where a deed to land is made on Sunday, and the money paid, the possession of the land having been previously given to the vendee, the law will leave the parties *in pari delicto*, where it finds them.

Ellis v. Hammond, 57 Ga. 179.

Equity will not enjoin a judgment at law

upon any ground which either was tried, or might have been tried, at law.

Emerson v. Udall, 18 Or. 477, 37 Am. Dec. 604.

A defendant is in diligence bound to plead to an action at law every defense, legal or equitable, which he may have to such action.

Brown v. Boynton, 69 Ga. 754.

A court of equity will not grant relief from a judgment that could have been prevented

consented to an account. *McClure v. Miller*, Ball. Eq. 107, 21 Am. Dec. 522.

For administrator and executor, see also *Cummins v. Bradford*, 16 Ky. L. Rep. 753, *supra*, IV. f.

j. Mutual agreements.

Equity will interpose by injunction in aid of a set-off, if there is a mutual agreement between the parties that one demand will offset the other.

So, an injunction was granted on the ground of set-off where complainant was induced to become a surety on an appeal bond on the understanding that an amount owing by him would be held as a security for his liability on the bond, and notwithstanding such agreement a judgment was obtained against him for that debt and the defendant in the injunction suit was insolvent. *Mattingly v. Sutton*, 19 W. Va. 19.

And where the action was by an assignee of a note made to an individual member of a firm, and assigned after maturity, and the firm had purchased wheat of the payee and agreed that the note should be taken in satisfaction of the same, and promised to give up and cancel the note, and the maker was insolvent, as the assignment was subject to the equitable right of relief. *McDonald v. Mackenzie* (Or.) 14 Pac. 866.

And where the equity of the bill was that the judgment really belonged to A though nominally for the use of B, and that A had agreed to a mutual credit and there was no other remedy, and justice could not be done at law, and the bill was for the settlement of a partnership account. *Graves v. Hull*, 27 Miss. 419.

And where such judgment was obtained by an assignee of a note, and the assignor had purchased a negro from complainant, and, after the note was due agreed that the note should be taken out of the price of the slave but the note was not given up at that time, an injunction was granted on the ground that payment after the day was a plea unknown to the common law and could not there be made; although the statute afterwards allowed the plea, but this did not oust equity of its jurisdiction. *Whittington v. Roberts*, 4 T. B. Mon. 173.

In *Hughes v. McCoun*, 3 Bibb, 254, an injunction on the ground of set-off was granted. It was held that "the subject-matter of relief in this case could have been only available at law under a plea of set-off, a plea unknown to the common law, and long before it was admitted by the statute courts of chancery retained jurisdiction for the purpose of setting off accounts where, under particular circumstances, such as attend the present case, an agreement to set off the one demand against the other is evident. And it is believed courts of chancery still retain this jurisdiction unless where defense is made at law under the statute allowing set-offs."

V. Payment.

a. Failure to defend.

The rule is well established that the defense of payment or credit is a legal defense, and an injunction will not be granted on the ground of payment if the failure to make such defense at law is not excused. But will be granted if good reasons are given for not defending at law.

31 L. R. A.

So, an injunction on the ground of payment was refused because the failure to defend at law was not excused. *Brown v. Toell*, 5 Rand. (Va.) 543, 16 Am. Dec. 759; *Beaudry v. Felch*, 47 Cal. 183; *Benton v. Roberts*, 3 Rob. (La.) 224; *Champion v. Miller*, 2 Jones, Eq. 194; *Clark v. Clapp*, 14 R. I. 248; *Garlick v. Reece*, 8 La. 101; *Gravler v. Roche*, 5 La. 441; *Greene v. Johnson*, 21 La. Ann. 464; *Jones v. Cameron*, 81 N. C. 154; *Lansing v. Eddy*, 1 Johns. Ch. 49; *Lee v. Hubbell*, 20 La. Ann. 551; *Monroe v. McMicken*, 8 Mart. N. S. 510; *Prather v. Prather*, 11 Gill & J. 110; *Prout v. Gibson*, 1 Cranch, C. C. 399; *Rider v. Morse*, 3 MacArth. 186; *Strong v. Hopkins*, 1 Mo. 530; *Turpin v. Thomas*, 2 Hen. & M. 139, 3 Am. Dec. 615; *Yancy v. Fenwick*, 4 Hen. & M. 423; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476; *Brickell v. Jones*, 2 Hayw. (N. C.) 357; *Greenlee v. Gaines*, 13 Ala. 128, 48 Am. Dec. 42.

And an injunction was refused for that reason where the defense was payment and set-off. *Cummins v. Bentley*, 5 Ark. 9.

And where the defense was that the bond upon which the suit was brought had been discharged. *Barnett v. Barnett*, 83 Va. 504.

And where the defense to a mechanic's lien was a tender discharging the lien, and such defense could have been, but was not, pleaded in the action to enforce the lien. *Patch v. Collins*, 158 Mass. 468.

And where the defense was the right to pay the debt in depreciated paper. *Hampton v. Dudley*, 1 J. J. Marsh. 272; *Fannin v. Thomasson*, 45 Ga. 538.

And where the defense was tender of bank notes made a legal tender by statute, and the failure to make such defense at law was not excused. *Dayton v. Commercial Bank*, 8 Rob. (La.) 17.

And where it was claimed a note was to be paid in state paper and not in specie, but the plaintiff at law was a bona fide holder for value before maturity and had no notice of such contract. *Duncan v. Morrison*, 1 Ill. 118. (As to tender in notes issued by plaintiff at law, see also *Robbins v. Mount*, 3 Ga. 74, *supra*, III. d.)

But an injunction was granted against a judgment without discussing the failure to defend, where the intention was to enforce the judgment in specie and the defense was that the consideration was a loan by the plaintiff at law of notes on the Bank of the Commonwealth at their nominal value, and at the time of the loan they were greatly depreciated, although Ky. act 1820 provided that the consideration of such loan shall not be questioned in any suit against the obligor; but this was construed to mean that the bank should accept in payment of such note its own notes at their nominal value or notes of the Bank of the Commonwealth. *Bank of Kentucky v. Hancock*, 6 Dana. 284, 32 Am. Dec. 76.

An injunction was refused on account of the failure to make a defense at law where the suit was on a foreign judgment and the defense was that collections had been made under an execution issued on such judgment in the state in which it was rendered. *Yantis v. Burdett*, 3 Mo. 457.

And where complainant failed to appear and resist an application to renew an execution and plea

but for the negligence of the party seeking it. *Smith v. Hornsby*, 70 Ga. 552.

Judgment can never be void where the court has jurisdiction over the suit, and the right to determine whether the demand on which it was rendered was legal and enforceable or not.

Arnold v. Shields, 5 Dana, 18, 30 Am. Dec. 669.

Where there was a judgment at law against a defendant in Mississippi, and he sought relief

in equity upon the ground that the consideration of the contract was the introduction of slaves into the United States and consequently illegal, a court of equity will not grant relief because the complainant was *in pari delicto* with the other party.

Sample v. Barnes, 55 U. S. 14 How. 70, 14 L. ed. 330; *Creath v. Sims*, 46 U. S. 5 How. 192, 12 L. ed. 111; *Giddens v. Lea*, 3 Humph. 135; *Lucas v. Nichols*, 66 Ill. 41.

payment of the judgment. *Sullivan v. Shell*, 36 S. C. 578.

And where the defense to an action by an administrator against a trustee of the decedent was that such trustee had paid an heir his share without authority, as a probate court had full jurisdiction to settle all estate matters. *Green v. Tittman*, 124 Mo. 572.

And where the judgment sought to be enjoined was on a scire facias, and the defense was satisfaction of the previous judgment. *Nevit v. Hamer*, 5 Smedes & M. 145.

And where the defense was that complainant was entitled to a credit, and that the plaintiff at law held collaterals, and that they should have been transferred to complainant before judgment, and that the original mortgage for the debt on which judgment was rendered was still uncanceled. *McMicken v. Millaudon*, 2 La. 180.

And where the defense was that the plaintiff at law had in his hands for collection demands belonging to complainant, and that more than sufficient amount had been collected to satisfy the demand. *Russ v. Wilson*, 22 Me. 207. (See *Mann v. Bamberger*, 4 Heisk. 496, *infra*, V. c.; *Whales v. Bank of Michigan*, *infra*.)

And where the defense was a credit, and the plaintiff supposed that the complainant would allow his claim after judgment. *Coleman v. Goyné*, 37 Tex. 552.

And where the defense was that the plaintiff's demand was unconscientious, and that complainant was entitled to credit for payment. *Bateman v. Willoe*, 1 Sch. & Lef. 201.

And where the defense was that complainant was an indorser, and that in another action against him and others a judgment was rendered on the same day in his favor on the same note, and that in the latter action a forthcoming bond was given and forfeited, which was claimed to be a satisfaction of the judgment against such indorser. Besides, a satisfaction by the substitution of new judgment on the bond for the original judgment was not a discharge. *Benton v. Crowder*, 7 Smedes & M. 185.

And an injunction on the ground of payment will be refused if complainant is negligent in not making such defense at law. *Semple v. McGatagan*, 10 Smedes & M. 98; *Slack v. Wood*, 9 Gratt. 40; *Floyd v. Swayne*, 6 Johns. Ch. 479; *Allman v. Owen*, 31 Ala. 167; *Collins v. Jones*, 6 Leigh. 530, 29 Am. Dec. 216; *Cabell v. Roberts*, 8 Rand. (Va.) 580; *Foster v. Wood*, 6 Johns. Ch. 87; *Grindol v. Ruby*, 14 Ill. App. 439; *Harding v. Hawkins*, 141 Ill. 572; *Kinney v. Ogden*, 3 N. J. Eq. 168; *Lott v. Michel* (Miss.) 16 So. 794; *Norris v. Fristoe*, 3 La. Ann. 646; *Mellendy v. Austin*, 69 Ill. 15; *McRae v. Purvis*, 12 La. Ann. 85; *Rudman v. Bockel*, 28 La. Ann. 276; *Sinking Fund Comrs. v. Patrick*, Smedes & M. Ch. 110; *Tutt v. Ferguson*, 13 Kan. 45.

So, an injunction on the ground of payment was refused on account of negligence in not making such defense, where there was also the remedy of new trial, appeal, or recordari. *Woodfin v. Smith*, 1 Dev. & B. Eq. 451.

And where there was a remedy at law by rule to stay execution. *Gorsuch v. Thomas*, 57 Md. 334. 31 L. R. A.

And where the defense was that a joint defendant had paid off the debts in judgment, and had the same assigned to a third party for his own use. *Stein v. Benedict*, 83 Wis. 603.

And where the defense was accord and satisfaction at law. *Armaworthy v. Cheshire*, 2 Dev. Eq. 234, 34 Am. Dec. 273.

But an injunction on the ground of payment or satisfaction, accord or acquittance will be granted if such defense is prevented by the conduct by fraud of the prevailing party.

So, an injunction on the ground of payment was granted where such defense was prevented by conduct of creditors. *Paddock v. Palmer*, 19 Vt. 581; *Dickenson v. McDermott*, 13 Tex. 248; *Gates v. Steele*, 58 Conn. 316.

And where the defense at law was prevented by reason of the plaintiff therein obtaining the note before maturity, and while it was so held the complainant paid the payee who claimed that it was at his house, and subsequent to maturity the payee's brother obtained an assignment of the judgment, but which was in pursuance of a fraudulent scheme and subject to complainant's equities. *Barhorst v. Armstrong*, 42 Fed. Rep. 2.

And where the defense was payment after the suit was filed, and complainant was led to believe that the action would be dismissed. *Bigham v. Gorham*, 52 Ga. 329.

And where the defense to an alternative judgment of replevin was that during the trial of such action the property was all returned, and evidence of such fact was refused on the trial, and a motion for new trial was prevented by fraudulent conduct of plaintiff's attorney agreeing to accept a compromise which he refused to carry out. *Thompson v. Laughlin*, 91 Cal. 313.

And where complainant in the injunction suit was a receptor in attachment for the amount of the debt, and no allowance was made for payments, and he was prevented from making a motion for new trial by representation that the judgment was paid. *Paddock v. Palmer*, 19 Vt. 581.

And where the debt in suit was settled under an award by the execution of a note with securities, and a judgment was taken for the debt and costs, and plaintiff at law did not surrender the note. The injunction was granted on the ground of surprise. *Sneed v. Town*, 9 Ark. 535.

But an injunction was refused against a judgment where complainant was a joint obligor and paid one half of the debt, and the obligee subsequently informed him that he would not be required to pay any more, as such a declaration preventing a defense was without consideration and not binding, and did not constitute a defense. *Strong v. Hopkins*, 1 Mo. 530.

And an injunction on the ground of payment will be granted where complainant is entitled to credits existing before judgment, and which fact could not have been discovered by the use of reasonable diligence in time to have been used as a defense to the action, or where sufficient excuse is given for not making the defense at law.

So, an injunction was granted where evidence of payment was discovered after the trial. *Hubbard v. Hobson*, 1 Ill. 147; *Winchester v. Jack-*

Atkinson, J., delivered the opinion of the court:

In this state, judgments conclude the parties, not only upon the matters of fact which were expressly involved in the litigation, but also upon all that might have been called in question under the pleadings in the case. If to an ordinary common-law action the party

defendant has a good defense, of the benefit of which he was not deprived by the fraud of the adverse party, unmixed with negligence upon his part, and he fail to make that defense, the judgment concludes him, as though it had been expressly put in issue and expressly adjudged against him. This is the general rule prevailing elsewhere, as well as here; but to

son, 3 Hayw. (Tenn.) 306; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423.

And where the complainant in the injunction suit was a surety, and had no knowledge at the time of the judgment of the payment. McGeehee v. Gold, 63 Ill. 215.

And where the defense of a deputy sheriff to an action for the failure to return an execution was that the debt was paid and the failure to defend at law successfully was due to complainant's ignorance of the settlement. Harrison v. Harrison, 1 Litt. (Ky.) 137.

And where the judgment of the supreme court directed a sale and application of the proceeds to two persons, and the debt of one of them had been paid before the appeal was taken, of which payment the other party had no knowledge. Massie v. Mann, 17 Iowa, 131.

In Price v. Fuqua, 4 Munf. 68, where an executor found evidence of a receipt against the debt after the judgment, and failed to make a defense of the statute of limitations under the mistake of counsel, and there was misconduct of the jury, an injunction was granted.

In Countess Gainsborough v. Gifford, 2 P. Wms. 424, it was said that after a judgment, if a receipt was found under the plaintiff's own hand for the debt, equity will grant relief.

So, an injunction on the ground of payment was granted where sufficient excuse was given for not defending at law. Winchester v. Jackson, and Hubbard v. Hobson, *supra*; Harvey v. Seashol, 4 W. Va. 115; Wales v. Bank of Michigan, Harr. Ch. (Mich.) 308; McGeehee v. Gold, *supra*; Terrill v. Southall, 3 Bibb, 458; Brown v. Luehrs, 79 Ill. 575; Price v. Fuqua, *supra*; Reed v. Harvey, 23 Ark. 44; Wilday v. McConnell, 63 Ill. 278.

And where a defense that a claim had been satisfied by reason of another judgment against two members of a firm of which complainant was a member, and of which defense complainant was ignorant in time to have used the same, but was refused as to one third of the judgment, as complainant was liable for that amount. Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423.

And where the defense was that the plaintiff at law had collected sufficient on collaterals to secure the debt, and excuse was given for not making such defense at law. Wales v. Bank of Michigan, Harr. Ch. (Mich.) 304. See McMicken v. Millaudon, 2 La. 180.

And where the defense was that the bond in suit had been satisfied, and such defense was prevented by the belief that the action was upon another bond. Mason v. Nelson, 11 Leigh, 227.

b. Defense made.

An injunction will be denied if a defense of payment is used at law or is attempted to be asserted and fails, or if there is a remedy by appeal, error, or the like.

So, an injunction on the ground of payment was refused on account of trial at law where no equitable ground was shown. Huston v. Ditto, 20 Md. 305.

And where the bill in chancery stated that complainant was now able to prove his defense of payment to the obligee of a bond before notice of an assignment, but did not suggest fraud or ask dis-

covery. Norris v. Hume, 2 Leigh, 334, 21 Am. Dec. 631.

And where the defense was that a sheriff was released from liability for not returning an execution by acts of the creditor in staying a previous execution, and that the debt in the replevin bond on which this execution issued was settled. Harrison v. Harrison, 1 Litt. (Ky.) 137.

And where no showing was made that the result would be changed in the injunction suit. Deaver v. Erwin, 7 Fred. Eq. 250.

And where the defense was payment or accord and satisfaction, which was unsuccessful at law on account of incompetency of a witness, and the incompetency existed at the time of the injunction suit. Williams v. Carr, 4 Colo. App. 368 (1894).

And where the debt had been settled and the court refused to admit the defense, as there was a remedy by appeal or writ of error. Dunn v. Fish, 8 Blackf. 407.

And where the defense was payment, and there was a remedy at law by motion to vacate. Ede v. Hazen, 61 Cal. 360.

And where the defense at law was ruled out on the ground that relief should be had in equity, and complainant failed to take exceptions and prosecute a writ of error. Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442.

And where the judgment was in ejectment by a mortgagee and the defense was part payment, but the plaintiff in ejectment was not summoned, and complainant might have filed a bill for redemption. Todd v. Pratt, 1 Harr. & J. 465.

In Stark v. Thompson, 3 T. B. Mon. 296, it was said an injunction would be refused where the defense was payment, and which had been tried at law, and no ground for equitable interference was shown.

An injunction was refused where the defense was that credits should have been allowed, and it is not shown but what they were contested on the trial at law. Hahn v. Hart, 12 B. Mon. 428.

c. Equitable defenses.

An injunction was granted against a judgment where the same was by default on an indorsement of a note of \$80, which note was only given to plaintiff at law under a parol agreement as a security for a loan of \$4, and which sum had been tendered before judgment. Smith v. Coble, Phil. Eq. 332.

And where the judgment was on a claimant's bond given by a trustee for creditors for property levied upon under a judgment rendered after the deed of trust, and such property had been taken from him under executions on prior judgments, as such defense could not be made at law. Ferriday v. Selcer, Freem. Ch. (Miss.) 258.

And where the defense was that the note was paid, and complainant, though not a party to the action, was contingently liable as indorser, and the note was obtained through fraud by the plaintiff at law. Hager v. Buechler, 6 Ill. App. 462.

And where the defense was that complainant had satisfied the note in judgment by executing and paying a note given by him to a third party to whom the plaintiff at law was indebted, although this defense was not made at law, as the remedy in equity was concurrent. "At common law 'payment after the day' could not be pleaded in an

this, in some of the states, exceptions have been allowed, and one of these exceptions is in favor of a defense that the debt was based upon a gaming consideration. Mr. High in his work on Injunctions (§ 285) uses this language: "Where the consideration for the contract on which the action at law is founded was money lost at gaming, and judgment is ob-

tained against defendant, courts of equity are inclined to be somewhat more liberal in the exercise of their restraining jurisdiction than in ordinary cases, and upon considerations of public policy and the necessity of the prevention of gaming, they will generally restrain proceedings under the judgment." He cites as authority for the text the cases of *White v.*

action at law. The only relief was in chancery. The statute authorizing 'payment after the day' to be pleaded at law is cumulative, not exclusive." *Harlan v. Wingate*, 2 J. J. Marsh. 138.

And where the defense was payment, and that the note in suit was given individually by the personal representative of an estate on the understanding that it was not to be payable unless that amount should be due and the amount due had been paid, as it is doubtful if such a defense could have been made at law. *Breeden v. Grigg*, 8 Baxt. 163.

And where a judgment was on a negotiable note held apparently by assignee but held for collection only, and the beneficial owner had been paid, and insolvent agents of plaintiffs at law, contrary to instruction, attempted to collect the same. It did not appear by the record that complainant had an opportunity to make proof of payment, and the injunction was granted on the ground of fraud in the use of the judgment. *Perry v. Siter*, 37 Mo. 273.

And where the defense of garnishees was that the same debt had been paid on a judgment in favor of other parties, and the judgment attempted to be enjoined was unauthorized by the plaintiff who disclaimed all interest in the matter, and complainant was not guilty of negligence. *Marchman v. Sewell*, 93 Ga. 653.

And where the plaintiff at law had sufficient collaterals in his hand to discharge the debt, and the injunction suit was on the ground of payment and for discovery and for an account and set-off. *Mann v. Bamberger*, 4 Helsk. 486. See *Russ v. Wilson*, 22 Me. 207, *supra*, a.

And where the defense was accord and satisfaction moving from a stranger not a privy to the bond in suit, as such defense could not be pleaded at law. *Stark v. Thompson*, 3 T. B. Mon. 296.

d. Summary proceedings.

An injunction on the ground of payment will be granted where the judgment is in the nature of a summary proceeding and an opportunity is not given for making a defense.

So, an injunction on the ground of payment was granted where the same was claimed against a judgment *via ordinaria*, and was allowed for the amount to which complainant was entitled. *Savoie v. Thibodeaux*, 28 La. Ann. 169.

And where there was a defense of payments and credits against a sale on a summary judgment. *Ludeling v. Frelsen*, 4 La. Ann. 534.

And where a sale was *via executiva* and the note had been paid and the plaintiff in that action had obtained fraudulent possession of the note with knowledge. *Halsey v. Lange*, 28 La. Ann. 248.

But an injunction was refused where the defense to a summary judgment on a replevin bond was payment, but such payment was made to a person not authorized to receive it. *Chinn v. Mitchell*, 2 Met. (Ky.) 92.

e. Pleading bill of discovery.

An injunction will be refused if the bill of complaint is not specific and definite, or if for a discovery, and it is not filed in time.

So, an injunction was refused where, in an action of nullity, a payment was not alleged to have been made after the judgment was rendered. *Todd v. Paton*, 12 La. Ann. 88.

31 L. R. A.

And where bill of discovery was filed to obtain evidence of set-off and the bill was not filed before judgment. *Powell v. Stewart*, 17 Ala. 719.

And where the bill of complaint does not allege whether the action was upon a note which was a specialty or simple contract, or if on the latter a defense could have been made at law. *Craig v. Whips*, 1 Dana. 375.

VI. Conditions.

Injunctions on the ground of nonperformance of conditions have generally been refused, where such defense was made at law, or might have been but was not.

So, an injunction was refused on a defense having been made at law where the defense to an action of covenant was that a condition precedent had not been performed. *Brown v. Street*, 6 Rand. (Va.) 1.

And where the defense in ejectment was that the several covenants in a lease had been performed and there was one against which there was no equitable ground for relief, although there was as to all the others. *Nokes v. Gibbon*, 3 Drew. 681, 3 Jur. N. S. 726, 26 L. J. Ch. 433.

And where the defense was that the condition of the judgment had been performed and was tried on a rule to show cause why a judgment in ejectment should not be enjoined, and was the same as the ground for injunction, and was *res judicata*. *Gordinier's Appeal*, 89 Pa. 628.

And an injunction was refused for failure to defend at law where the defense was that a parol condition was omitted from a written contract and there was no charge of fraud, as such a defense would not be available either at law or in equity. It was said that if he could have made any defense, it was a legal one. *Gatlin v. Kilpatrick*, N. C. Law Repos. 524, 6 Am. Dec. 557.

And where the defense was that a plaintiff at law had not performed his part of the contract sued upon. *Buckmaster v. Grundy*, 8 Ill. 626.

An injunction was refused where complainant in the injunction suit failed in the partition suit because a decree that he desired to use in evidence did not describe the land and at the time of the trial the complaint in the preceding case was lost, as he should have procured a continuance. Besides he was guilty of laches in seeking equitable jurisdiction. *Ratliff v. Stretch*, 130 Ind. 282.

VII. Partition and dower.

An injunction was refused where full relief could be had at law, although such defense was rejected and appeal taken, which was pending when the suit for injunction was filed. *Hopkins v. Medley*, 99 Ill. 509.

And an injunction was refused for failure to defend at law where the defense against an assignment of dower was equitable estoppel, which might have been made at law. *Milliken v. Dockray*, 80 Me. 82.

VIII. As to party.

An injunction was refused on account of the right to defend at law which was not asserted where the defense was that the plaintiff at law was not a corporation as alleged. *Mahan v. Accommodation Bank*, 26 La. Ann. 34.

And where the defense was that the action was

Washington, 5 Gratt. 645; *Woodson v. Barrett*, 2 Hen. & M. 80, 3 Am. Dec. 612; *Skipwith v. Strother*, 3 Rand. (Va.) 214. It will be seen

from an examination of the decisions referred to in support of the text that the cases cited by the author were from Virginia, and are predi-

premature and petitioners at law could not sue, and that the holders of a judgment were exhausting an estate to the injury of complainants who were legatees. *Lafon v. Desessart*, 1 Mart. N. S. 71.

An injunction was refused on account of the matters having become *res judicata*, where the defense was that the party controlling the judgment was not the party in interest, which was made in a prior injunction suit. *Moody v. Harper*, 38 Miss. 599; *Tompkins v. Drennen*, 56 Fed. Rep. 694, 13 U. S. App. 308.

And where the defense was want of service of process, and that the plaintiff was not the party in interest, and that the notes in suit were obtained by fraud and duress, and there had been a prior injunction suit against the same judgment. *Bass v. Nelms*, 56 Miss. 502.

And an injunction was refused where the only ground for injunction was that there were new parties to the injunction suit, as "new parties without new facts, changing the rights of the plaintiffs in the common-law judgment to have the land, in the ears of equity are but 'sounding brass and tinkling cymbal' to which she gives no heed." *Robinson v. Veal*, 78 Ga. 301.

For party, see *Gatewood v. City Bank*, 49 Ga. 45; *Phillips v. Walker*, 48 Ga. 55; *French v. Shotwell*, 5 Johns. Ch. 555, *supra*, III. d; *Hager v. Buechler*, 6 Ill. App. 462; *Perry v. Stite*, 37 Mo. 273; *Marchman v. Sewell*, 98 Ga. 653; *Stark v. Thompson*, 3 T. B. Mon. 296, *supra*, V. c; *Hauser v. Mann*, 1 Murph. 410, *supra*, II. b; *Donelson v. Young*, Meigs, 155, *supra*, II. c; *Radcliffe v. Varner*, 56 Ga. 222, *supra*, IV. a. See *supra*, IV. b, *Parties; infra*, X. *Nonliability in general*.

An injunction was refused because the grounds therefor had been previously tried, against an action for tort for assisting a debtor to remove his property in order to prevent a levy where the defense was that the complainant was the owner of the property. *Meredith v. Johns*, 1 Hen. & M. 585.

And where the defenses that the plaintiffs at law were not the owners of the judgment, and payment, and bar of the statute of limitations, had been made, on a rule to show cause why the execution should not be quashed, as the judgment discharging the rule was equivalent to a judgment dissolving an injunction. *Trescott v. Lewis*, 12 La. Ann. 197.

And where the defense in an action of trespass for damming water against plaintiff was that complainant was the owner of the land in dispute, and that since the judgment he had acquired the title to the same; but on affirmance the supreme court had held that so much of the verdict as related to the title might be disregarded, and so much of it as assessed damages for the trespass ought not to be disregarded. *Peytavin v. Winter*, 8 La. 271.

IX. Title to property.

An injunction was refused because the ground therefor was a legal defense and should have been made at law, where the defense against an action by a tutor for the balance of an account due, was that complainant was entitled to the property or its usufruct during her life. *Thibodeaux v. Thibodeaux*, 5 La. Ann. 598.

And where the action was by the husband's administrator against the widow for rent and the defense was that the husband had no title to the land. *Kirby v. Kirby*, 70 Ala. 370.

And where the action was for rent against a tenant and the defense was that he had bought the property on an execution against his landlord 31 L. R. A.

prior to such action. *Casey v. Gregory*, 13 R. Mon. 505, 56 Am. Dec. 581.

And where the defense to an action for the price of a wagon was that the plaintiff was not the owner of the same. *Menfee v. Myers*, 33 Tex. 690.

And where the defense in replevin was that the complainant held the goods merely as bailee of plaintiff. *Davis v. Baylis*, 51 Iowa. 435.

And where the defense was that the title of the prevailing party in ejectment was invalid. *Ballance v. Forsyth*, 65 U. S. 24 How. 183, 16 L. ed. 738.

An injunction was refused where a suit of claim and delivery had been dismissed for want of jurisdiction, by a justice after the plaintiff therein obtained the property, and a judgment was rendered in the alternative for the return of the property or its value, and the plaintiff claimed that if he paid the money over he would be without remedy. *Powell v. Allen*, 108 N. C. 46.

And where the ground for injunction was that the defendant in a replevin suit had no title to the property, but that it belonged to a partnership of which the plaintiff at law was a member, and that the property had been appropriated for firm purposes, and that the firm was insolvent. *Bowman v. McGregor*, 6 Wash. 118.

And where the defense was that the plaintiff at law had no right or title to the claim sued upon, which was an alleged surplus after a foreclosure sale. *Tompkins v. Drennen*, 56 Fed. Rep. 694, 13 U. S. App. 308.

And where the defense in trover was that the property was owned by complainant in the injunction suit. *Haughy v. Strang*, 2 Port. (Ala.) 177, 27 Am. Dec. 648.

And where the defense was that the title of the personal property recovered in detinue was in the complainant in the injunction suit. *Glasgow v. Flowers*, 1 Hayw. (N. C.) 238.

And where the defense to an action for conversion was that the plaintiff at law had no title to the property, but the bill did not show that a defense could not have been or was not made at law. *McClanahan v. Stovall*, 6 Lea. 506.

X. Nonliability in general.

An injunction was refused because the grounds therefor could have been and were not used as a defense in the action at law, where the defense was nonliability of a shareholder. *Hardinge v. Webster*, 1 Drew. & S. 101, 6 Jur. N. S. 88, 29 L. J. Ch. 161.

And where the defense was that the notes in the action should never be collected or enforced against complainant. *Harmon v. Harmon*, 51 Fed. Rep. 113.

And where the action was in assumpsit for money had and received, against which every equitable defense may be had upon the general issue. *Tompkins v. Drennen*, 56 Fed. Rep. 694, 13 U. S. App. 308.

And where the defense of rescission of contract was rejected at law. The remedy was by appeal. *Moore v. Dial*, 3 Stew. (Ala.) 157.

And where the defense was that the note in suit was not given for a debt which had inured to complainant's separate benefit, and that she was a married woman and the failure to make a defense at law was not excused. *Hall v. Carroll*, 10 La. Ann. 412.

And where the answer of a married woman was withdrawn by an attorney, who answered for her and her husband, at her husband's request, and a judgment was taken by default without her knowledge. *Cayce v. Powell*, 20 Tex. 767, 73 Am. Dec. 211.

cated upon a statute of that state which expressly declares judgments rendered upon a gaming consideration void. A similar statute

was of force in Kentucky, and while it was of force the courts of that state likewise held that, the judgment being void by the statute,

And where the defense was that the attachments were improperly issued under Md. act 1831, chap. 271, providing for attachment proceedings on judgments. *Windwart v. Allen*, 18 Md. 196.

And where the action was on a constable's receipt, and he did not make the defense at law that the money was not collected, believing that the plaintiff at law would have to prove the collection before he could obtain judgment. This mistake of law was no ground for equitable interference. *Meem v. Rucker*, 10 Gratt. 506.

And where the defense against a motion for a penalty incurred by a clerk on nonpayment of taxes on process was that he had used due diligence to obtain a settlement with a commissioner of the revenue. *Auditor of Public Accounts v. Nicholas*, 2 Munf. 31.

And where the defense of a surety on a sheriff's bond was that the sheriff was prevented from returning an execution on account of the death of a party in whose hands it had been placed. *Bierne v. Mann*, 5 Leigh, 364.

And where the defense was that the sheriff was not indebted as shown by a settlement and judgment thereon. *Price v. Johnson County*, 15 Mo. 433.

And where a school district declined to defend on the ground that the claim was just, and a taxpayer sought to have the judgment enjoined. *Skirving v. National L. Ins. Co.* 59 Fed. Rep. 742, 19 U. S. App. 442.

And where the defense was that a village was not liable for an accident, as it had no funds and was unable to procure the means to keep a bridge in repair. *Carney v. Marseilles*, 136 Ill. 401.

And where the common council directed the city attorney to withdraw the defense in an action by a contractor against the city and a taxpayer brought a suit for an injunction on the ground that the charge for extras was illegal, but fraud was not shown. *Chaffee v. Granger*, 6 Mich. 51.

And where the defense was an agreement to extend the time of the payment of the debt, and such agreement was made before the judgment was rendered. *Bartlett v. Peck*, 5 La. Ann. 670.

And where a defense to a suit of forcible entry and detainer was that the lease had been extended. *Curd v. Farrar*, 47 Iowa, 504.

And where a defense to a scire facias was that the defendant was entitled to the benefit of Ga. act 1868 entitled "An Act for the Relief of Debtors, and to Authorize the Adjustment of Debts upon Principles of Equity." *Dibble v. Pease*, 59 Ga. 618.

And where the defense was the statute of limitations. *Eatis v. Patton*, 3 Yerg. 382.

And where the defense was that the complainant was not a member of the partnership firm which issued the bill in controversy. *Protheroe v. Forman*, 2 Swanst. 227.

And where the note sued on was made by complainant's partner after a dissolution of the firm, and complainant was negligent in not making such defense at law. *Leggett v. Morris*, 6 Smedes & M. 723.

And where the defense against a summary judgment on an injunction bond was that the judgment enjoined had become dormant and could have been had under N. C. Rev. Stat. chaps. 32, 33, providing that proceedings on injunction bonds shall be had under the same rules, regulations, and restrictions as bonds on appeal from the county to the superior court. *McReynolds v. Harshaw*, 2 Ired. Eq. 195.

And where the defense against a sci. fa. on a mortgage and two nihilis was minority, and the complainant was of age at the time of judgment and slept upon his rights ten years until the claim was barred by limitation before the injunction suit was filed. *Clark v. Bond*, *Wright* (Ohio) 282.

But an injunction was granted where the debt was barred by limitation and the action at law was on a foreign transcript, notwithstanding there was a remedy by motion in the courts of Illinois where the judgment was rendered, as this did not prevent the exercise of equitable jurisdiction in the state where the suit was brought. *Brown v. Parker*, 28 Wis. 21.

In *Hampson v. Weare*, 4 Iowa, 13, 66 Am. Dec. 116, where the defense against an execution was that private property of the members of a corporation was exempt, and that statutory proceedings had not been followed, and that the members were only liable for the amount of their stock, and then only on certain conditions, an injunction was refused, as these were matters of defense, but was granted because the judgment was against the corporation and execution did not follow the judgment.

An injunction was refused on grounds which had been asserted in defense of the action at law, where the defense was that the right to dividends on insurance policies was forfeited. *Continental L. Ins. Co. v. Currier*, 58 Vt. 229.

And where the defense was that credit was given exclusively to one partner and it was not intended that the other should be looked to for payment. *Smith v. Durrett, Sneed* (Ky.) 236, 2 Am. Dec. 714.

An injunction was granted against a judgment on sufficient excuse having been shown for failure to defend, where the note sued upon was made in a firm name long after complainant had left the firm. *Baltzell v. Randolph*, 9 Fla. 366.

And where complainant was a member of a partnership firm and the note in suit was given for a debt of the predecessors of the firm, and complainant did not know such fact until after judgment. *Vennum v. Davis*, 35 Ill. 563.

An injunction was granted against a judgment, where the defense was that although the debt was for necessities it was on a contract made by a drunkard after the appointment of his guardian, who was not a party to the suit. *Devin v. Scott*, 34 Ind. 67.

An injunction was granted against a judgment where the grounds were that complainants were taxpayers and the judgment was on a contract in favor of a teacher who had no certificate as required by law, and complainants were not parties to that action. *Barr v. Deniston*, 19 N. H. 180.

In *Pendleton v. Taylor*, 77 Va. 580, an injunction was granted against a judgment where the action was for having collected a bond belonging to an estate, and such bond had not been collected by complainant but by the plaintiff at law. The question as to failure to defend was not made.

For injunctions in cases in favor of or against "executors and administrators;" in "ejectment cases;" and in "summary proceedings in forcible entry and detainer," see note to *Parsons v. Hartman* (Or.) 30 L. R. A. 98, "Injunctions against execution sales or other proceedings under final process."

For negligence in asserting a defense generally, see note to *Payton v. McQuown* (Ky.) ante, 33, "Negligence as a cause for and as a bar to injunctions against judgments."

Foreinjuncting judgments against or in favor of sureties, see note to *Michener v. Springfield Engine & Thresher Co.* (Ind.) ante, 59.

Matters in regard to defenses of bankruptcy are not included in this note. I. T.

a court of equity will enjoin proceedings under such judgment. See *Clay v. Fry*, 3 Bibb, 248, 6 Am. Dec. 634. In this state we have no statute which renders void judgments founded on debts based upon a gaming consideration, and, if that defense be relied upon to defeat an action, it must be pleaded as any other at common law; and, if the defendant suffer judgment to go against him, the debt of the plaintiff stands purged of its impurity, and the defendant is thereafter concluded. So far as the moral

aspect of the two defenses is concerned, usury and gaming consideration stand upon the same footing, and in this state they stand upon the same legal footing with respect to the conclusiveness of judgment based thereon. In neither case is the judgment rendered void, and after judgment the defendant is concluded, either as to usury or gaming consideration. See *Owen v. Gibson*, 74 Ga. 465.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

Nathaniel JARVIS, Jr., *Respt.*,

v.

MANHATTAN BEACH COMPANY, *Appt.*

(148 N. Y. 652.)

Information that a certificate of stock is in a condition for transfer, given by a person in charge of the office of a corporation in response to an inquiry on the faith of which a broker guaranteed its genuineness, estops the corporation from denying its liability to indemnify him or his assignee against loss on account of the fact that the certificate was spurious and worthless.

(March 3, 1896.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York County Circuit in favor of plaintiff in an action brought to recover damages for defendant's refusal to permit a transfer on its books of certain certificates of its stock. *Affirmed.*

The facts are stated in the opinion.

Mr. William J. Kelly, for appellant:

At the close of the plaintiff's case the defect in his title was apparent. His vendor could transfer no better title than he himself possessed.

A complete transfer of shares in a corporation involving a novation of the contract of membership can be effected only in the manner prescribed by the charter or articles of association.

1 Morawetz, *Priv. Corp.* § 169; *Mechanics' Bkg. Asso. v. Mariposa Co.* 3 Robt. 395; *Purchase v. New York Exch. Bank*, Id. 164.

There is no equity, no question of estoppel which can work against the defendant in this case.

Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *Bank of Commerce v. Union Bank*, 3 N. Y. 280.

The original certificate was issued and signed by the company's officers in the regular course of business and without knowledge that Big-nell was a fictitious character.

Shipman v. Bank of the State, 126 N. Y.

318, 12 L. R. A. 791; *Irving Nat. Bank v. Alley*, 79 N. Y. 536; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* 137 N. Y. 231, 19 L. R. A. 331. •

The transfer is not a part of the certificate, is something the corporation cannot guarantee, nor has it in its possession stock books or any other means by which it could be assumed to testify to the genuineness of a third party's signature.

Manhattan Beach Co. v. Harned, 27 Fed. Rep. 486; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 23 L. R. A. 584.

There is no estoppel arising from the statements alleged to have been made at the company's office.

Iselin v. Henlein, 16 Abb. N. C. 73; *Bigelow, Estoppel*, 4th ed. 559.

There can be no estoppel when the party claiming one is obliged before changing his position to inquire for the existence of other facts to make the inducements sufficient and to rely upon them also in acting.

Bigelow, Estoppel, 4th ed. p. 622; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *People v. Bank of North America*, 75 N. Y. 548; *Manhattan Beach Co. v. Harned*, 27 Fed. Rep. 484.

Messrs. Charles Steele and William D. Guthrie, for respondent:

An examination was a duty because it was the obvious dictate of good sense as the easiest and safest check upon the agent's conduct.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30, 59.

Ignorance is unavailable to the defendant, for it could only have existed by reason of the most inexcusable carelessness which would render defendant liable to precisely the same extent as if they had knowingly issued the spurious certificate.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; *Shipman v. Bank of the State*, 126 N. Y. 818, 12 L. R. A. 791; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 23 L. R. A. 584; *Coggill v. American Exch. Bank*, 1 N. Y. 113, 49 Am. Rep. 310; *Western U. Teleg. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047.

Checks and drafts drawn to fictitious payees may be legally indorsed by the real party in

NOTE.—In connection with the above case, see also the following case of *Knox v. Eden Musee American Co.* (N. Y.) post, 779, as well as the note to *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* (N. Y.) 19 L. R. A.

331, on the liability of a corporation for fraud or forgery of its officers in the issue of stock.

the fictitious name. In principle this rule is equally applicable to stock certificates.

Robertson v. Coleman, 141 Mass. 231, 55 Am. Rep. 471; *Emporia Nat. Bank v. Shotwell*, 85 Kan. 360, 57 Am. Rep. 171; *Forbes v. Espy*, 21 Ohio St. 474; *Dodge v. National Exch. Bank*, 30 Ohio St. 1.

No privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury.

Bank of Batavia v. New York, L. E. & W. R. Co. 106 N. Y. 195, 60 Am. Rep. 440; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

When a certificate of its stock was presented for transfer or for information as to its transferability, the defendant was bound to determine upon its own responsibility whether or not such certificate was in all respects a genuine and valid certificate of stock, whether or not the person therein named was a stockholder in the company, and whether or not the certificate, in the form presented, was acceptable for transfer.

Western U. Teleg. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047.

What difference does it make in legal effect whether Fox & Co. were misled by an actual transfer or by the defendant's statement that it would transfer when requested.

Continental Nat. Bank v. National Bank of the Commonwealth, 50 N. Y. 575; *Clews v. Bank of New York Nat. Bkg. Assn.* 103 N. Y. 398.

Relying upon the defendant's representation that it would accept the certificate for transfer, Fox & Co. indorsed and sold it, and became liable for its value. After the opportunity for arrest and detention of the criminal was past the defendant sought to retract its statements. It is estopped from doing so.

Manhattan Beach Co. v. Harned, 27 Fed. Rep. 484; *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 575; *Justh v. National Bank of the Commonwealth*, 56 N. Y. 478.

O'Brien, J., delivered the opinion of the court:

The plaintiff in this action recovered a judgment for damages sustained by his assignors in consequence of the defendant's refusal to transfer a certificate for 100 shares of its capital stock upon request, whereby the holders of the certificate were compelled to purchase other shares of equal amount. The defendant had a capital stock of \$5,000,000 divided into 50,000 shares of \$100 each. A large portion of the stock was issued, and the certificates were listed upon the New York Stock Exchange, and were the subject of purchase and sale by the public. The certificates were signed by the defendant's president and assistant treasurer, and in order to guard against frauds, countersigned and registered by the Central Trust Company, which acted as registrar of transfers, in order to authenticate the genuineness of the certificates. The defendant had an office in the city of New York, where the transfers of its stock were made, and a transfer clerk was in attendance there to make the transfers. On the 30th of September, 1882, this transfer clerk delivered to a firm of brokers in New York, in the ordinary course of

business, a certificate for 100 shares of the defendant's capital stock, to sell for his account. The certificate bore the genuine signatures of the defendant's president and assistant treasurer, and was countersigned by the Central Trust Company, with a certificate of its registration on the day of its date indorsed thereon. It was in all respects regular in form, and carried upon its face every assurance of genuineness, and certified that one B. Bignell was the owner of 100 shares of defendant's capital stock. What purported to be the signature of Bignell was indorsed thereon, under the blank form of transfer; and this signature was witnessed or purported to be witnessed, by the transfer clerk, who presented it to the brokers. It appeared that this certificate was in fact spurious, fabricated by the transfer clerk over the genuine signatures of the president, assistant treasurer, and registrar, upon the blanks used by the defendant in issuing genuine certificates; that Bignell was not a holder of any stock; and that his name upon the paper was a mere fictitious and fraudulent device. It was shown that, by the rules of the stock exchange, certificates sold there must either stand in the name of some member, and be indorsed in blank by him, or, if standing in the name of some other person, and indorsed in blank by him, must be guaranteed by a member of the exchange. The purpose of this rule is to give to the purchaser the security of the indorsement or guaranty of some member, and hence the selling broker becomes a surety for the validity and genuineness of the certificate. The defendant had knowledge of this rule or custom, but did not follow it in practice. When making transfers of stock, in case the signature of the holder was unknown to it, then it had to be attested by a witness whom it did know. In the present case the signature indorsed on the certificate was attested by its own transfer clerk, whose signature was well known; and so the certificate was apparently in a condition for transfer, under the practice adopted at the defendant's office. The brokers to whom the certificate was presented by the transfer clerk sold it in the open market for his account, but were, as already stated, obliged to guarantee its genuineness. In order to ascertain whether they could safely do so, they sent the certificate by a messenger, first to the office of the Central Trust Company, the registrar, and then to the defendant's office, to inquire whether it was genuine and acceptable for transfer. The Central Trust Company informed him that the certificate was properly registered, and the person in charge at the defendant's office informed him, as the plaintiff claims, that the certificate was all right for transfer. The brokers did not procure it to be transferred, but, being thus assured that it was in a condition for transfer at any time, they made the guaranty upon it, and sold it for the account of the transfer clerk, paying to him the proceeds, retaining only the regular commissions. Subsequently, and about two years after, when it was ascertained that the certificate was spurious and worthless, the brokers were obliged to make their guaranty good, and took it back from the purchaser; procuring and delivering to him a genuine certificate, which they purchased in the market. Upon the re-

fusal of the defendant to recognize the certificate or indemnify the brokers for their loss, they assigned the right of action to the plaintiff. In March, 1884, the transfer clerk, who had been in the defendant's employ for several years, absconded, and then the defendant, for the first time, ascertained from an examination of the books that for years he had been engaged in fraudulently issuing certificates of its stock, including the one in question. The evidence tended to show that prior to his departure he had the sole charge of the business of transfers, and of the stock ledger and transfer books; that practically no supervision was exercised over his conduct, and no examination made of the books, though, if made, the fraud of the clerk would have appeared, as it did when the examination was made after the absconding. On these facts and circumstances the case was submitted to the jury, and a verdict was rendered in favor of the plaintiff for the amount which it cost the brokers to replace the spurious certificate with a real one, with the interest, and the general term has affirmed the judgment.

The principles upon which a corporation may be held liable to a bona fide holder of certificates of stock fraudulently issued or put in circulation by the wrongful or criminal acts of its officers or agents are quite well settled. Numerous cases involving these questions have received the attention of this court, and quite recently some new features of such transactions have appeared. *Schuyler Case*, 34 N. Y. 30; *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* 137 N. Y. 231, 19 L. R. A. 331; *Manhattan L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 139 N. Y. 146; *Knorr v. Eden Musee American Co.* 148 N. Y. 441, *post*, 779. The liability in such cases is determined by an application of the general rules of law that govern the relations of principal and agent as developed and applied to corporations, acting solely through such agencies. The principal is liable to a third person, in a civil action, for the fraud or other malfeasance of his agent perpetrated by the latter in the course of his employment, although the principal did not authorize, justify, or know of the misconduct. In this case the certificate contained the genuine signatures of three authorized officers or agents of the defendant, namely, the president, the assistant treasurer, and the registrar. The paper, upon its face, was an assurance to the public, through the acts of its officers, that a person named therein, whether a real or fictitious person, was the owner of 100 shares of its capital stock. It had upon its face all the essential evidence of genuineness and it was presented to the brokers for sale, apparently in proper form for transfer, by the very agent of the defendant that it had held out to the public as the person who had the power to represent and act for it in making such transfer. When the paper was delivered to the brokers by the transfer clerk, having indorsed thereon what appeared to be a regular transfer, it is difficult to see why it was not received by them with every reasonable assurance that the defendant was able to give, that the certificate was not only genuine stock, but in a condition to be transferred upon the books in favor of any one 31 L. R. A.

who should receive it in good faith. The paper, in fact, however, was nothing but a fictitious and fraudulent device on the part of the transfer agent, which he had fabricated for purposes of his own; and although the evidence tended to show that his frauds in this respect could have been detected or prevented by the exercise of reasonable diligence on the part of the defendant's officers, yet, as the brokers knew, or ought to have known, that he was dealing with himself in respect to the certificate, it may very well be that this circumstance was sufficient to put them on their guard, and to impose upon them the duty of making some inquiry as to its origin and validity. The paper came to them accredited by the genuine signatures of the proper officers of the defendant, and countersigned by the registrar, whose duty it was to guard against unauthorized or fraudulent issues of the stock. These signatures carried with them—to strangers, at least—the very highest assurance of the genuine character of the security. But we do not think it is necessary, in this case, to decide what the liability of the defendant would be in case it appeared that the brokers took the certificate without inquiry, since the proof tended to show that they were not negligent in that respect. This was really the only question of fact contested at the trial, and submitted by the court to the jury. While such certificates do not possess all the qualities of commercial paper, they do possess some of them; and innocent parties dealing in them will be protected upon analogous principles, and, in a proper case, will be entitled to compel recognition as stockholders, where power exists to issue new certificates, or to indemnify if there was not.

We think that the judgment in this case can stand upon the verdict of the jury, which implies a finding of fact that before the brokers received the certificate for sale, or guaranteed its genuineness, they sent it to the defendant's office, in order to ascertain whether they could safely do so, and were informed by the person in charge that it was in a condition for transfer. This was, in substance, an assurance that the stock would be transferred in case the brokers took it, or, at least, that there was no defect in the instrument to prevent the transfer. The brokers having acted upon the faith of the assurance, the defendant must be held estopped from denying the liability to indemnify them or their assignee from the result of such action. *Claus v. Bank of New York Nat. Bkg. Asso.* 105 N. Y. 398; *Kenyon v. Knights Templar & M. A. Aid Asso.* 123 N. Y. 247, 254; *Stokes v. Mackay*, 140 N. Y. 640. There was some dispute at the trial as to the precise scope of the representations made at defendant's office by the person in charge, as well as his authority to make them; but these questions were submitted to the jury upon evidence which admitted of opposing inferences, and the verdict must, on this appeal, be taken as establishing not only the representations as stated, but the authority of the person in the office to deal with the subject, and to make them. Assuming, as we must, that the brokers, before assuming any liability in regard to the certificate, made general inquiry of the defendant as to its charac-

ter and condition, and were then assured it was genuine and in condition for transfer, and, relying upon such assurance, they sold the certificate, making the guaranty required by the rules of the exchange, the case contains all the elements of an estoppel against the defendant. It is urged by the learned counsel for the defendant that upon the proofs the only inquiry made was as to the form of the certificate. It is scarcely to be supposed that brokers constantly dealing in stocks would take the trouble to inquire of the corporation whether its certificates were made up in proper form. The jury had the right, upon all the testimony, to adopt the more probable theory that the information sought by the brokers was, not as to the form, but as to the genuineness, of the certificate, and that they sent it to the office of the defendant in order to know whether they could safely deal with it. The evidence as to the precise representation made at the defendant's office, and the identity and authority of the person who made it, was not very clear or satisfactory. There can be no doubt, however, that the brokers sent the certificate to the defendant's office for verification. The uncertainty arises in regard to what took place there, and the parties to the transaction; and when it is borne in mind that the witnesses were testifying years afterwards to transactions of everyday occurrence, it is not surprising that they were unable to give the precise words used, or all the details of the interview. The proof was of such a character that, under all the circumstances, the court was not warranted in withdrawing from the jury the question as to what representations, if any, were actually made as to this certificate at the defendant's office, as well as the agency and authority of the person in charge to make them.

The defendant's counsel asked the court to submit to the jury the question whether, in taking the certificate, the brokers acted in good faith. The request was refused, and the defendant excepted. The only evidence on this point was that in several previous transactions these same brokers acted for the same transfer clerk in the sale of shares of defendant's stock, and, upon receiving the certificates, sent them to the defendant's office, and procured them to be transferred in the name of some of their clerks, whereas, in this case, they made no transfer. We think that bad faith on the part of the brokers could not be found, upon this testimony, especially in view of the fact that before dealing with the certificate they took the precaution to send it to the registrar, the Central Trust Company, and were informed there that it had been properly registered, and then to the office of the defendant, where they were informed, in substance, as the verdict implies, that the certificate was in a condition for transfer. While the case, in some respects, was a close one, we think that it presents no legal error that would warrant us in interfering with the verdict.

The judgment must therefore be affirmed with costs.

All concur.

Edward M. KNOX, *Respt.*,

v.

EDEN MUSEE AMERICAN COMPANY,
Limited, *Appt.*,

(148 N. Y. 441.)

1. **The title of the true owner of a lost or stolen certificate of stock** in a corporation may be asserted against any one subsequently obtaining its possession, even if the holder is a bona fide purchaser.
2. **Directing an employee to cancel surrendered certificates of stock** does not give him any authority, express or implied, to act as agent in issuing them so as to bind the corporation by his wrongful use of them to secure a personal loan.
3. **Permitting surrendered certificates of stock to remain uncanceled** in the safe of the corporation to which an employee has access, and relying upon him to cancel the certificates as he was directed to do, are not such negligence as will make the corporation liable for his fraudulent use of them to secure a personal loan about three weeks later, if the company did not know or have reason to suspect that he was dishonest, although a by-law requiring the cancellation of the surrendered certificates was not complied with.

(February 18, 1896.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered in the office of the clerk of New York County upon the report of a referee in favor of plaintiff in an action brought to hold defendant liable for the value of certain of its stock which its employee had taken from its custody and disposed of to plaintiff as his own property. *Reversed.*

Statement by **Andrews**, Ch. J.:

The action was brought to recover damages claimed to have been sustained through the defendant's alleged negligence in not having accomplished the cancellation of three certificates, each for five shares of its capital stock, which had been surrendered for transfer, and which the plaintiff asserted he was thereby induced to receive as valid certificates, when, in fact, they no longer represented stock, but were mere vouchers for the actual certificates, which had been issued in their stead.

Four old certificates, including the three above mentioned, and another, also for five shares of the defendant's stock (all of which had been surrendered for transfer and a new certificate for twenty shares issued therefor), were taken without authority from the defendant's safe by one of its employees, who induced the plaintiff to make him a personal loan on the certificates, upon the representation that they were valid outstanding certificates and were his personal property. The loan fell due and was unpaid, and the defend-

NOTE.—As to the liability of a corporation for fraud or forgery by its officers in the issue of stock, see *note* to Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co. (N. Y.) 19 L. R. A. 331. See also the case of *Jarvis v. Manhattan Beach Co.* (N. Y.) *ante*, 776.

ant undertook to realize upon his collateral. He then discovered upon inquiry at the defendant's office that the certificates were not valid, but were mere vouchers for genuine stock which had been issued upon the surrender of these old certificates to the company.

Messrs. William D. Guthrie, Charles Steele, and James W. Monk, for appellant:

Where recoveries have been had for stock fraudulently issued, it was put upon the ground that the fraud was committed by the agent of the company, as its official representative, in the course of his employment.

Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co. 137 N. Y. 231, 19 L. R. A. 331; *Manhattan L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 139 N. Y. 146; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 559.

Stock certificates, even when indorsed in blank, are not strictly negotiable instruments.

The only ground upon which the title of a purchaser in good faith from one not the real owner of shares has been sustained, is that of estoppel, the theory being that the real owner, having clothed another with the apparent indicia of actual ownership, is estopped from denying such ownership as to one who in reliance upon such apparent evidence of title, has in good faith parted with consideration for the stock.

Cook, Stock & Stockholders, 2d ed. § 412; *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *Weaver v. Bartlen*, 49 N. Y. 286; *Hammond v. Hastings*, 134 U. S. 401, 33 L. ed. 960.

A bona fide purchaser of a stolen or lost certificate indorsed in blank acquires no title to it.

Cook, Stock & Stockholders, 2d ed. § 368; *Anderson v. Nichols*, 23 N. Y. 600; *Wells v. Smith*, 7 Abb. Pr. 261; *Bangor Electric Light & P. Co. v. Robinson*, 52 Fed. Rep. 520; *Biddle v. Bayard*, 13 Pa. 150; *Baratow v. Savage Min. Co.* 64 Cal. 388, 49 Am. Rep. 705; *Sherwood v. Meadow Valley Min. Co.* 50 Cal. 412; *Swim v. Wilson*, 90 Cal. 126, 13 L. R. A. 605; 2 *Thomp. Corp.* § 2516.

Nor does it make any difference that the real owner has been negligently in the care of his property.

People v. Bank of North America, 75 N. Y. 547; *Biddle v. Bayard*, *supra*; *Burson v. Huntington*, 21 Mich. 415, 4 Am. Rep. 497; *Codding v. Gilbert*, 17 N. Y. 489; *Sickles v. Richardson*, 23 Hun, 559.

Any one accepting from an officer of a corporation notes or securities of such corporation, in a transaction which is for the personal benefit of such officer, is bound to make inquiry as to the right of the officer to deal with such securities, and failing to do so, he must be held to have known all that such inquiry would have disclosed.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145; *Manhattan L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 139 N. Y. 146; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 559; *Simmons v. London Joint-Stock Bank* [1891] 1 Ch. 270; *Central Bank v. Hammett*, 50 N. Y. 158; *Moores v. Citizens' Nat. Bank*, 15 Fed. Rep. 141, Affirmed 111 U. S. 156, 28 L. ed. 385; *Westwood Bd. of Edu. v. Sinton*, 41 Ohio St. 504; *Farrington v.* 31 L. R. A.

South Boston R. Co. 150 Mass. 406, 5 L. R. A. 849; *Hill v. C. F. Jewett Pub. Co.* 154 Mass. 172, 13 L. R. A. 193; *Garrard v. Pittsburg & C. R. Co.* 29 Pa. 154.

There can be no estoppel as against the defendant, for the defendant did no act which would estop it from asserting its title to these vouchers which had been stolen from its possession.

Sean v. North British Australasian Co. 2 Hurlst. & C. 175.

By-laws are made, not for the protection of the public, but of the company, and so long as reasonable care is observed by the company in the transfer and cancelation of stock, it is quite immaterial to the public whether or not such transfers are made in accordance with the by-laws, because the public does not know what the by-laws are, and cannot be assumed ever to act upon the faith of their accurate observance.

Flint v. Pierce, 99 Mass. 63, 96 Am. Dec. 601; *Pritchard's Case*, L. R. 8 Ch. App. 956; *Ward v. Johnson*, 95 Ill. 215; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 559; *People v. Bank of North America*, 75 N. Y. 547.

There is no evidence of negligence on the part of the defendant.

People v. Bank of North America, *supra*; *Westwood Bd. of Edu. v. Sinton*, 41 Ohio St. 504; *Merchants' Nat. Bank v. Guilmartin*, 83 Ga. 797, 17 L. R. A. 322; *Bangor Electric Light & P. Co. v. Robinson*, 52 Fed. Rep. 520; *Scott v. National Bank*, 72 Pa. 471, 13 Am. Rep. 711; *Hill v. C. F. Jewett Pub. Co.* 154 Mass. 172, 13 L. R. A. 193; *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. C. P. N. S. 715; *Goodwin v. American Nat. Bank*, 48 Conn. 550; *Maas v. Missouri, K. & T. R. Co.* 83 N. Y. 223.

The defendant's negligence (if any) was not the proximate cause of the plaintiff's loss.

Westwood Bd. of Edu. v. Sinton, and *Hill v. C. F. Jewett Pub. Co.* *supra*; *Sean v. North British Australasian Co.* 2 Hurlst. & C. 175; *Bank of Ireland v. Egan's Charities*, 5 H. L. Cas. 388; *The Staple of England v. Bank of England*, L. R. 21 Q. B. Div. 160; *Arnold v. Cheque Bank*, L. R. 1 C. P. Div. 578; *Ledwich v. McKim*, 53 N. Y. 307; *Jackson v. Vicksburg, S. & T. R. Co.* 13 Alb. L. J. 353.

The plaintiff was guilty of contributory negligence.

Westwood Bd. of Edu. v. Sinton, 41 Ohio St. 504; *Isham v. Post*, 141 N. Y. 100, 23 L. R. A. 90.

Messrs. Henry D. Hotchkiss and William S. Maddox, for respondent:

The three certificates were in effect negotiable securities, and they are good in the hands of a purchaser in good faith and for value.

The current of modern authority shows that stock certificates indorsed in blank are now to be considered as negotiable instruments.

Cook, Stock & Stockholders, 3d ed. § 415.

It is far more essential for the convenience and safety of the commercial public that stock certificates indorsed in blank should have full recognition by the courts as negotiable instruments, than either bills of lading or warehouse receipts. And yet these latter instruments have for years by statute in this state been recognized as capable at least of being made

negotiable, if they are so stamped by those who issue them.

McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; *Bush v. Lathrop*, 22 N. Y. 585.

All negotiable instruments have acquired that attribute only by a process of evolution.

23 Am. & Eng. Enc. Law, p. 601, note 1; *Mercer County v. Hackett*, 68 U. S. 1 Wall. 86, 17 L. ed. 549; *Morawetz, Priv. Corp.* 2d ed. § 185.

The authorities in this state justify this court, at this time, in holding that such a transferee has all the rights of a holder of negotiable paper under similar circumstances.

Kortright v. Buffalo Commercial Bank, 20 Wend. 91; *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 599; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *McNeil v. Tenth Nat. Bank, supra*; *Leitch v. Wells*, 48 N. Y. 585; *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* 137 N. Y. 231, 19 L. R. A. 331; *Johnston v. Laflin*, 103 U. S. 800, 26 L. ed. 532.

The best text-writers admit that the current of modern authority is in line with the New York cases.

Morawetz, Priv. Corp. 2d ed. § 190; *Cook, Stock & Stockholders*, 3d ed. § 416.

Certificates of stock are assignable, and pass from hand to hand by indorsement, as bills of exchange and promissory notes pass, and holders of such certificates are prima facie presumed to be the bona fide owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee.

Supply Ditch Co. v. Elliott (1887) 10 Colo. 333; *First Nat. Bank v. Lanier*, 78 U. S. 11 Wall. 369, 20 L. ed. 172; *Prull v. Tilt* (1877) 28 N. J. Eq. 483; *Rumball v. Metropolitan Bank, L. R.* 2 Q. B. Div. 194.

The defendant was guilty of negligence, and is estopped from disputing the validity of these certificates.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; *Cleveland & M. R. Co. v. Robbins*, 35 Ohio St. 483; *Lowry v. Commercial & F. Bank*, Taney 310; *Chew v. Bank of Baltimore*, 14 Md. 300; *Roosevelt v. Land & R. Imp. Co.* 11 Misc. 595.

That which never happened before, and which in its character is such as not to naturally occur to prudent men to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency.

Hubbell v. Yonkers, 104 N. Y. 439, 58 Am. Rep. 522; *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213.

Defendant is estopped from denying its liability.

Holbrook v. New Jersey Zinc Co. 57 N. Y. 616; *Titus v. Great Western Turnp. Co.* 61 N. Y. 237; *Bruff v. Mali*, 36 N. Y. 200; *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* 137 N. Y. 231, 19 L. R. A. 331.

Defendant's officers, whose duty it was to see to it that the certificates in question were 31 L. R. A.

"canceled," wholly omitted to perform such duty, but relied upon Jurgens to see that it was done. Because of this act on the part of the defendant's officers, and because of the trust reposed by them in Jurgens, he was enabled to keep in force the "continuing affirmation" that the persons named in and who had indorsed those certificates in blank were the owners of stock as therein set forth.

The defendant's negligence was the proximate cause of the loss.

Holbrook v. New Jersey Zinc Co. supra; *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440; *Hardy v. Chesapeake Bank*, 51 Md. 591, 34 Am. Rep. 325.

When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident could not have happened.

Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; *Ehrgott v. New York*, 96 N. Y. 233, 48 Am. Rep. 622; *West v. Ward*, 77 Iowa, 323; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Van Houten v. Fleischman*, 1 Misc. 134, Affirming 142 N. Y. 624.

Although in a legal sense these uncanceled certificates were, after their surrender, retained by defendant in its own possession, as matter of fact they were in the custody of Jurgens, and it is only required that he should appropriate them to his own use to make them efficient instruments of injury to others.

This act was one to be reasonably anticipated, and was the "natural and probable consequence" of defendant's act in leaving the certificates uncanceled and under Jurgens' control.

Lowery v. Manhattan R. Co. 99 N. Y. 163, 52 Am. Rep. 12; *Swan v. North British Australasian Co.* 2 Hurlst. & C. 175.

In all cases in which any person undertakes the performance of an act which, if not done with care, may involve loss or injury to one or more persons known or unknown, the law *ipso facto* imposes as a public duty the obligation to use due care.

Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; *Smith, Neg.* 90 *et seq.*; *Whart. Neg.* §§ 853 *et seq.*; *Van Winkle v. American Steam Boiler Co.* 52 N. J. L. 240; *Fifth Avenue Bank v. Forty-second Street & G. S. F. R. Co.* 137 N. Y. 242, 19 L. R. A. 331.

In cases coming within this rule no privity is necessary between the parties.

Broom, Com. Law, 4th ed. 673 *et seq.*

Jurgens was defendant's agent to cancel and defendant is liable for his acts.

McNeil v. Tenth Nat. Bank, 46 N. Y. 330, 7 Am. Rep. 341; *People v. Bank of North America*, 75 N. Y. 547.

No actual notice to plaintiff of any invalidity of the stock is shown.

Plaintiff was not bound to present the certificates to the company for verification.

Isham v. Post, 141 N. Y. 100, 23 L. R. A. 90. The doctrine of constructive notice does not apply.

Seydel v. National Currency Bank, 54 N. Y. 283, 13 Am. Rep. 583.

Even gross negligence on the part of the purchaser or pledgee for value will not defeat his title. It is a question simply of his good faith.

Birdsall v. Russell, 29 N. Y. 220; *Welch v. Sage*, 47 N. Y. 143, 7 Am. Rep. 423; *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691; *Belmont Branch of State Bank v. Hoge*, 35 N. Y. 65.

Of course a defect on the face of the instrument would be of itself notice to such a buyer, but nothing less than proof of knowledge of such facts and circumstances (*i. e.*, as show the invalidity) "can meet the exigencies of such a defense."

Goodman v. Simonds, 61 U. S. 20 How. 343, 15 L. ed. 984; *Bank of Pittsburg v. Neal*, 63 U. S. 22 How. 96, 16 L. ed. 323; *Murray v. Lardner*, 69 U. S. 2 Wall. 110, 17 L. ed. 857.

The doctrine of notice, either actual or constructive, has no possible application to ordinary sales of personal property, such as chattels and merchandise.

Parker v. Conner, 93 N. Y. 118, 45 Am. Rep. 178; *Bush v. Roberts*, 111 N. Y. 278; *Wilde v. Gibson*, 1 H. L. Cas. 605.

Andrews, Ch. J., delivered the opinion of the court:

The rigid rule of the common law which prohibited the assignment of choses in action was, in England, at an early day, relaxed to some extent to conform to the usages of merchants and the necessities of commerce, and at length by the aid of statutes and judicial decisions, bills of exchange and promissory notes were completely taken out of its influence, and they came to have distinct attributes and qualities not pertaining to any other form of contract. They were not only made transferable by delivery and subale in the name of the transferee, but, contrary to the general rule of the common law, "honest acquisition," for value was held to give to the transferee a new and original title, wholly independent of that of the prior holder and subject to no infirmity which affected the paper in his hands. The real owner, who had been despoiled of the paper by robbery or theft, or who had lost it without negligence, was concluded from reclaiming it, and the maker, although he had been defrauded into executing it, could not be heard to allege the fraud as a defense against a bona fide holder. And the transferee, although he may have been negligent in taking it and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *malu fide*, his title, according to the doctrine now settled, will prevail. These familiar but arbitrary principles applicable to commercial paper, originating in commercial policy, the encouragement of trade, the convenience of having some representative of money readily convertible and commanding confidence, while they operate in many cases with great severity upon the rights of innocent persons, have contributed greatly to stimulate commerce and advance the prosperity of states. The principles applicable to negotiable paper have been extended to embrace public debentures payable to bearer, and bonds of corporations, and some of the incidents of negotiability have either by custom or statute been

applied to instruments not strictly negotiable. Certificates of stock in business corporations are embraced in the class last mentioned. They are not negotiable in form, they represent no debt and are not securities for money. But the courts of this country, in view of the extensive dealing in certificates of shares in corporate enterprises, and the interest both of the public and of the corporation which issues them, in making them readily transferable and convertible, have given to them some of the elements of negotiability. The owner of shares may transfer his title by delivery of the certificate with a blank power of attorney indorsed thereon signed by the owner of the shares named in the certificate. Such a delivery transfers the legal title to the shares as between the parties to the transfer, and not a mere equitable right. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341. The transferee in good faith and for value holds his title free from latent equities between prior parties in the line of transmission. Under the doctrine of implied agency and the application of the principle of estoppel to the situation, the true owner is in many cases precluded from asserting his title. The case of *McNeil v. Tenth Nat. Bank* is a leading case on the subject, and marks the limit to which the court has hitherto gone in subordinating the rights of the true owner of a stock certificate to the title of a transferee derived under one who, being in possession of the certificate by the consent of the true owner, has transferred it in fraud of his rights. That case holds that an agent to whom the owner has delivered a certificate of stock duly indorsed for transfer, with a limited power of disposition for a special purpose, may bind the title thereto as against the true owner by transferring it to a bona fide transferee who has no notice of the limitations of the agent's authority, although the transfer was made for an unauthorized purpose and with the intention on the part of the agent to commit a fraud upon his principal. The certificates there in question were pledged by the owner with brokers to secure advances, having indorsed thereon in form an unconditional power of attorney to make all necessary transfers, but with a limited authority to use the power only when necessary to make the pledge available. The brokers, in violation of their duty, pledged the shares for a large sum for their own purposes, and the controversy was between the original owner and the pledgees of the brokers. It was decided that, under the circumstances disclosed, the original owner, having placed the certificates in the hands of the brokers with power of disposition, was estopped as against the pledgees in good faith and for value, from denying their authority to transfer, upon the principle that the owner should rather suffer for his misplaced confidence in the brokers than those who dealt with them on the strength of an apparent authority. In the well-known case of *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, the same principle of implied agency was applied to charge the corporation with liability in damages for spurious stock issued by Schuyler, the president and transfer agent of the company.

The courts have been frequently importuned

to extend the qualities of negotiability of stock certificates beyond the limits mentioned and clothe them with the same character of complete negotiability as attaches to commercial paper, so as to make a transfer to a purchaser in good faith, for value, equivalent to actual title, although there was no agency in the transferrer, and the certificate had been lost without the fault of the true owner or had been obtained by theft or robbery. But the courts have refused to accede to this view, and we have found no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value. The precise question has not often been presented to the courts, for the reason probably that they have with great uniformity held that stock certificates were not negotiable instruments in the broad meaning of that phrase, but, whenever the question has arisen, it has been held that the title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a bona fide purchaser (*Anderson v. Nicholas*, 28 N. Y. 600; *Bangor Electric Light & P. Co. v. Robinson*, 52 Fed. Rep. 520; *Biddle v. Bayard*, 13 Pa. 150; *Barstow v. Savage Min. Co.* 64 Cal. 388, 49 Am. Rep. 705. See *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557, 25 L. ed. 892). It may be observed that the elaborate opinion of Judge Rapallo in *McNeil v. Tenth Nat. Bank*, to show that the plaintiff in that case was estopped from asserting his title on the ground of implied agency, was quite unnecessary if a transfer of a stock certificate indorsed in blank to a bona fide holder conferred a title as against the true owner, irrespective of the fact whether he voluntarily parted with the possession or was deprived of it by felony or fraud. It is plain, we think, that the argument in support of the judgment in this case, based on the complete negotiability of stock certificates, is not supported by, but is contrary to, the decisions. If public policy requires that a further advance should be made in more completely assimilating them to commercial paper in the qualities of negotiability, the legislature, and not the courts, should so declare. Under the law as it has hitherto prevailed there does not seem to have been any serious hindrance in dealing with property of this character. It may, perhaps, be doubted, taking into consideration the interests of investors as well as dealers, whether it would be wise to remove the protection which the true owner of a stock certificate now has against accident, theft or robbery. The system of registry of negotiable bonds, which prevails to a considerable extent, authorized by statutes of some of the states, and of the United States, seems to indicate a tendency to restrict rather than to extend the range of negotiable instruments.

Nor, in our opinion, can the judgment below be sustained upon any principle of agency in Jurgens, express or implied, to issue the surrendered certificates, which, on the issue of the new certificates to Siebrecht, became mere vouchers in possession of the company. If it 31 L. R. A.

can be said that the direction of the president to Jurgens to cancel the certificates made him the agent of the company for that purpose, it was an authority to destroy and not to use. His act in abstracting them from the safe and uttering them as valid certificates had no relation to the authority conferred. It was not an act of the same kind as that which he was authorized to perform. He had no apparent authority to issue them as genuine certificates, because he had no authority to issue certificates for any purpose, and what he did was, as was said in *Manhattan L. Ins. Co. v. Forty-second Street & G. S. F. R. Co.* 139 N. Y. 146, "a wilful and criminal act, perpetrated for private gain and not connected with the exercise of any official authority or semblance of authority which he possessed as the defendant's agent." The certificates were, at all times after their surrender and before they were abstracted by Jurgens from the safe of the defendant, in the legal possession of the company. The company never placed them in the possession of Jurgens or invested him with the indicia of ownership. He had access to the safe as the mere servant of the defendant. The doctrine of implied agency is, we think, wholly inapplicable to the circumstances of this case.

We come, therefore, to consider the ground upon which the learned referee placed his judgment against the defendant, *viz.*: the negligence of the company. The claim of liability of the defendant on the ground of negligence is based on the fact that in violation of its by-laws it permitted the surrendered certificates to remain uncanceled in its safe, to which Jurgens had access, and thereby enabled him to commit the fraud, and upon the further allegation that the company neglected to exercise a proper supervision over its business and the conduct of its employees, and committed to Jurgens the management of its affairs without special inquiry into the manner in which he discharged his duties. We are of opinion that the company was not chargeable with any negligence which gives a right of action for the injury caused to the plaintiff by the fraudulent use by Jurgens of the surrendered certificates. The surrendered certificates were placed by the company in its safe in its office, of which Jurgens had the key, and thereby, it may be said, afforded him the opportunity to commit the crime of which he was guilty, in abstracting and uttering them as valid. But it is not true, as a general rule, that a man may not intrust his property to the custody of his servant, except at the peril of losing his title thereto if the servant steals and disposes of it to another. There must be something more than the mere intrusting to a servant of the custody of a chattel and the consequent opportunity for theft, in order to preclude the master from reclaiming it, if stolen by the servant and sold to another. Rapallo, J., in *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329. The rule declared by Ashhurst, J., in *Lickbarrow v. Mason*, 2 T. R. 70, frequently quoted, that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," has no application to such a case. The case in which the rule was stated

affords a good illustration of its application. The consignor and vendor of the goods had by the delivery of a bill of lading delivered the possession of the goods to the holder with power according to the law merchant to transfer them by indorsement of the bill, and it was held that as against a transferee in good faith for value, the right of stoppage *in transitu* was lost. It was a case where the vendor had by his affirmative act enabled the holder to commit a fraud upon his rights, and it was justly held that he should bear the loss rather than the innocent purchaser. The familiar statement of Lord Holt, in *Hern v. Nichols*, 1 Salk. 289, "for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger,"—was made in a case where the question was whether a merchant was liable for the deceit of his factor in the sale of goods represented to be of one quality when they were of another. The principle announced by Lord Holt has been frequently applied to such and similar cases. But the employment of a servant to whom is intrusted the master's property, with no power of disposition, is not alone such a putting of trust and confidence in the servant by the master as to enable the latter by his wrongful act to defeat the master's title. The rule which would convert the mere employment of a servant into an authority in him, as to third persons, to sell or dispose of his master's goods intrusted to him for safe keeping, would be highly dangerous and has no sanction in the adjudged cases.

It remains to consider whether there were any special circumstances in this case which take it out of the general rule adverted to. Jurgens had been in the employment of the defendant for several years prior to the transaction in question and nothing had come to the knowledge of the defendant which raised doubt as to his honesty and faithfulness. The facts found by the referee show that the defendant reposed confidence in his integrity, and, so far as appears, the abstraction and uttering of the surrendered certificates was his first act of malversation during his employment. His power in respect to the issuing of certificates on the transfer of stock was clerical only. In case of transfer, he was accustomed to cancel the surrendered certificates and paste them in the certificate book, prepare the new certificate and impress the company's seal thereon, and then procure the president of the company to sign it. In every case prior to the one in question, the president signed the new certificate only, when the surrendered certificate was presented to him by Jurgens, canceled, together with the new certificate. There was a departure from that practice in the single instance in question under the special circumstances found by the referee. The president of the company knew when he signed the new certificate that the old certificates had been surrendered and were then in possession of the company, because he had himself placed them in the safe, and the fraud of Jurgens was made possible because the president relied upon Jurgens to cancel the surrendered certificates as he had directed him. It is urged that the improper use made of the certificates might reasonably

have been expected to result from leaving them in the safe of the company in his care uncanceled. In other words, the claim is that the company ought to have anticipated that Jurgens might commit the crimes of forgery and larceny, and put the certificates on the market if they were left uncanceled under his control. We do not assent to this suggestion. If the company knew that Jurgens was dishonest, or had reason to suspect his honesty, a different question would be presented. But it is not generally an omission of ordinary prudence that an employer deals with his employees on the assumption that those who have hitherto been faithful in the performance of their duties will continue so to be, or because he does not anticipate and provide against the possibility of their criminal acts. Breaches of trust and confidence unfortunately are not infrequent. But honesty is nevertheless, we believe, the general rule of human conduct, and one may indulge in this faith in human nature and trust those who have proved themselves worthy of it without subjecting himself to a charge of negligence if it should turn out that they afterwards yielded to temptation and used their position to the injury of others. "It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause." Williams, J., *Ex parte Sean*, 7 C. B. N. S. 447. See also Bramwell, L. J., *Barendale v. Bennett*, L. R. 3 Q. B. Div. 530.

The fact that in the particular instance the defendant did not observe the by-law, and issued the new certificate without the actual cancelation of the surrendered certificates, was not, we think, as to the plaintiff, actionable negligence. It may be admitted that a business corporation is bound to exercise reasonable care in respect to the transfer of its shares. The defendant had adopted the usual precautions, and its by-laws required that transfers should be made only on the surrender and cancelation of outstanding certificates. The certificates on their face carried an assurance by the company that the shares represented had not been transferred on the books of the company, while the original certificates were outstanding. There was no representation on the face of the certificates that surrendered shares would be actually canceled by the company. The company, however, had by the by-law provided that this should be done, and it is said, and it is undoubtedly true, that this regulation was in conformity to the usual practice of stock corporations. By-laws are primarily for the protection of the corporation enacting them and its stockholders. The regulation that transfers shall only be made on the books on surrender of the outstanding certificates is essential as well for the protection of the company as the dealers in the stock. The regulation for actual cancelation of surrendered certificates is a still further protection. But can it be justly said that this latter regulation was so obligatory on the company that a single departure therefrom under special and

peculiar circumstances which gave an opportunity for Jurgens' crime, was, as to the plaintiff, actionable negligence? We think it was not. To constitute actionable negligence there must not only be a violation of duty owing by one to another or to the public, but the injury must be the natural consequence of the alleged negligent act or one which might reasonably have been anticipated. Parke, B., in *Bank of Ireland v. Evans's Charities*, 5 H. L. Cas. 889, where it was claimed a corporation was bound by the fraudulent affixing by its secretary of the seal of the corporation in his custody, to a power of attorney to transfer its funds in the Bank of Ireland, states the true ground of actionable negligence in such a case. Speaking for the judges, he says: They are all of opinion "that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself." Blackburn, J., in *Swan v. North British Australasian Co.* 2 Hurlst. & C. 181, states the principle with even greater perspicuity. He says: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what amounts to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

The claim that the injury to the plaintiff was occasioned by the omission of the defendant to exercise proper supervision over the conduct of Jurgens has, we think, no force. There was

an interval of about three weeks between the time when the certificates were surrendered to the company and their abstraction and transfer by Jurgens. If during this period the officers of the defendant had examined the contents of the safe, it might have been ascertained that the certificates were uncanceled. An examination after that time would not have benefited the plaintiff, at least there is no evidence that a discovery of the fraud after it had been accomplished would have changed his position. The transfers of stock on the books of the company were comparatively infrequent. The president had reason to suppose that Jurgens would obey his directions and cancel the certificates, and the omission to inquire whether he had done so, during the period mentioned, is, as we think, quite insufficient to support the charge of negligence.

Finally, if the company had been the owner of some of its own shares, or if it had owned shares in other corporations which had been deposited in its safe for safe keeping, and they had been stolen and sold by Jurgens to the plaintiff, there can be no doubt that the company could reclaim them, and the loss would fall upon him. It is difficult to see how he could acquire a better right to the surrendered certificates or charge the company with damages resulting from Jurgens' crime.

Having reached the conclusion that there was no actionable negligence on the part of the defendant, it is unnecessary to consider the other questions argued at the bar.

The judgment below should be reversed and a new trial ordered, with costs in all the courts to abide the event.

All concur.

MARYLAND COURT OF APPEALS.

CONSOLIDATED GAS COMPANY OF BALTIMORE CITY, *Appt.*,

v.

John J. CROCKER.

(82 Md. 113.)

1. **Carrying a lighted lamp into originating matches in a cellar filled with gas** which afterwards explodes cannot be pronounced contributory negligence as matter of law so as to defeat a recovery for the injury resulting from the explosion, unless it appears affirmatively and without dispute that such acts caused the explosion.
2. **Failure of a gas company to exercise any care to discover and remedy a leak** which proves to be in its street mains, when notified that gas is escaping into the cellar of a building abutting on the street, may render the escape of the gas evidence of negligence which will make it liable for injuries caused thereby.

(December 6, 1896.)

NOTE.—A very extensive note on liability for negligence in the escape and explosion of gas is found with the case of *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337. See also *Evans v. Keystone Gas Co.* (N. Y.) 30 L. R. A. 651.

31 L. R. A.

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by an explosion of gas for which defendant was responsible. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. Alexander Preston, Alexander Preston, and William A. Fisher, for appellant:

The evidence presents a clear case of contributory negligence.

Lanigan v. New York Gaslight Co. 71 N. Y. 29; *Bartlett v. Boston Gaslight Co.* 117 Mass. 533, 19 Am. Rep. 421; *Oil City Gas Co. v. Robinson*, 99 Pa. 1; *Hampton v. Cradley Heath Gas Co.* 8 Am. & Eng. Enc. Law, p. 1274, note; *Vallée vs Qualité v. New City Gas Co.* (Montreal Super. Ct.) 7 Am. L. Rev. 767; *Holden v. Liverpool New Gaslight & C. Co.* 3 C. B. 14; *Brown v. New York Gaslight Co.* Anth. N. P. 351; *Dietrich v. Baltimore & H. S. R. Co.* 58 Md. 358; *Baltimore & P. R. Co. v. State*, 54 Md. 655.

There is no evidence of negligence.

According to the evidence produced by the appellee, gas continued to escape into the cellar until the time of the explosion in consider-

able volume, but no notice was given to the defendant until after the explosion.

Holly v. Boston Gaslight Co. 8 Gray, 121, 69 Am. Dec. 233; *Bartlett v. Boston Gaslight Co.* 122 Mass. 213.

Messrs. John F. Preston and E. Beverly Slater, for appellee:

To justify a court in taking a case from the jury on the ground of contributory negligence of the plaintiff, there must be no room for ordinary minds to differ as to such contributory negligence.

People's Bank v. Morgolofski, 75 Md. 442; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 61, 48 Am. Rep. 88; *North Baltimore Pass. R. Co. v. Arnreich*, 78 Md. 593; *Baltimore Traction Co. v. State*, 78 Md. 422.

The question of contributory negligence was properly submitted to the jury, and it "was a question which the trial court could not properly decide for itself, but was bound to submit to the jury as one which they alone could answer."

Greany v. Long Island R. Co. 101 N. Y. 419.

As to the duties and responsibilities of gas companies generally and the degree of care required of them, see —

Butcher v. Providence Gas Co. 12 R. I. 149, 34 Am. Rep. 626; *Emerson v. Lowell Gaslight Co.* 3 Allen, 413; *Mose v. Hastings & St. L. Gas Co.* 4 Post. & F. 324; *Schermhorn v. Metropolitan Gaslight Co.* 5 Daly, 144; *Bartlett v. Boston Gaslight Co.* 122 Mass. 209.

Evidence of contributory negligence sufficient to raise a question of law to be decided by the court must establish without contradiction the direct fact in issue, and such fact must be decisive of the cause under trial.

McMahon v. Northern C. R. Co. 39 Md. 449; *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 44; *Baltimore Traction Co. v. State*, *supra*; *Grabrues v. Klein*, 81 Md. 83; *People's Bank v. Morgolofski*, and *Cumberland Valley R. Co. v. Maugans*, *supra*; *Cooke v. Baltimore Traction Co.* 80 Md. 551.

The weight of the testimony produced at the trial, the credibility of witnesses, etc., as to whether or not the accident was caused by an explosion of illuminating gas or gasoline, belong peculiarly to the jury, and will not be considered by this honorable court.

Grabrues v. Klein, *supra*.

McSherry, J., delivered the opinion of the court:

The only questions we have before us on this appeal are those which arise in consequence of the rejection by the trial court of the prayers presented by the defendant for instructions to the jury, and those which grow out of the granting by the court of three instructions of its own. The case is one founded in alleged negligence. The fundamental principles which must govern its decision are thoroughly settled and established. To apply those principles correctly is all that is required. The defendant below (the appellant here) is a gas company. It manufactures and supplies gas for illuminating purposes. The gas is transmitted through mains and pipes underneath the surface of streets into houses and elsewhere. The plaintiff below (the appellee here) leased and occupied certain premises in Baltimore city.

31 L. R. A.

In those premises he conducted a saloon. He moved into them on or about the 20th of November, 1891. At that time the odor of escaping gas was very perceptible in the cellar of the house. When an employee of the gas company was notified that the gas was escaping and accumulating in the cellar, he stated that another employee of the company would be sent to remove the old meter and to replace it with a new one, as was customary whenever there was a change in the occupants of premises; and, when the attention of the employee who did remove the old meter was called to this odor, he stated that he guessed the new meter would remedy the matter. In fact, however, this did not furnish a remedy, and gas continued to flow into the cellar to such an extent that it was necessary to keep the door closed at the head of the stairway leading from the cellar into the dining room. There was evidence tending to show that the gas escaped from a main which ran under and parallel to the sidewalk, and that, thus escaping, it penetrated the front wall of the premises occupied by the plaintiff. In the cellar there was a gasoline stove, used for cooking oysters. On the evening of December 8, 1891, Mrs. Staengler, an employee of the appellee, went into the cellar for the purpose of frying some oysters. She closed the door behind her at the head of the cellar stairway. She took with her a lighted coal-oil lamp, and placed it on a bracket near the top of the cellar, and then proceeded to ignite the gasoline in the stove. The cellar had been opened but once in the preceding twenty-four hours, and then only for a brief period. She struck several matches, but there being, apparently, some water in the cup of the stove, the gasoline did not vaporize and burn. Mrs. Bryant, an acquaintance of Mrs. Staengler, then entered the cellar, but left the door leading to the dining room open. In the dining room, and just opposite the door leading into the cellar, two gas jets were burning. According to the testimony of Mrs. Staengler, she threw a basin of water, containing a few spoonfuls of gasoline, on the coal pile, and in about two minutes after again lighting the gasoline stove, which immediately went out, she happened to look in the direction of the steps leading up to the dining room, and there she saw a sheet of bluish flame, which was instantly followed by an explosion. This explosion occurred in about ten minutes after Mrs. Staengler had entered the cellar with the lighted coal-oil lamp. This lamp continued to burn during the whole time Mrs. Staengler was in the cellar. The force of the explosion was so great that it threw Mrs. Bryant out of the front cellar door, and did considerable damage to the building. The coal-oil lamp suspended in the cellar was uninjured, but the globes on the gas jets in the dining room were shattered. According to the testimony of Mrs. Bryant, who was called as a witness for the defendant, Mrs. Staengler emptied the gasoline out of the stove into a basin, and then replenished the stove, and threw the basinful of gasoline on the coal pile. She further stated that after this Mrs. Staengler lit several matches to start the fire in the stove, and that shortly after the explosion occurred. It was further shown that after the explosion had taken place sev-

eral persons entered the cellar, and found a blaze proceeding apparently from burning oil in the coal pile.

By rejecting the defendant's first prayer the court refused to rule that, in law, the act of entering the cellar with the lighted coal-oil lamp, under the circumstances stated, was such a glaring act of contributory negligence, contributing to the injury complained of, as to preclude a recovery by the plaintiff. Had it been a *concessum* in the case, or had it even been clear, from the evidence, that the lighted coal-oil lamp carried into the cellar caused the explosion, there would have been some foundation for imputing contributory negligence to the plaintiff's employee in carrying it there. Not only does it not appear that the carrying of the lamp into the cellar actually caused the explosion, but the defendant, on the contrary, strenuously insists that there was no explosion of gas at all, but that the explosion proceeded from gasoline. When large quantities of gas have escaped into a building, and have commingled with the air therein, and thus formed a highly explosive compound, and this condition is known to a person entering such building, it is obviously, in law, a grossly negligent act to enter with a lighted candle or lamp, or to strike a match after entering, because, according to known and unvarying laws, an explosion, or a suddenly liberated mechanical energy, resulting from the instantaneous combustion of the inflammable compound when brought in contact with a flame, will inevitably follow. And when, under these conditions, an explosion does instantly result the moment a flame is brought in contact with such a compound of gas and atmosphere, the fact that the flame caused the combustion and the consequent and simultaneous explosion is beyond reasonable dispute or question. The deliberate or the careless application of a flame to such an explosive compound is clearly an act of negligence so unequivocally contributing to the production of the injury that no recovery can be had by the person guilty of, or chargeable with, that act of concurrent negligence. And this is precisely what was decided in *Lunigan v. New York Gaslight Co.* 71 N. Y. 29; *Oil City Gas Co. v. Robinson*, 99 Pa. 1. In these cases the explosion instantly followed upon a light being brought in contact with the gas, and there could be no possible dispute that the bringing of the light in contact with the gas caused the explosion. But where there is not such a connection between the act of entering the house with a lighted lamp and the explosion of the gas as to establish with certainty, and to the exclusion of any other reasonable hypothesis, the relation of cause and effect, the question as to what did cause the explosion is for the jury to solve under proper instructions from the court. When, therefore, as here, more than ten minutes intervened between the time the lamp was taken into the cellar and the time that the subsequent explosion occurred, and when, as here, the lamp itself was uninjured, it would be impossible for the court to assume that the lighted lamp caused the explosion, and to rule, as a conclusion of law, that the plaintiff's employee was guilty of contributory negligence in taking the lamp

into the cellar. And this is true, also, with respect to the lighting of the matches to ignite the gasoline in the stove. Assuming, as must be done in discussing this prayer, that all the evidenced adduced by the plaintiff was true, then at least two minutes intervened between the period of time when the last match was struck, and the stove was lighted and extinguished for the last time, and the period when the explosion took place; and there was obviously, therefore, no evidence to show that the explosion proceeded from these matches or from the stove. If, then, the evidence failed to show affirmatively, and without dispute, that the explosion resulted from the lighted lamp or from the burning matches being brought in contact with the gas, it would have been improper for the court to say, as a legal conclusion, that the taking of the lighted lamp into the cellar, or the striking of the matches there, was an act of contributory negligence, directly contributing to the production of the injury complained of, because, unless the explosion did result from the one or the other causing a combustion, then neither the one nor the other contributed to the explosion. If there is no evidence to show that a particular act of imputed negligence did actually concur in producing an injury, then there is no evidence that the doing of that act was in itself contributory negligence, and it would be clearly erroneous to ascribe to it that character or quality. To justify a court in pronouncing a given act such an act of contributory negligence as to defeat a recovery, it must be a distinct, prominent, and decisive fact, about which ordinary minds would not differ, because, where the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality, as matter of law. *Cooke v. Baltimore Traction Co.* 80 Md. 558. Under the conditions we have stated, and in view of the failure of the evidence to show that the lamp or the matches, to the exclusion of every other reasonable probable cause, occasioned the ignition or combustion that produced the explosion, the court was right in declining to rule, as requested in the defendant's first prayer, that the plaintiff had been guilty of such pronounced negligence, directly contributing to the injury, as to preclude a recovery.

The defendant's second prayer was also properly rejected. It asked the court to instruct the jury that the plaintiff had offered no legally sufficient evidence of negligence on the part of the defendant. Assuming the truth of the evidence adduced by the plaintiff, it was clearly negligence on the part of the defendant to allow gas to escape from its pipes after receiving notice that a leak existed. "While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require in the case of a gas company not only that its pipes and fittings should be of such materials and workmanship,

and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759. A neglect or a failure to use such precautions would be clearly negligent. It cannot be doubted, if the evidence adduced by the plaintiff be credited, that the least attention or diligence on the part of the company's employees would have apprised them of the escape of gas into the street and through the walls of the plaintiff's house. The defendant's employee had been notified of the escape of gas. He had promised to remedy it when the new meter should be placed in position, but he failed to search for or to discover whence the leaking gas proceeded. He seems to have assumed that the change in the meter would obviate the trouble, but he made no search, nor did the other employee who put the new meter in position endeavor to locate the leak. It was clearly negligence on the part of these employees not to make some effort to discover the location of the defect which caused the leak. They were aware of the leak, and that was notice to the company. It then became obligatory on the company to use reasonable efforts, in a reasonable time, to ascertain where the leak was, and to stop it. *Mose v. Hastings & St. L. Gas Co.* 4 Fost. & F. 324. If, instead of doing this, the company's employees chose to assume that a change of the meter would remedy the complaint, though confessedly they did not know whether it would or not, they obviously did not discharge the duty incumbent upon them, and their negligence in this particular was the negligence of the company. When a gas company is made aware, as in this case, that large quantities of gas are escaping into a building, it becomes its plain duty to use reasonable diligence to discover and to stop the leak. It cannot discharge that duty by assuming, without knowing, that the leak proceeds from one source, when in fact it proceeds from a totally different source, which could have been discovered by proper inspection. This rule requires nothing unreasonable. It does not require that the company shall keep up a constant inspection all along its lines, without reference to the existence or nonexistence of a probable cause for the occurrence of leaks or escapes of gas; but it does require that, when notice of the existence of a leak has been given to a company, the company shall use reasonable care and appropriate means to discover the cause of the leak, and to remedy it. This doctrine is not in conflict with the principle laid down in *Hutchinson v. Boston Gaslight Co.* 122 Mass. 219, and other cases of a kindred character. "There the escape of gas complained of was the result of an overwhelming calamity that laid a great part of the city of Boston in ashes, and fractured and severed the company's pipes in so many places that all the force it could employ could not guard against all possible consequences of the escape of gas immediately, without shutting off the supply

from the whole city, and this it was excused from doing on the ground that more mischief would result therefrom than was likely to result from the neglect so to do." *Koelsch v. Philadelphia Co. supra.* The escape of gas from the defendant's main was, under the circumstances stated, after it had received notice that gas was escaping into the plaintiff's house, and after it had failed or neglected to use reasonable care or proper inspection to discover the location of the leak and to stop it, some evidence of negligence; and the court would not have been justified in withdrawing the question of negligence from the consideration of the jury. We are not called on to go further, or to lay down a broader rule than this, in the pending case, and we are not to be understood as doing so, though it has been held by courts of high authority that the escape of gas from the mains underneath the surface of a public street, unless explained, is prima facie evidence of some neglect on the part of a gas company. The case of *Smith v. Boston Gaslight Co.* 129 Mass. 318, is an illustration of this doctrine.

The defendant's third and fifth rejected prayers were fully covered by the court's instructions, and the appellant has therefore no reason to complain of the refusal of the court to grant them. We find no errors in the instructions given by the court. There were two opposite theories presented by the evidence. The plaintiff founded his case upon the theory that the gas which escaped into the cellar, and was confined there while the doors leading into the cellar were closed, rose when Mrs. Bryant entered the cellar and omitted to close the door behind her, and in a few moments came in contact with the lights at the head of the cellar steps, and then exploded. It was, according to the testimony of Mrs. Staengler, at the head or top of these steps that she saw the bluish flame spread out at the moment of the explosion. A slat partition across the cellar was partially blown down, towards the street and away from the steps, as though the force had been applied from the side next to the cellar steps—the side nearest the lighted gas jets at the head of the stairway. On the other hand, assuming, first, that the explosion was a gas explosion, it was insisted that the plaintiff was guilty of contributory negligence: and, secondly, denying that it was a gas explosion, it was contended that the explosion was caused by gasoline. The first contention we have already considered. It is not necessary to state the evidence relied on by the appellant to support the second alternative. Suffice it to say that both theories were fairly submitted to the jury by the instructions given by the learned and accomplished trial judge, and that upon both theories the law was accurately and clearly announced. It became then solely the province of the jury to determine the facts, and if they found, as they were required to find before returning a verdict for the plaintiff, that the gas escaped by reason of the negligence of the defendant, that the explosion was a gas explosion, and that the act of Mrs. Staengler in going into the cellar with a lighted lamp and striking matches there was, under all the circumstances, such conduct as a person of ordinary prudence and care would

have pursued, they were warranted in finding a verdict for the plaintiff. If, on the contrary, they found that the explosion was a gasoline explosion, or that, being a gas explosion, Mrs. Staengler had been guilty of negligence in entering the cellar with a lighted lamp, or in striking matches there, and that either of these acts caused the explosion, the plaintiff was not entitled to recover. The second instruction correctly defined where the burden of proof rested. As we find no error in the rulings of the trial court, its judgment must be affirmed.

Judgment affirmed, with costs above and below.

BOLTON MINES COMPANY, *Appt.*,

v.

Francis STOKES *et al.*

(82 Md. 50.)

Bringing a suit in replevin for goods sold, and discontinuing it before judgment without obtaining benefit therefrom because the value of the goods was paid by the plaintiff to satisfy his replevin bond, do not estop him from claiming payment of the purchase price out of the assets of the estate of the purchaser.

(December 6, 1895.)

A PPEAL from an order of the Circuit Court of Baltimore City denying the claim of appellant against the insolvent estate of the Waring Manufacturing Company. *Reversed.*

The facts are stated in the opinion.

Messrs. Fielder O. Slingluff and William S. Bryan, Jr., for appellant:

It was error to hold that the appellant was estopped, by its attempt in the replevin case to rescind the contract of sale, from now claiming under that contract.

McQueen's Appeal, 104 Pa. 601, 49 Am. Rep. 592.

A party is not estopped from assuming a position forced upon him by the opposite party.

7 Am. & Eng. Enc. Law, p. 22, note; *Potter v. Brown*, 50 Mich. 436; *Bigelow, Estoppel*, p. 719; *Pendleton v. Dalton*, 92 N. C. 185.

It is familiar practice for attaching creditors who have unsuccessfully assailed a deed of trust for the benefit of creditors as fraudulent to afterwards come in and take their dividend under the deed.

Burrill, Assignm. p. 607; *Brashear v. West*, 82 U. S. 7 Pet. 615, 8 L. ed. 804; *Vernon v. Morton*, 8 Dana, 254; 2 Enc. of Pl. & Pr. p. 873, note; *Re Van Norman*, 41 Minn. 494.

Messrs. Gans & Haman and Vernon Cook, for appellees:

The Bolton Mines Company having declared its intention to rescind this contract, it is now bound by its election, and cannot be allowed to change front and assume the wholly inconsistent position that the contract is binding and the note still enforceable.

Edes v. Garey, 46 Md. 41; *Beall v. Pearre*, 12 Md. 366; *Walsh v. Chesapeake & O. Canal*

Co. 59 Md. 427; *Kiddall v. Trimble*, 1 Md. Ch. 143; *Wile v. Brownstein*, 35 Hun, 68; *Farwell v. Myers*, 59 Mich. 180; *Goss v. Mather*, 2 Lans. 283; *Vorhees v. Earl*, 2 Hill, 268, 38 Am. Dec. 588; *Strong v. Strong*, 102 N. Y. 69.

A party cannot, either in the course of litigation or in dealings *in pais*, occupy inconsistent positions. And where a man has an election between inconsistent courses of action, he will be confined to that which he first adopts.

Bigelow, Estoppel, p. 673; *Thompson v. Howard*, 31 Mich. 309; *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498, 33 Am. Rep. 655; *Washburn v. Great Western Ins. Co.* 114 Mass. 175; *Fisher v. Boyce*, 81 Md. 46.

McSherry, J., delivered the opinion of the court:

In December, 1889, the Bolton Mines Company contracted to sell to the Waring Manufacturing Company a quantity of fertilizers. The sale was made, the goods were delivered, and the purchaser gave its promissory note to the vendor on March 15, 1890, for the price agreed on, payable in four months after its date. On the 28d day of May, 1890, before the maturity of this note, the Waring Manufacturing Company executed to Hanson H. Haines and Francis Stokes, trustees, a deed of trust for the benefit of its creditors, and the trustees filed their bond in Cecil county on May 31, and in Baltimore city on June 11, 1890. On June 9 of the same year the Bolton Mines Company sued out a writ of replevin, and under it the sheriff seized and took from the possession of the trustees, and turned over to the Bolton Company, the same fertilizers that had been sold by it to the Waring Company under the contract of December, 1889; and five days afterwards the Bolton Company tendered the trustees the promissory note given for the purchase price, but the trustees declined to receive it. After the Bolton Mines Company got possession of the fertilizers under the writ of replevin, it discontinued or dismissed the replevin suit without trial, and thereafter, on April 10, 1891, the trustees instituted suit in the superior court of Baltimore city against the surety of the Bolton Mines Company on the replevin bond which had been given by it, and that suit resulted in a judgment in favor of the trustees for the penalty of the replevin bond, to be released on the payment of the sum of \$4,464.72, the value of the replevied fertilizers at the date of their seizure under the writ of replevin, together with interest to the date of the verdict. Part of this judgment has been paid, and the residue is to await the result of this proceeding, but may be treated as actually paid. The Bolton Mines Company then filed in the Waring Company's trust estate proceeding the note of the Waring Company held by the Bolton Company; and when the auditor made his report, distributing the cash assets in the hands of the trustees among the creditors of the Waring Company, he allowed to the Bolton Mines Company its ratable share or percentage upon the note of March 15. To this allowance Haines and Stokes, who are creditors, as well as trustees, filed objections. The ground upon which the trustees, in their character as creditors, object to this allowance is that the Bolton Mines Com-

NOTE.—As to election of remedies, see also *Miller v. Hyde* (Mass.) 25 L. R. A. 42, and cases cited in footnote thereto.

31 L. R. A.

pany, having by replevying the fertilizers for the payment of which the note was given, disaffirmed the sale, and having treated the contract of purchase as rescinded, cannot after a judgment has been obtained against it on the replevin bond for the value of the identical articles replevied, reaffirm the sale, and claim to participate in a distribution of the proceeds of the debtor's assets. The court below so decided and hence this appeal.

Does the fact, then, that the Bolton Mines Company sued out a writ of replevin, and seized thereunder the same fertilizers which it had previously sold to the Waring Company, preclude the vendor, the Bolton Company, from asserting a claim to a proportion of the creditor's assets, if the vendor abandoned the replevin suit without a trial, and then paid to the vendee's trustees the full value of the replevied articles? This is the single question which the pending appeal presents.

The situation is a peculiar one. The Bolton Mines Company and the trustees are precisely in the position both would have occupied had not the replevin been sued out; for the Bolton Mines Company still has the note of the vendee, the trustees have in money the value of the fertilizers, and the note is unpaid. This being so, the Bolton Company asks a court of equity to allow to it from the assets of the debtor—in which assets are included the values of the creditor's fertilizers—a percentage equal to that distributed to the debtor's other general creditors; but the court, by its order, refuses this request, and excludes the Bolton Company from participating in the distribution of even the very funds which have been realized from the identical property that the Bolton Company sold and delivered to its insolvent debtor, and for which the vendor has received no payment whatever. Can that order be maintained? It is not pretended that it can be supported upon any other theory or ground than this: that the creditor, having, by the replevin of his suit, elected to treat the original contract of sale as rescinded, cannot afterwards assert the validity of that same contract, and claim to be paid for the goods furnished under it; that, having two alternative remedies, and having selected one of them, and having failed to prosecute it to a final judgment, it cannot resort to the other. Thus abstractly put, the proposition appears far more reasonable and just than when it is practically applied. The actual result of its application to the facts of this case is that the Bolton Company loses the full value of the fertilizers which it sold to the insolvent vendee, and is besides entirely cut out from sharing in the vendee's assets. The vendor, the Bolton Company, therefore gets nothing, and the other creditors get the value of the Bolton Company's fertilizers. It must be an exceedingly rigid and stringent rule of law that will constrain a court of equity to work out such a singular and inequitable result. Is there such a rule as that? It cannot be denied that "the law is adverse to multiplying suits; and, if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal either for or against him, as a general rule he will not be permitted to resort to the other." *Beall v. Pearre*, 12 Md. 566; *Walsh v. Ches-*

apeake & O. Canal Co. 59 Md. 427. And so in *Edey v. Garey*, 46 Md. 24, where Carson was both executor and trustee under a will, and as executor, transferred certain funds to himself as trustee, and to secure these funds executed a deed to himself, as trustee, conveying certain lots in Baltimore city, but failed to place the conveyance on record. After his death a creditor's bill was filed, and these lots were sold. The parties for whose benefit the unrecorded deed was executed claimed the proceeds of the sales of the lots conveyed thereby, and these proceeds were allowed to them. They afterwards filed a bill in equity against the sureties on Carson's bond as executor, but this court held that common sense and common justice require that, having claimed and having received the entire proceeds of the sale of the property conveyed by the unrecorded deed upon the express ground that it was executed by Carson to secure the complainants on account of the money belonging to them, and which he held as trustee under the will, they should not be permitted to deny those facts in a suit brought against the sureties on the administration bond." And so in the still more recent case of *Fisher v. Boyce*, 81 Md. 46, it appeared that the will of James Boyce was duly admitted to probate by the orphans' court of Baltimore county; that thereupon the executors filed a bill in equity against all the parties interested in the estate of the decedent, asking the court to construe the will, and to assume jurisdiction over the administration and settlement of the entire estate. This bill was answered by all parties in interest, including those who subsequently sought to caveat the will. In those answers the defendants (two of whom were the same persons who afterwards assailed the will by caveat) unequivocally admitted the due execution, publication, and probate of the will. Later on, the circuit court, by its decretal order, assumed jurisdiction of the whole estate and of its administration. Afterwards one of the defendants filed a petition in the equity case, claiming that she was entitled under the will, to certain income, and praying an allowance under the will for her maintenance pending the settlement of the estate. This petition was answered, and both petition and answer were heard upon proof adduced, and finally the petition was dismissed by the court. Two years later two of the defendants in the equity proceeding filed in the orphans' court a caveat to a part of the will, and upon appeal this court held they were estopped to question its validity. They had taken a beneficial interest under the will, whose validity they formally and solemnly asserted, and they were thereafter prohibited from setting up any adverse right, which, if successfully asserted, would have defeated the full operation of the instrument. And so in *Keedy v. Long*, 71 Md. 335, 5 L. R. A. 759, it was held that, where a person had two alternative remedies open to him, and proceeded upon one to a final judgment, he would be precluded from resorting to the other one afterwards. And to the same effect is *Olmstead v. Bach*, 72 Md. 132, 22 L. R. A. 74. It will be observed, and must be borne in mind, that in all the above and similar cases, it was not the mere insti-

tion of a suit, which was abandoned before a final judgment had been reached, that operated to estop the prosecution of a subsequent suit between the same parties, and founded on the same cause of action, but that it was the selection by the plaintiff of one of two remedies that were open to him, and a decision thereon by a competent tribunal, that precluded a resort to the other inconsistent remedy. The obvious principle which underlies this class of cases must therefore be that, when a party has deliberately selected his form of action, and pursued it to a final judgment,—and whether that judgment be for or against him is wholly immaterial,—he shall not be at liberty to again vex the same defendant with another suit in a different form of action, for the identical demand involved in, and passed upon by, the antecedent litigation. Where the remedies are alternative, and not cumulative, his choice of the one, and his pursuit of it to a final judgment, will exclude the other or opposite remedy, and, having thus repudiated the latter, he cannot afterwards ignore the judgment actually rendered, change his position, and adopt the remedy he had repudiated, and repudiate the one he had adopted. Upon the plainest principles of public policy, he "would be absolutely estopped to do this, because a man who obtains or defeats a judgment by pleading or representing an act in one aspect will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject." *McQueen's Appeal*, 104 Pa. 595, 49 Am. Rep. 592. It is an inflexible and invariable rule that, when the cause of action is substantially the same, and is or might be sustained by the same evidence, no change in the form of the suit or of the pleadings shall avail to withdraw a matter, which has once been judicially determined, from the estoppel of the adjudication. Consequently, a judgment in one suit will be conclusive in every other where the cause of action is substantially identical, notwithstanding a change in the form in which the action is brought. But, for this defense to be availing, there must have been a judgment for a discontinuance of the suit, before judgment will create such estoppel. It has been established, both in this country and in England, that, whenever an act is done, or a statement is made, by a party, which cannot be contravened or controverted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission, the character of an estoppel will attach to what would otherwise be mere matter of evidence, and it will become binding, even in opposition to proof of a contrary nature. But it is perfectly obvious that the case at bar does not belong to this class of estoppels, for the change in the character of the claim by the appellant has resulted in no fraud or injury. The case of *Farnell v. Myers*, 59 Mich. 179, and the case of *Washburn v. Great Western Ins. Co.* 114 Mass. 175, both cited by the appellee, sustain our conclusions. In the Michigan case the claimants sold to the defendant goods to the value of \$10,000. The defendant, a few days afterwards, executed a deed of trust for the benefit of his creditors, and the vendors sued out a writ of replevin for the goods so sold to the insolvent. Under the

writ a portion of these goods, valued at about \$4,000, was recovered, but the rest could not be found. The vendors thus got possession of, and retained, the part of the goods which they had replevied. They then filed their account against the insolvent estate for \$10,000, less \$4,000, the value of the goods replevied. The court held that, having elected by the replevin suit, which went to trial and to final judgment, to rescind the contract, they were bound by that election and could not, in the distribution of the insolvent's estate, treat the contract as in force, after having proceeded in the replevin suit upon the assumption that it had been rescinded. The court held that "by rescinding the sale, and prosecuting to judgment an action of replevin for the goods sold, on the theory that the fraud of the assignor had vitiated the contract, and that they owned said goods, the plaintiffs had elected their remedy, and cannot be allowed to come into court a year afterwards, because of their failure to secure adequate relief in the replevin suit, and base a claim upon the inconsistent idea that the goods were sold to the assignor." It may not be amiss to observe that in *Powers v. Benedict*, 88 N. Y. 605, a case quite similar to the one at bar, a conclusion precisely the reverse of that announced in the Michigan case was reached, and the doctrine was recognized that a partial recovery of goods, under a replevin sued out under circumstances such as we have here, did not bar an action for the remainder, or preclude the vendor from filing a claim in the insolvent vendee's estate for the value of the balance of the goods which he failed to recover under the writ of replevin. In the Massachusetts case, where a person filed a bill in equity to reform a policy of insurance by striking out a clause of warranty, and afterwards brought an action at law upon the policy as written, alleging compliance with the warranty, and after a trial on that issue had judgment rendered against him, it was held that he had elected his remedy, and had waived his right to prosecute his bill for the reformation of his policy. And to the same effect are *Sanger v. Wood*, 3 Johns. Ch. 416, and *Steinbach v. Relief F. Ins. Co.* 77 N. Y. 498, 33 Am. Rep. 655.

The record now before us discloses the fact that the replevin suit was not pressed to trial, and that a judgment was not entered therein. The suit was voluntarily discontinued. To hold that the vendor, by merely suing out the writ, though it (the vendor) subsequently abandoned the proceeding, and paid to the vendee's trustees the value of the goods replevied, forfeited all right to claim payment for these very same goods, would be to stretch the doctrine of election of remedies, and to widen its consequences far beyond any limits heretofore recognized in Maryland. It would, in fact, prescribe as a penalty for a mere mistake in bringing a suit, not the usual one of costs, but the far graver one of a forfeiture of a just and meritorious claim; and its adoption would place a court of equity in the same anomalous situation of being forced to say to a suitor: "You made a mistake in suing out this writ of replevin, but you recognized your error, and promptly discontinued the action. Your mistake has hurt no one, because the trustees have

recovered from you the full value of the goods you took, and the creditors have therefore not been prejudiced. Confessedly, you delivered the insolvent the goods, and confessedly you have not been paid for them. Their value forms part of the insolvent's estate, but, because you inadvertently supposed you had a right to reclaim the goods (though when you discovered you had not such right you abandoned your suit), you shall not receive a dollar of your debtor's estate. You shall not get even a part of the money realized from the very property which you sold and delivered to the insolvent." With equal propriety could a legatee, who, having caveated a will, subsequently dismissed the proceeding without a trial, be deprived of his legacy; but it has been distinctly held that he is not estopped to recover his legacy. *State v. Adams*, 71 Mo. 620.

Estoppels must be reciprocal, and bind both parties. They operate only on parties and privies in blood or estate, and can be used neither by nor against strangers. "He that shall not be concluded by the record or other matter of estoppel, shall not conclude another by it." *Alexander v. Walter*, 8 Gill, 239, 50 Am. Dec. 688. The trustees of the vendee were not bound by the replevin suit, nor by the vendor's election of that remedy. They brought suit upon the replevin bond, and recovered a judgment for the full value of the replevied property, and this they did upon the claim that the title to the fertilizers had vested in the Waring Manufacturing Company, under the contract of sale with the Bolton Company. In other words, the trustees successfully insisted on the contract of sale being a subsisting, unrescinded contract, notwithstanding the attempted repudiation of it by the Bolton Company. Having recovered a judgment, and having collected the money due under that judgment, upon the hypothesis that the contract was not rescinded, but was in fact in full force, what standing have they, in their capacity as creditors, to object to the payment of the promissory note held by the vendor of those goods for the price at which the goods were sold? Having recovered the value of the goods on the theory that the contract was not rescinded, they object to the payment of the note on the opposite ground, that the contract had been rescinded. This is certainly, as the Scotch say, "to approbate and repro-

bate." *Re Chesham*, L. R. 31 Ch. Div. 466.

If the doctrine sanctioned in *Thompson v. Howard*, 31 Mich. 309, to the effect that it is immaterial whether the plaintiff obtains redress in the first action or not, were adopted, and it were held that the mere fact of bringing a suit in one form of action, though abandoned, without trial or without judgment, forever precluded a resort to any other form of action respecting the same subject-matter, it would, when logically followed out, prevent an amendment from one form of action to another, although the right to make such amendments is expressly given by § 34, art. 75, of the Code. It would prevent such amendments, because, if the mere naked selection of one remedy is such an exclusion of another inconsistent one as to estop the party who had selected the first from ever afterwards resorting to the second, the bare bringing of a suit in one form of action would necessarily preclude a resort, even by way of amendment, to the opposite, or inconsistent, form of action. If the doctrine of *Thompson v. Howard* were generalized, it would amount to this: That a litigant elects his remedy in every case, in the first instance, at his peril. If he finds that he has made a mistake, whether in consequence of erroneous views of law or fact, he has nevertheless estopped himself from retracing his steps. He cannot dismiss his suit, and institute a new proceeding, of a different nature, against the same party. But no one supposes that this is the law. *Anchor Mill Co. v. Walsh*, 20 Mo. App. 107.

We hold, then, that the mere fact that the Bolton Mines Company sued out a writ of replevin to recover possession of these goods, and then discontinued the proceeding without trial and before judgment, and without realizing anything by its suit (for it paid the value of the goods to the trustees of the vendee), does not estop it to claim, out of the vendee's assets, payment of the note given by the purchaser for the price of the fertilizers sold. The appellant is consequently entitled to participate with the other creditors of the Waring Manufacturing Company in the funds which the trustees hold for distribution. We therefore reverse the order appealed from.

Order reversed, with costs above and below, and cause remanded for further proceedings.

ALABAMA SUPREME COURT.

W. L. THORNHILL, *Appt.*,

v.
Martin O'REAR.

(..... Ala.)

1. An agreement by one person to take all the chances on a proposed scheme to raffie off property, thereby eliminating all the elements of chance and fixing a definite price for the property, is not unlawful.

2. The fact that forfeits were deposited on Sunday to bind the parties to an agreement which was invalid because made on that day does not give one of them any right to recover his deposit after the holder has executed the transaction on a subsequent day by delivering the forfeit to the other party before he was notified not to do so.

(January 16, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Walker County in favor

NOTE.—As to lottery schemes, see also *People v. Elliott* (Mich.) 3 L. R. A. 403, and note; *Yellowstone Kit v. State* (Ala.) 7 L. R. A. 759, and note; *Bal-* 31 L. R. A.

lock v. State (Md.) 8 L. R. A. 671; *State v. Bonell* (La.) 10 L. R. A. 60, and note; *Long v. State* (Md.) 12 L. R. A. 89.

of defendant in an action brought to recover possession of a watch which defendant had obtained as a forfeit for plaintiff's refusing to carry out a contract. *Affirmed.*

The facts are stated in the opinion.

Mr. T. L. Sowell, for appellant:

The contract is void, made so by express statutory declaration.

Ala. Code 1886, §§ 1742, 1749.

It is absolutely and *ab initio* void, and therefore must be a nullity,—must be without legal effect, incapable of conferring right or imposing duty.

Flinn v. Barber, 64 Ala. 193.

The appellant is entitled to recover.

Dodson v. Harris, 10 Ala. 566; *Wieman v. Mabey*, 45 Mich. 484, 40 Am. Rep. 476.

The watches put in the hands of the stakeholder were a wager that the illegal trade would be consummated on Monday.

2 Bouvier, Law Dict. title *Wager*; Burrill, Law Dict.; Webster, Unabridged Dict.

If it was a wager the appellant was clearly entitled to recover his property.

Ala. Code 1886, § 1742; *Trammell v. Gordon*, 11 Ala. 656; *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816.

Messrs. Coleman & Bankhead, for appellee:

Where the forfeiture is paid over to the winner by the stakeholder with the consent of the loser the contract becomes executed.

Fisher v. Hildreth, 117 Mass. 558; *McKee v. Manice*, 11 Cush. 357.

The appellant and appellee being parties to the transaction after the execution of the contract by the consent of appellant they were *in pari delicto*.

Wood v. Duncan, 9 Port. (Ala.) 227; *Fisher v. Hildreth*, and *McKee v. Manice*, *supra*.

If a contract based on a consideration contrary to law has been fully and voluntarily executed, and the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other.

Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; *Lea v. Cassen*, 61 Ala. 315; *Morris v. Hall*, 41 Ala. 510; 2 Kent, Com. p. 467; 1 Brickett's Dig. 377, § 32; *Wood v. Duncan*, *supra*; *Long v. Georgia P. R. Co.* 91 Ala. 519; *Parrior v. New England Mortg. Secur. Co.* 88 Ala. 279; 9 Am. & Eng. Enc. Law, p. 882.

Haralson, J., delivered the opinion of the court:

All the authorities hold, if money or property be placed in the hands of a stakeholder, to abide the result of a bet, or as a forfeit to bind parties to an illegal contract while it remains in his hands, it may be arrested by the bailor before or after the happening of the event upon which the money is to be paid or the forfeiture depends. While in his hands, it is *in transitu*. He is not a party to the illegal contract, and upon the revocation of his authority, the money or property remains in his hands as a naked trustee for the parties who placed it there. *Wood v. Duncan*, 9 Port. (Ala.) 227; *Shackelford v. Ward*, 3 Ala. 87, 36 Am. Rep. 485; *Lewis v. Bruton*, 74 Ala. 317, 49 Am. Rep. 816; *Ball v. Gilbert*, 12 Met. 403; *Fisher v. Hildreth*, 117 Mass. 558; *Vischer v. Yates*, 11 Johns. 25. But, as was announced 81 L. R. A.

in *McKee v. Manice*, 11 Cush. 358, "the law seems to have been held, by the authorities, that if after the event is determined the loser pays the money to the winner, or permits, by his assent or silence, the stakeholder, into whose hands the same has been placed, to pay it over to the winner, the loser cannot recover back the same. In such case, the principle is applied that the law will refuse its aid to restore the money to the loser, both parties being *in pari delicto*." In *Vischer v. Yates*, 11 Johns. 25, it was said by Kent, Ch. J.: "If, after the determination of the event against the plaintiff, the money had actually been paid over to the winner with the plaintiff's consent, or perhaps without notice to the defendant to the contrary, the plaintiff could not have sustained an action against the winner to recover back the deposit;" citing *Houson v. Hancock*, 8 T. R. 575, in which Lord Kenyon said that there is no case to be found where an action has been maintained to recover the money back again. All the decisions of this court are in line with these authorities, holding, as to suits upon executory contracts founded upon immoral or illegal considerations, they may always be defended on the ground of their invalidity; but that when executed, unless controlled by statute to the contrary, the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, for the reason that, being equally at fault, the law will help neither. *Long v. Georgia P. R. Co.* 91 Ala. 522, and authorities there collected.

Section 1742 of our Code provides that all contracts founded in whole or in part on a gambling consideration are void; and any person who has paid any money or delivered anything of value, lost upon any game or wager, may recover such money, thing, or its value, by action commenced within six months from the time of such payment or delivery. If the case before us falls within the influence of that statute, it would be an exception to the rule as to executed contracts to which we have just referred. *Samuels v. Ainsworth*, 13 Ala. 866. The facts are, that on Sunday morning, being in the presence of defendant and others, when the subject of raffling came up, the plaintiff stated, that "he believed he would raffle off his dwelling house and lot by chances," stating the proposed scheme, the chances to be 500, at a specified valuation. The defendant said he would take all the chances, to which plaintiff assented, and said he would make out a deed to the house and lot the next day, and deliver it to defendant, when he could pay him the money for it. Both parties agreed at the same time, to put up their watches in the hands of a stakeholder, as a forfeit, to stand by the proposition as made and accepted, which was done. This statement of facts shows that all the elements of chance were eliminated from the contract, which resulted in being nothing more than an offer by the one party to sell the house and lot at a certain price, to be arrived at by calculation, and the acceptance of the offer by the other. There was nothing unlawful in this offer, as made and accepted, if it had been done on any other day than Sunday, but having been made on that day, it was void, and incapable of enforcement. Code, § 1749.

But this suit arises outside the contract of

the sale and purchase of the house and lot, namely, out of the transaction of putting up the watches to secure the fulfillment of this contract. It is said this was a bet or wager, which brings the case under the influence of said § 1742 of the Code. As to this, let us see. A wager is nothing more than a bet, "by which two parties agree that a certain sum of money, or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event." 2 Bouvier, Law Dict. *Wager*. The transaction of putting up the watches was not a wager. It was only a pledge of the good faith of the parties to abide the terms of the agreement, in the shape of liquidated damages for a failure of either to perform his agreement. *Keeble v. Keeble*, 85 Ala. 552. If the transaction had occurred on any day but Sunday, the idea of gambling, perhaps, would not have occurred to any one. This suit, it will be borne in mind, is not on the contract. It is in detinue by the plaintiff, who receded from the bargain, against the defendant, who stood by it, and to whom plaintiff's watch, put up as a forfeit, had been delivered. The evidence of plaintiff tended to show that on Sunday, the day of the transaction, shortly after it occurred, he notified the stakeholder that he would not stand by the proposition, and not to deliver the watch to the defendant; that he demanded the watch from the stakeholder, before he delivered it to defendant, and did not authorize him to deliver it to him; and that on Monday or Tuesday following, plaintiff told defendant he would not abide the proposition made on Sunday before, and wanted his watch, which defendant refused to deliver to him. On the part of defendant it was shown that plaintiff did not notify him of his intention not to abide the transaction of Sunday, until after the watch had been delivered to him by the stakeholder, and further, that the next day, Monday, plaintiff told the stakeholder it was defendant's watch, and to turn it over to him, which he accordingly did, and that after he had turned it over to defendant, plaintiff told the stakeholder not to give it to defendant, when he notified him that he had already

turned it over to him. The attempt of plaintiff here is to recover this property because the agreement of forfeiture was entered into on Sunday. It could not, as we have shown, have reference to any illegality growing out of the proposed raffles which was afterwards abandoned. The condition on which the forfeit was to be delivered to defendant had taken place. No delivery was made on Sunday, but on Monday or Tuesday following, and thereby, as between the parties to the transaction, it became executed. Whatever element of illegality, if any, there may have been in putting up the forfeiture, in the beginning, on Sunday, the plaintiff was as much to blame for as defendant, and if the watch was delivered according to the terms of the agreement of forfeiture, that agreement became executed, and plaintiff, in a suit in detinue for the property itself, is in no condition to ask the law to reclaim it from the predicament in which he contributed to place it. It is only in suits on contracts, void under the statute for having been made on Sunday, that the defense of invalidity for having been executed on that day can be made, if the contract remains unexecuted. If one buy a horse on Sunday, and it is delivered and paid for, it could hardly be contended that either party could sue the other, the one for the horse, or the other for the money he paid for it, because the transaction occurred on Sunday. *Black v. Oliver*, 1 Ala. 450, 35 Am. Dec. 381; *Windham v. Childress*, 7 Ala. 357; *Walker v. Gregory*, 36 Ala. 184; *Morris v. Hall*, 41 Ala. 536; *Long v. Georgia P. R. Co.* 91 Ala. 522. If this suit had been brought in proper form against the stakeholder, and the proof showed that he was notified not to deliver the watch before he did so, a case different from the one we now have would be presented.

It follows from what we have said that under the evidence in this case the plaintiff was not entitled to the general charge as requested. Nor was there any error of which plaintiff can complain, in giving those charges requested for defendant.

Affirmed.

CALIFORNIA SUPREME COURT.

Alexander McBEAN, *Appt.*,
v.
City of FRESNO *et al.*, *Respts.*
(.....Cal.....)

1. A city may contract for the disposal of sewage from the outfall of sewers although this is outside the corporate limits.
2. The liability incurred by a city contract to pay an annual sum during a

period of years for the disposal of sewage is, within the meaning of a constitutional provision that any liability "exceeding in any year the income and revenue provided for it for such year" shall be void, to be deemed the amount annually payable, and not the aggregate for the whole time of the contract.

3. A contract by a municipal board extending for more than one year or beyond the term of office of the board which makes it, if it is fair, just, and reasonable, prompted by

NOTE.—On the question, What constitutes indebtedness of a municipality within the meaning of provisions limiting the amount thereof? see *note* to *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402, and also the case of *Saleno v. Neosho* (Mo.) 27 L. R. A. 760.

As to the limitation of municipal indebtedness in 31 L. R. A.

general, see also *Rainsburg v. Fyan* (Pa.) 4 L. R. A. 336; *Brooke v. Philadelphia* (Pa.) 24 L. R. A. 781, and *Linn v. Chambersburg* (Pa.) 25 L. R. A. 217.

As to the validity of contracts made by officers for a period beyond their term of office, see *note* to *Shelden v. Fox* (Kan.) 16 L. R. A. 257.

the necessities of the situation or in its nature advantageous to the municipality, is not invalid as a surrender or suspension of the legislative power of the municipal authorities.

(March 25, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Fresno County in favor of defendants in an action brought to recover the contract price for services rendered in disposing of sewage for defendant city. *Reversed.*

The facts are stated in the opinion.

Messrs. E. D. Edwards and W. C. Graves, for appellant:

Decisions in our supreme court in passing upon the provision of our Constitution have, as interpreted by Dillon, construed it to mean that each year's income and revenue must pay each year's indebtedness and liability, and that no indebtedness or liability in any one year shall be paid out of the income or revenue of any future year.

Dill. Mun. Corp. 4th ed. § 134a.

When in such cases a municipality contracts for work and labor its debt or liability for payment does not arise until the work is done or the labor performed under the contract.

Crowder v. Sullivan, 128 Ind. 486, 13 L. R. A. 647; *East St. Louis v. East St. Louis Gaslight & C. Co.* 98 Ill. 430, 38 Am. Rep. 97; *Weston v. Syracuse*, 17 N. Y. 113; *Garrison v. Howe*, 17 N. Y. 465; *Vincennes v. Citizen's Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485.

If there is no debt or liability to pay except as each year's work is performed under the contract, the city can and will easily make provision out of each year's income and revenue for the payment for that year's debt.

Grant v. Davenport, 36 Iowa, 396.

The provisions which prohibit a municipal corporation from legislating future restrictions to its own legislative power are not applicable to a time contract entered into by such a corporation.

Indianapolis v. Indianapolis Gaslight & C. Co. 66 Ind. 396; *Weston v. Syracuse*, 17 N. Y. 110; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 378.

There is no limitation as to time of making contracts upon the city of Fresno in its charter or the Constitution of this state.

In the absence of such limitation the board are bound by no rule other than an honest and fair exercise of the discretion reposed in them.

Cook v. Racine, 49 Wis. 243; *Riehl v. San José*, 101 Cal. 442; *San Francisco Gaslight Co. v. Dunn*, 62 Cal. 585; *Territory, Woods, v. Oklahoma*, 2 Okla. 158.

Mr. L. W. Moultrie, for respondents:

The common council had no authority to provide for the creation of a debt to arise in the future, any more than to create a debt directly and *in presenti*.

Wallace v. San José, 29 Cal. 181.

The framers of the Constitution meant that no such indebtedness or liability should be incurred (except in the manner stated) exceeding in any year the income and revenue actually received by such city.

San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; *Shaw v. Stutler*, 74 Cal. 258.
31 L. R. A.

A claim could not be allowed or paid out of the funds of a subsequent fiscal year.

Schwartz v. Wilson, 75 Cal. 502; *Smith v. Broderick*, 107 Cal. 644; *Sutro v. Pettit*, 74 Cal. 332.

This whole contract obligation is a liability to the full extent of the whole period.

Niles Waterworks v. Niles, 59 Mich. 312; *Smith v. Newburgh*, 77 N. Y. 131; *Springfield v. Edwards*, 84 Ill. 626; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785.

By entering into a five-year contract the city trustees surrendered or bargained away their legislative or governmental powers and duties.

Oakland v. Carpentier, 13 Cal. 540; Dill. Mun. Corp. § 97; *People v. Johnson*, 6 Cal. 499; *Nougues v. Douglass*, 7 Cal. 65.

The inability of a business corporation to avoid its obligation upon the plea of *ultra vires* when it has received and retained the consideration for its obligation has no application to a municipal corporation.

Von Schmidt v. Widber, 105 Cal. 151; *Young v. Independent School Dist. No. 47, Bd. of Edu.* 54 Minn. 385; *Gutta Percha & R. Mfg. Co. v. Ogallala*, 40 Neb. 775.

Henshaw, J., delivered the opinion of the court:

The city of Fresno duly and regularly, so far as form and procedure are concerned, entered into a contract with plaintiff by which plaintiff agreed to take care of and dispose of the sewage of the city for the period of five years for the sum of \$4,900 per annum, payable quarterly. Plaintiff was required to give, and did give, a bond in the sum of \$10,000, to which extent he agreed to reimburse the corporation for any liability or loss it might incur or suffer by reason of a faulty performance of his contract. No natural means were available to Fresno for the disposition of its sewage. It had provided sewers, but had made no provision for the care of their contents. These were to be discharged beyond the city limits. But, before the sewers could be used, a sewer farm was necessary for the reception and treatment of the waste matter. The city had secured no such farm. Under these circumstances, the contract with McBean was entered into. He made the necessary expenditures, and year by year performed his contract according to its letter and spirit. Each year, in turn, the city levied, collected, and apportioned to the sewer fund a tax to cover the yearly amount due McBean, and duly audited and paid his demands on the fund. This continued for three years. During the fiscal year ending May 31, 1894, plaintiff performed his contract, but the city refused payment upon the ground that the contract was void. McBean then instituted this action, charging in the first count, for the value of labor and services furnished at defendant's request, and, in the second, pleading at length and standing upon the contract in question. He also averred that there was in the sewer fund, not otherwise appropriated, and available for the payment of his demand, more than \$3,000, and such is the undisputed fact. Indeed, none of these facts is disputed. Upon the trial most of them were admitted under stipulation, and others proved without conflict. The court sustained a general de-

murrer to the second cause of action. At the close of plaintiff's case a motion for nonsuit upon the cause of action in assumpsit was made and granted. These two rulings are the errors complained of.

Against the validity of the contract, the first objection urged is that the city had no power to enter into this contract for the care and disposition of its sewage, because "it has no reference whatever to the sewage within the city, but provides for the care and disposal of the sewage from the outfall of the sewers some distance from the city." We see no force in this objection. Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether, by possibility the power had been expressly denied. In the case of the city of Fresno, a city of the fifth class, the power is, however, expressly conferred. "The board of trustees shall have power to establish, construct, and maintain drains and sewers." Municipal Corporation Bill, § 764, subd. 5. Disposition of the outfall is an essential part of the maintenance of a sewer system, and it must often be necessary for inland cities to arrange for that disposition without their corporate limits. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601.

But the controlling questions presented by this contract for determination are: (1) Does it violate the Constitution and charter of the city of Fresno? (2) Does it operate as a surrender or suspension of the legislative powers of the trustees of the city? The Constitution provides (art. 11, § 18): "No . . . city . . . shall incur indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, without, etc. . . . Any indebtedness or liability incurred contrary to this provision shall be void." The charter of the city of Fresno provides, in terms harmonious with those of the Constitution: "The trustees shall not create, audit, allow, or permit to accrue any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes, etc." Stat. 1888, p. 255. The charter of the city of Fresno authorizes the levying and collecting of a tax, not exceeding 10 cents on each \$100, for the sewer fund. Municipal Corporation Bill, § 764, subd. 9. No question is here presented but that the text which may thus be collected is ample for the payment of the sums due or to become due to plaintiff under his contract, and the question of the validity of the contract is free from any embarrassment from this consideration. In the constitutional provision under consideration, the framers had in mind the great and ever-growing evil to which the municipalities of the state were subjected by the creation of a debt in one year, which debt was not, and was not expected to be, paid out of the revenue of that year, but was carried on into succeeding years, increasing like a rolling snowball as it went, until the burden of it became almost unbearable upon the taxpayers. It was to prevent this abuse that the constitutional provision was enacted. In *San Francisco Gas Co. v. Brickwedel*, 62 31 L. R. A.

Cal. 641, and in *Shaw v. Statler*, 74 Cal. 258, the question is discussed, and the interpretation of the constitutional provision laid down, and the reason for it given. Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of municipalities are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever-increasing volume from year to year, until he who is without any property may be in a better financial situation than one who owns much.

Upon the other hand, the correlative rights of a creditor of the city, under these circumstances and under the law, have been recently set forth with exactness and clearness by Mr. Justice Harrison in *Weaver v. San Francisco City & County* (Cal.) 43 Pac. 972: "Whoever deals with a municipality does so with notice of the limitation of its powers, and with notice also that he can receive compensation for his labor or materials only from the revenues and income previously provided for the fiscal year during which his labor and materials are furnished, and with the knowledge, too, that all other persons dealing with the municipality have the same rights to compensation and are subject to the same limitations, as he is. Even though, at the time of making his contract, there are funds in the treasury sufficient to meet the amount of his claim, he is charged with notice that these funds are liable to be paid out for municipal expenditures before his contract can mature into a claim against the city; and if others, whose claims have accrued subsequent to his, are able to intercept these funds, he is in the same condition as any creditor who has dealt with one whose assets are exhausted before he presents his claim. He acquires no claim in the nature of a lien upon these funds for the amount of his demand, nor is there any legal obligation upon the municipality, any more than upon any other debtor, to pay the claims against it in the order in which they are incurred, unless they are presented in that order, and in such condition and with such formalities as entitle the claimant to immediate payment. In dealing with the municipality, he must rely upon the integrity of its officers that they will not incur any liabilities during the year in excess of the income and revenue provided for that year, and as a prudent man, he will ascertain, not only the amount of that income, but also the amount of the claims already existing and of those that are likely to be incurred."

In the case of contracts extending over a period longer than one year, it may be readily seen that the municipality is abundantly protected, and that it is the contractor therewith who subjects himself to peril and risk or loss. If there are not revenues for any given year sufficient and available for the payment of his claims for that year, those claims become waste paper, and are not carried over as a charge against the income, and the revenue of a succeeding year. This determination of the law in this state removes a potent objection found by the supreme court of Michigan to sustaining a contract under a law similar to

our own, where the life of the contract was for several years. Says the court: "There can be no doubt, in our opinion, that this whole contract obligation is a liability to the full extent of the thirty years rental; and it is equally clear that all unpaid sums would be aggregated until paid." *Niles Waterworks v. Niles*, 59 Mich. 312.

In this state such a rule would not obtain, and the contract under consideration is left with its validity to be determined primarily as the question is answered. Does it or does it not create a debt or liability for a given year exceeding the revenue of that year? And upon this it may be said, at the outset, that there is a contrariety of opinion in the courts of the states which have been called upon to interpret constitutional or charter provisions similar to or identical with our own. The state of Michigan, as will be observed from the case last cited, holds such contracts to be void, for the reason above quoted. Ohio, New Jersey, Montana, and Oregon have reached the same conclusion, and perhaps other states. *State v. Medbery*, 7 Ohio St. 526; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Salem Water Co. v. Salem*, 5 Or. 29; *Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665.

Upon the other hand, in Illinois, Pennsylvania, Massachusetts, New York, Iowa, Indiana, and Oklahoma (and it may be in others which have not come beneath our notice), it is uniformly held that contracts such as these are not violative of the constitutional inhibition. *East St. Louis v. East St. Louis Gaslight & C. Co.* 98 Ill. 415, 88 Am. Rep. 97; *Erie's Appeal*, 91 Pa. 498; *Smith v. Dedham*, 144 Mass. 177; *Westen v. Syracuse*, 17 N. Y. 110; *Grant v. Davenport*, 86 Iowa, 396; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Indianapolis v. Indianapolis Gaslight & C. Co.* 46 Ind. 396; *Territory, Woods, v. Oklahoma*, 2 Okla. 158.

In a certain very restricted sense it may be said that a liability is created by a contract such as this; but to call it a present liability for the aggregate amount of the payments in the contract contemplated thereafter to be made is not legally permissible. A liability to the city would arise upon breach of contract, but the Constitution never meant to protect the city from the consequences of its own wilful and tortious acts. A liability might arise against the city for the negligence of its officers, and the damages due to an individual who had suffered therefrom might be great; but such liability for a municipal wrong the Constitution never meant to protect against. When we come to consider the contractual relations between the city and appellant, it is at once seen that the city cannot be liable in any one year for more than \$4,900, an amount far within the revenue derived to the sewer fund, and further that it cannot become liable for this amount at all until faithful service rendered by the contractor each year. If the city, in any one year, should fail to collect into its sewer fund money sufficient to pay the just claims of the contractor, then, as above said, it would be the contractor's loss, the city would be chargeable with no financial responsibility therefor, and the result, at the most, so far as it was concerned, would be a failure upon the part 31 L. R. A.

of its officers to observe good faith in their own dealings. There need be here no struggles with the niceties of definitions given to "debt" or "liability." An able discussion of those questions will be found in the case of *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416. We base our views upon the conviction that, at the time of entering into the contract, no debt or liability is created for the aggregate amount of the instalments to be paid under the contract, but that the sole debt or liability created is that which arises from year to year in separate amounts as the work is performed. These views find abundant support in the adjudicated cases in this state. Article 8 of the former Constitution of California provided that the legislature shall not create any debts or liabilities in any manner which shall exceed the sum of \$300,000, except under certain specified contingencies. The state made a contract for the care of its prison, for convict labor, etc., for the period of five years, agreeing to pay therefor the sum of \$10,000 per month. The act came before this court for review in *State v. McCauley*, 15 Cal. 429, where the question was elaborately argued, and fully considered by the court. Chief Justice Field, in delivering the opinion of the court, spoke as follows: "The unconstitutionality of the act . . . is asserted on two grounds: First, that it appropriated the sum of \$600,000, and thus created a debt or liability against the people of the state exceeding the limit prescribed by the eighth article of the Constitution. . . .

The contract provides for the payment of \$10,000 a month, and the act appropriates this sum per month. The appropriations are to take effect, and the services are to be rendered in future. Until the services are rendered, there can be no debt on the part of the state. The lessee could not have claimed, at any time after the making of the contract, the aggregate of all the monthly instalments,—because the state never owed him that amount. The state only became indebted as the services were each month performed. . . . The 8th article was intended to prevent the state from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities, as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the services operates in fact in the nature of a cash payment." This interpretation, after further consideration and argument, was reaffirmed in *People, McCauley, v. Brooks*, 16 Cal. 11, and again in *Koppikus v. State Capitol Comrs.* 16 Cal. 248. In *People v. Arguello*, 37 Cal. 524, it is said: "A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened."

These decisions being before the framers of the present Constitution, under familiar rules of interpretation it will be held that their enactment of similar provisions was made in the light of them. *Wallace v. San Jose*, 29 Cal. 181, is not in conflict with these decisions. The contract there contemplated a payment which

might become a debt in the year in which the contract was executed, as well as in some future year. Under the peculiar language of the charter, which forbade the creation of any debt unless the money was actually in the treasury to meet it, it was declared that the council had no authority to provide for the creation of a debt to arise in the future, any more than to create one directly and *in presenti*.

Upon the second proposition, namely, whether or not the contract operates as a surrender or suspension of the legislative powers of the trustees of the city, it is to be observed that there is in this state no inhibition against the making of a contract by a municipal board which shall extend for more than one year, or even beyond the term of office of the board which makes it. If the legislature desired to restrict municipalities in this particular, it could easily do so by the passage of a law, such as exists in some other states, declaring void any contract upon the part of a municipality which is to extend beyond the current fiscal year, or beyond the term of office of the authorities which enter into it. But, even in the absence of such provisions, courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time—First, because such contracts, in their nature, tend to create a monopoly in favor of the other party thereto for supplying the city with the article contracted for; second, because they may involve an undue restraint upon the legislative powers of the successors of the board, and prevent those successors from availing themselves of a change in the times, of opposition, of reduced rates, or other causes operating legitimately to decrease the price of the commodity, of which decrease in price the city, by reason of its contract, cannot avail itself. There is thus, by law and reason, a well-defined limit set to such contracts. In the absence of any other objection to them, they will not be upheld, in the absence of a clear showing of a reasonable necessity for their execution. But if, on the other hand, it be made to

appear that, at the time the contract was entered into, it was fair and just and reasonable, and prompted by the necessities of the situation, or was in its nature advantageous to the municipality, then such a contract will not be construed as an unreasonable restraint upon the powers of succeeding boards. In *San Francisco Gaslight Co. v. Dunn*, 62 Cal. 585, this court says: "In the absence of an express limitation as to the period of time for which a contract may be made, we would hold, perhaps, that the contract with the plaintiff for five years was not beyond the power of the supervisors." In *Riehl v. San José*, 101 Cal. 442, an action was brought to set aside a contract for five years, made by the city with an electric company for the lighting of its streets. The complaint sounded in fraud, and further declared that the contract was against public policy, illegal, and void. The contract was upheld, it being found that there was no fraud, and that the "members of the common council . . . acted as honest men, and exercised their honest discretion for the best interests of the city."

We have here, then, a contract made for a purpose expressly authorized by the charter, a contract which looked to supplying the city with an absolute need, a contract which pertained to the ordinary expenses of the city, and, together with other like expenses, was well within the limit of the current revenue authorized by its charter annually to be provided for this specific purpose. The term of the contract was fair, indeed, in view of the considerable expense which the evidence showed plaintiff was obliged to undergo to fulfil his undertaking. Under these circumstances, we hold the contract to be valid, operative, and binding upon the city.

The judgment and order are reversed, and the cause remanded, with directions to the trial court to overrule defendants' demurrer.

We concur: **McFarland, J.; Garoute, J.**

MISSOURI SUPREME COURT.

STATE of Missouri, *ex rel.* LACLEDE GAS-LIGHT COMPANY,

v.

Michael J. MURPHY, Street Commissioner of St. Louis.

(130 Mo. 10.)

1. The right to lay electric-light wires in the streets of a city by virtue of a franchise to lay pipes, fixtures, or other things for the purpose of lighting the city, is subject to the municipal control of the streets and general police power regulating and restricting the manner in which such wires, tubes, and cables may be secured or supported and insulated,—especially when the franchise was given before the use of electricity for such purposes was known.

NOTE.—Police regulation of electric companies.

- I. In general.
- II. As to the occupation of highways or waters.
- III. As to guard wires.
- IV. As to the operation of electric lines.
- V. Limitations of the police power.
 - a. Limitations in state Constitutions.
 1. Impairment of obligation of contracts.
 2. Deprivation of property without due process of law.
 3. Class legislation.
 - b. Limitations in Federal Constitution.
 1. Statutes requiring electric wires to be put underground.

2. It is a matter of common knowledge that electricity is used for the purpose of trans-

V.—Continued.

2. Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.
3. Statutes regulating telephone prices and requiring service on equal terms to all.
4. Statutes imposing license fees on telegraph companies.

I. In general.

That the regulation of electric lines is within the range of police regulations is perfectly obvious on the briefest consideration of the nature of police

mitting sound by telephone and messages by telegraph, and also for generating light and producing power.

(June 18, 1895.)

APPPLICATION for a writ of mandamus to compel defendant as street commissioner of St. Louis to permit relator to lay electric wires under a certain street in that city. *Denied.*

The facts are stated in the opinion.

Messrs. Henry Hitchcock, G. A. Finkelnburg, and Isaac H. Lionberger, for relator:

If the state of Missouri has invested relator

with certain powers and franchises, among which is the right to light the city of St. Louis, and to make and vend gas lights and other lights, including electric lights, and to that end to lay down "all pipes, fixtures, or other things properly required," then the city of St. Louis cannot by any ordinances or requirements on its part annul or destroy those franchises, nor can it impair or abridge them, nor can it impose substantial burdens and conditions upon their exercise, not imposed by the state itself.

Relator, its stockholders, and all those who have invested in relator's securities, have vested rights which cannot be substantially abridged or disturbed by the state itself, much less by

power. The police power is the power of the legislature representing the body of the citizens to enforce the maxim "*sic utere tuo ut alienum non laedas*." "We think it is a settled principle," says Chief Justice Shaw, "growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Com. v. Alger*, 7 Cush. 84.

"The police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state." *Redfield, Ch. J.*, in *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625.

"The police of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order and to prevent offenses against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." *Cooley, Const. Lim. p. 572*, 6th ed. p. 704.

Under the reserve powers of the state, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the state for the good order, peace, and protection of the community. The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation—that the state does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation, it may make all necessary provisions with respect to the buildings, poles, and wires of electric companies in its jurisdiction which the comfort and convenience of the community may require. *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, Reversing 1 Am. Elec. Cas. 632, 95 Ind. 12, 48 Am. Rep. 662.

"The police power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized, in particular cases, are quite numerous, as well as various in their application to our complex system of government. This . . . power . . . embraces the entire system of internal state regulation, having in view, not only the preservation of public order and the prevention of offenses against the state, but also the promotion of such intercourse between the inhabitants of the state as is calculated to prevent a conflict of rights, and to promote the interests of all. It is a power inherent in every sov-

31 L. R. A.

eighty, and is, in its broadest sense, nothing more than the power of a state to govern men and things within the limits of its own dominion." *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201.

This general power of police regulation in respect to electric wires is exercised in some states by statutes expressly providing for insulation of electric wires and other modes of preventing injuries therefrom.

A city ordinance prohibiting the suspension of electric wires over or upon the roofs of buildings, or the suspension or support of such wires upon any building unless it was to supply some occupant of the building with electric light or power or the facilities for using the wire in telegraph or telephone service, was contested in *Electric Improv. Co. v. San Francisco City & County*, 45 Fed. Rep. 593, 13 L. R. A. 131, but was sustained by the court. *Sawyer, J.*, in his opinion said: "That the stretching of these wires over buildings in the manner practiced, as shown by the evidence, no one, I think, can doubt after reading the affidavits, is extremely dangerous, both as being liable to originate fires, and as obstructions to the extinguishment of fires otherwise originated. Indeed, the danger is a matter of common knowledge. We might almost as well require strict proof of the danger of storing gunpowder, or dynamite, in, under, upon, or about our houses. . . . It is certainly competent, under the police powers of the state, to suppress such dangerous erections in the interest of the common safety of the community. Who can say, in view of the constant and perpetual menace, that the provisions of this ordinance are unreasonable?"

II. As to the occupation of highways or waters.

The regulation of the occupation and use of the highways is a well-recognized exercise of the police power of the state. The highways within and throughout the state are constructed either by the state itself, or by municipalities through delegated powers from the state, which has full powers to provide all the proper regulations of police to govern the actions of persons using them and to make from time to time such alterations in these ways as the proper authorities shall deem best. *Cooley, Const. Lim. p. 588.*

The most wide-reaching application of the police power to the regulation of the occupation of the highways by electric lines is the enactment of statutes by which the municipal authorities are given the right to regulate the erection and maintenance of electric lines on the highways. Statutes of this nature have been passed in almost every state, and are intended to delegate to the local municipal authorities such portion of the police power of the state as to designate the place in the highway which the pole shall occupy, and the number and height of the poles, and number of wires to be used, as shall, in their opinion, secure the least possible inconvenience to the

the municipal authorities of the city of St. Louis.

State, St. Louis, v. Laclede Gaslight Co. 102 Mo. 472; *State, Haeussler, v. Greer*, 78 Mo. 188; *Sloan v. Pacific Railroad*, 61 Mo. 24, 21 Am. Rep. 397; *Scotland County v. Missouri, I. & N. R. Co.* 65 Mo. 123; *Weston v. Charleston*, 27 U. S. 2, 2 Pet. 449, 7 L. ed. 481; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Louisville Gas Co. v. Citizens Gaslight Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

Relator cannot comply with the requirements now made by the city of St. Louis, or

accept the ordinance in question, without a virtual surrender of its charter.

Police regulations must have some reference to the comfort, safety, or welfare of society. They must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchise.

State, Haeussler, v. Greer, State, St. Louis, v. Laclede Gaslight Co., New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.,

traveling public. See statutes collected in Crosswell on Electricity, chap. 6.

The right to exercise this police power is inferable from the general power given to municipal governments to regulate the use of the streets, even when it is not especially conferred upon them by the direct terms of a special statute. Dill. Mun. Corp. § 691.

And the courts have uniformly held that it is a valid and proper exercise of the police power of the state. *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *H. Clausen & Sons Brewing Co. v. Baltimore & O. Teleg. Co.* (N. Y. Sup. Ct.) 2 Am. Elec. Cas. 210; *People, New York Electric Lines Co. v. Squire*, 107 N. Y. 593; *United Lines Teleg. Co. v. Grant*, 137 N. Y. 7; *State, Wisconsin Teleph. Co. v. Janesville Street R. Co.* 87 Wis. 72, 22 L. R. A. 759; *Mutual U. Teleg. Co. v. Chicago*, 16 Fed. Rep. 309; *Allentown v. Western U. Teleg. Co.* 148 Pa. 147.

The reason of this is obvious. The primary and fundamental object of all public highways is to furnish a passageway for travelers in vehicles, or on foot, through the country. *Bouvier, Inst.* § 442.

They were originally designed for the use of travelers alone. But in the course of time and in the interest of the general prosperity and comfort of the public, they have been put, especially in large cities, to numerous other uses; but such uses have always been held to be subordinate to the original design and use. Thus they have been appropriated in recent times for the reception of sewer, water pipes, gas pipes, pipes for heating and manufacturing purposes, underground railroads, trenches for wires for telegraph, telephone, and other purposes, which all require in their construction the disruption of the pavements, and the temporary interruption, at least, of the rights of travelers in the public highways. The due and orderly arrangement of the various and conflicting claims to privileges in the streets of large cities is pre-eminently a police power, and it is within the legitimate authority of a legislature to delegate its exercise to municipal corporations. *People, New York Electric Lines Co. v. Squire, supra.*

Under such statutes, the municipal authorities may say what streets shall be used, at what points in the streets the poles shall be erected, and how they shall be planted and secured. *American U. Teleg. Co. v. Harrison*, 31 N. J. Eq. 627; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32.

And also allow a change in the line if it becomes necessary in reconstructing the street. *Monongahela v. Monongahela Electric Light Co.* 12 Pa. Co. Ct. 529.

The improvement of the streets, and what is necessary to complete a given improvement thereof, are matters solely within the control of the municipal corporation, and even the court can interfere only where there is fraud, corruption, or oppression. *Ibid.*

81 L. R. A.

Where a street is graded, and a vitrified pavement is being laid, whether the poles of an electric-light company should be allowed to stand in the line of the curb, and make a break therein and project out into the angle of the brick and curbstone which forms the water table, or should stand back of the curb line, leaving the curb continuous, and the water table free and unobstructed, is a question solely within the jurisdiction of the city councils, and from their decision there is no appeal by such a private corporation whose occupancy and use of the street are adverse to and not for the benefit of the traveling public. *Ibid.*

The plenary power of the state on this subject includes the power to deny to any form of electric use the right to occupy the highways. If, in the opinion of the state officials, such occupation is not for the public interest, except so far as this denial may be in conflict with the Federal Constitution, which is the case, as will be seen later, in regard to telegraphs, and possibly telephone lines. *American U. Teleg. Co. v. Harrison*, and *Wisconsin Teleph. Co. v. Oshkosh, supra.*

This power of denial of the right to occupy is, with the exception just stated, generally delegated to municipal authorities with a view to the proper care of local interests, and is implied without express words in the general powers of regulating and caring for the streets and highways. In the case of electric-light and electric-railway companies, it would seem that, in the absence of inconsistent statutory provisions, the municipal authorities might, in their discretion, wholly refuse an application for leave to occupy the streets. This point was considered in a case in which an electric-light company sought for a writ of mandamus to compel the board of aldermen of a city to grant a location for its poles. The company based its application upon a statute granting to telegraph companies the right to set their poles in the highway, subject to the designation of place by the aldermen, and upon a later statute providing that the acts relating to telegraph companies should, so far as applicable, extend to lines for the transmission of electricity for the purpose of lighting. The court decided that the mandamus should not issue, placing the refusal upon either of two grounds. In the first place, that the matter of granting locations was left to the discretion of the aldermen of the city or the selectmen of the town, and that they might refuse wholly to grant such location, in cases where it would interfere with public travel on account of the narrowness of the street, or for other reasons; and second, that even if it were considered imperative upon the municipal authorities to grant such location to telegraph companies, yet the reason for an imperative construction of this statute would not apply to electric-light companies; that telegraph companies must in almost all cases run from town to town, and through different towns, and therefore it might be considered imperative that their

and *Louisville Gas Co. v. Citizens Gaslight Co.* *supra*.

Mr. W. C. Marshall, for respondent:

The legislature could not grant to the Laclede Gaslight Company the right to authorize any one else to use streets and highways, for such an act would be clearly a delegation of the power vested in the legislature to a private and quasi-public corporation, and in conflict with the rights of the city of St. Louis, under the act of 1865.

St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721.

A similar question arose in *New York, New York Electric Lines Co., v. Squire*, 145 U. S.

175, 36 L. ed. 666, 14 Daly, 154, 107 N. Y. 593, where the court said the state law of 1885 simply transferred the reserved police power of the state from one set of functionaries to another, and required the company to submit its plans and specifications to the latter, who would determine whether they were in accordance with the terms of the ordinance giving it the right to enter and dig up the streets of the city, and being so construed it violates no contract rights of the company which might grow out of the permission granted by the municipality.

The said act of 1886 comes within the principles settled in *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, and is not

locations should be granted by the selectmen of every town through which they should pass: but the same reason would not apply to electric-lighting companies, whose operations are usually confined to a single town or part of a single town, and are of local interest merely; and that so far as electric-lighting companies are concerned, it must be taken to be the intent of the statute that the authorities of the town to which, ordinarily, the whole business of the electric-lighting company is confined should have the right to say whether or not any location of poles should be granted. *Suburban Light & P. Co. v. Boston*, 153 Mass. 200, 10 L. R. A. 497.

This power of denial, however, is not vested in the municipal authorities if it is inconsistent with express statutory provisions (*Suburban Light & P. Co. v. Boston*, *supra*), as, for instance, in the case of telegraph lines, which in most states are directly granted a right of way by statute, and only the regulation of the use of this right of way is left to the city or town. The state statutes granting this right of way to telegraph companies (cited in *Croswell on Electricity*, p. 53) are generally copies of, and are all intended to conform to, and give local sanction to, the act of Congress which will be discussed hereafter, which gives telegraph companies the right of way over all post roads of the United States. The conflict between the police power of the state and the Federal Constitution in this regard will be considered later.

The statutes which delegated this police power of regulating the occupation of the highways by electric companies to the various municipalities, were generally enacted before the advisability of putting electric wires underground had been developed by the great increase in the number of such wires, but there are at the present time many states in which statutes expressly giving municipal authorities the right to regulate underground wires have been enacted. Such is the case in Indiana, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, and Vermont. See *Croswell on Electricity*, §§ 163-165. These statutes are either permissive in their form, giving the electric companies the right to put their wires underground if they desire, as in Indiana, Kansas, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, and New York, or mandatory, as in Maryland, Massachusetts, Ohio, and Vermont, or both, as in some of the states above cited.

The necessity of these acts sprung out of a great evil, which, in recent times, has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purpose of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation, not only of the surface and air above the streets, but indefinite space under ground. This evil had

become so great that every large city was covered with a net work of cables and wires attached to poles, houses, buildings, and elevated structures, bringing danger, inconvenience, and annoyance to the public. Extensive spaces under ground were also required to lay pipes and build trenches and arches, to transact the business of the various corporations requiring them. These works not only called for great skill to harmonize the various and conflicting claims of competing companies to rights above as well as beneath the ground, but a comprehensive plan and supervision, to prevent the constant disruption of the streets and the interruption of travel. The necessity of a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to. *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593.

These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to by requiring all such wires to be placed under ground in such cities, and be subject to the control and supervision of local officers, who could reconcile and harmonize the claims of conflicting companies, and obviate in some degree the evils which had grown to be almost, if not quite, intolerable to the public. The scheme of these statutes was not to annul or destroy the contract rights of such companies, but to regulate and control their exercise. They did not purport to deny them any privileges theretofore granted, but they did require that they should be exercised with due regard to the claims of others, and in such a way that they should cease to constitute a public nuisance, and should be enjoined in such a manner as to inconvenience and endanger the general public as little as possible. *Ibid*.

These acts in their general scope have always been held to be a valid exercise of the police power of the state. *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *H. Clausen & Sons Brew. Co. v. Baltimore & O. Teleg. Co.* (N. Y. Sup. Ct.) 2 Am. Elec. Cas. 210; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593; *United Lines Teleg. Co. v. Grant*, 137 N. Y. 7.

As to questions under the Federal Constitution, see *infra*, V. b.

For license tax for use of streets by electric companies, see also *infra*, V. b. 4.

Another form in which the police power of the state has been exercised upon electric companies is found in the various statutory enactments which provide that when the lines are laid under navigable streams they shall be so laid and maintained as not to obstruct navigation. See statutes; *Croswell, Electricity*, § 61; *Western U. Teleg. Co. v. Inman & I. S. Co.* 50 Fed. Rep. 365, 20 U. S. App. 247; *The City of Richmond*, 43 Fed. Rep. 85; *Stephens & C. Transp. Co. v. Western U. Teleg. Co.* 8 Ben. 502; *Blanchard v. Western U. Teleg. Co.* 60 N. Y. 510.

Similarly, if a line is put across a draw bridge,

in conflict with the provision of the 14th Amendment that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Macfarlane, J., delivered the opinion of the court:

On the petition of relator an alternative writ of mandamus was issued by this court, directed to respondent, Murphy, as street commissioner of the city of St. Louis, commanding him to show cause why he should not be required to issue a permit to relator to make an excavation along the east side of Broadway, as near the curbas practicable, and extending from Mound

street to Olive street in the city of St. Louis, in so far as such excavation should be necessary for the purpose of laying relator's electric wires under ground. By its petition, relator represents that it is a corporation created under an act of the legislature of the state approved March 2, 1857, and a supplementary and amendatory act approved March 3, 1857, and an amendatory act approved March 26, 1864. These acts are set out in full in the petition. The first, approved March 2, 1857, is entitled "An Act to Incorporate the Laclede Gaslight Company." Laws 1856-57, p. 598. The first section of the act creates James M. Hughes and seven others a body politic and corporate by the style of "The Laclede Gaslight Company,

the wires must be so arranged as not to interfere with the working of the draw or the passage of vessels. *Pacific Mut. Teleg. Co. v. Chicago & A. Bridge Co.* 36 Kan. 118.

The propriety of this particular instance of the exercise of the police power of the state over highways has never been questioned, and is obviously valid for the reasons given as to underground wires.

Other forms in which the police power of the state has been exercised in regard to the occupation of the streets by electric wires are the statutes found in a few states as to cutting wires when necessary for moving buildings, giving this power when necessary from the circumstances of the case. *Croswell, Electricity*, §§ 256-265, and statutes inflicting penalties for injuries to electric lines, posts, or apparatus. *Id.* § 265, note.

The relative rights of trolley railway companies, and the owners of telephone or other electric lines in the use of streets is a kindred subject, but distinct from that of this note, and will be separately treated hereafter; but much can now be found on that question in *Cumberland Teleg. & Teleg. Co. v. United Electric R. Co.* (Tenn.) 27 L. R. A. 236, and cases there cited.

III. As to guard wires.

Considering the dangerous nature of electric wires it would seem to be clearly within the reasonable exercise of police power to require guard wires to be placed between different electric wires where several lines cross each other or hang at different heights along the street. In one case a municipal ordinance requiring such guard wires has been brought in question and sustained. *State, Wisconsin Teleg. Co., v. Janesville Street R. Co.* 87 Wis. 72, 22 L. R. A. 759. The court says: "The ordinance is reasonable because it requires that to be done which in law and good conscience the defendant (a trolley railroad company) ought to do for the protection of the relator (a telephone company) whose established business it has endangered and disturbed. Second, it is clearly sustained under the police power of the city. . . . There can be no question at this late day but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street and require all reasonable safeguards for the same."

That a lawfully authorized order or direction of the mayor requiring companies using trolley wires to guard and protect them by what is known as guard wires had been made, is alleged by plea of a telephone company in *McKay v. Southern Bell Teleg. Co.* (Ala.) *ante*, 589, in which the telephone company sought to escape liability for negligence in respect to its own dangerous wires by asserting that the damage was caused by the trolley company's failure to obey such order as to the guard wires, but this plea was held bad on demurrer.

For cases as to the duty of electric companies to

maintain guard wires as a reasonable exercise of care, even when no ordinance or other public regulation has ordered, see *note* to *Denver Consol. Electric Co. v. Simpson* (Colo.) *ante*, 566.

IV. As to the operation of electric lines.

The most important form in which the police power of the state has been exercised upon the operation of electric lines is found in the statutes which regulate the operation of telegraph companies and require them to receive and transmit messages in good faith, with impartiality, and with due care and reasonable dispatch. Such statutes are in existence in most states, and in many cases a penalty is affixed to the nonperformance of the statutory duty. See statutes collected in *Croswell, Electricity*, chap. 15.

These statutes are valid exercises of the police power, for they are merely statutes which require persons, whether natural or artificial, doing business within the state, to transact that business with fairness, diligence, and impartiality. *Western U. Teleg. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692. *Rev'd* as to interstate business in 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 308; *Western U. Teleg. Co. v. Meredith*, 95 Ind. 93. These statutes, however, have been drawn in question in several cases in regard to their extraterritorial force as being in conflict with the exclusive powers of Congress over interstate commerce. This question will be discussed later.

The application of the Sunday law to a telegraph company, although it is a foreign corporation, is sustained in *Western U. Teleg. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224.

In various other cases which did not expressly decide that Sunday laws were applicable to telegraph business the application of such statutes has been impliedly recognized, as by making the necessity of the message the test of the duty of the telegraph company to receive and transmit it. As illustrations of these cases are *Rogers v. Western U. Teleg. Co.* 78 Ind. 169, 41 Am. Rep. 558; *Western U. Teleg. Co. v. McLaurin*, 70 Miss. 36; *Thompson v. Western U. Teleg. Co.* 32 Mo. App. 191; *Burnett v. Western U. Teleg. Co.* 39 Mo. App. 599; *Rassett v. Western U. Teleg. Co.* 48 Mo. App. 568; *Western U. Teleg. Co. v. Wilson*, 93 Ala. 32; *Western U. Teleg. Co. v. Hutcheson*, 91 Ga. 252; *Millingham v. Western U. Teleg. Co.* Id. 449.

Another form of the police regulation of the operation of electric lines is found in the statutes which have been enacted in several states, and which require telegraph companies to make free delivery of messages within a certain limited distance from the central office. Telegraph companies often do this voluntarily, but in some states acts are passed compelling them so to do. Such statutes are found in California, Connecticut, Georgia, Minnesota, Ohio, and Oregon (see *Croswell on Electricity*, § 417; and under the general rule

and by that name they and their successors and assigns are given perpetual succession," etc. The second section fixed the capital stock at \$50,000, and authorized it to be increased to \$2,000,000. The third section directs that the affairs of the company shall be managed by a board of not less than five directors, etc. The fourth section authorizes books of subscription for the capital stock to be opened in St. Louis, and, upon the sum of \$50,000 being subscribed, provides that the company may organize under this charter. Section 5 provides that said company, its successors and assigns, should, within the corporate limits of said city, not embraced within the limits as established by act of 1839, "have and enjoy, during the continuance of this

act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas lights, gas fixtures, and of any substance or material that may be now or hereafter be used as a substitute therefor, and to that end may establish and lay down, in said portion of said corporate limits, all pipes, fixtures, or other things properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company." Section 6 authorizes the city of St. Louis and the company to make any contracts that they may deem to their mutual ad-

laid down in *Western U. Telegr. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, are undoubtedly a valid exercise of the police power, so far as they do not conflict with the Federal Constitution, which will be considered later.

Another form of police regulation of the operation of electric lines is statutes regulating the prices which the company shall charge for services. In the case of telegraph and telephone lines there have been enacted in several states statutes which fix maximum prices for telegraph and telephone service. This is the case in Florida, Indiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, Pennsylvania, and Vermont, and statutes with a similar intent as to electric light service exist in many states. *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623, 2 L. R. A. 278; *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201; *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1; *Johnson v. State*, 118 Ind. 143; *Central U. Teleph. Co. v. State*, *Falley*, 118 Ind. 194, 123 Ind. 113; *State*, *Webster*, *v. Nebraska Teleph. Co.*, 17 Neb. 126, 52 Am. Rep. 404. The statutes are cited in *Crowell on Electricity*, § 319, note.

The validity of this exercise of the police power has been little questioned. It was maintained to its fullest extent in a case in Indiana (*Hockett v. State*, *supra*.) in which the right of a state to enact maximum charges for telephone service was the point in issue. The court describes the police power of the state in the terms given in the beginning of this note, and adds: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and, in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended, and articles sold. . . . The obvious deduction from what has been said, as well as from the authorities cited, is that the power of a state legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete."

The delegation of this power to municipal authorities, however, is not to be easily inferred, but must be by express statute or by necessary inference for the proper exercise of other powers conferred by express statutes, and a mere power given to municipal authorities to "regulate" telephone companies will not confer this right, nor will a general power to pass such ordinances as are for the

general welfare of the city, if other specific grants of powers in the charter show that the general welfare clause was intended to include such power. *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623, 2 L. R. A. 278.

A kindred form of the exercise of the police power over the business of electric companies arises in cases where the state or city exacts a license fee from such companies for the use of streets. The nature of this fee has been disputed in several cases. *Western U. Telegr. Co. v. Philadelphia*, 22 W. N. C. 39; *Chester v. Western U. Telegr. Co.*, 154 Pa. 464, 3 Lanc. L. Rev. 174; *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, 22 W. N. C. 572; *Lancaster v. Edison Electric Illum. Co.*, 8 Pa. Co. Ct. 178.

It is generally conceded not to be a tax, strictly speaking. *Chester v. Western U. Telegr. Co.*, *Lancaster v. Edison Electric Illum. Co.*, *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, and *Western U. Telegr. Co. v. Philadelphia*, *supra*; *Philadelphia v. Postal Telegr. Cable Co.*, 67 Hun. 21.

But to be a true exercise of the police power. *Lancaster v. Edison Electric Illum. Co.*, *Western U. Telegr. Co. v. Philadelphia*, *Philadelphia v. Postal Telegr. Cable Co.*, *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, and *Chester v. Western U. Telegr. Co.*, *supra*.

But not to be such an ordinary police power as is incidental to the power of regulating the use and occupation of the highways, but to be so far a special power as to require express delegation by statute from the state to the municipal authorities. *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, *supra*.

This seems to be the correct view of the case. The fee cannot be considered as a tax, for there is no assessment. It is not based on any valuation of property, and it is not laid merely for revenue, but as a consideration for certain privileges, either of setting poles in the streets, of municipal inspection and care of the same, or for the mere privilege of carrying on business. *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, *Western U. Telegr. Co. v. Philadelphia*, *Lancaster v. Edison Electric Illum. Co.*, and *Chester v. Western U. Telegr. Co.*, *supra*.

Considered in this light, it is generally held to be a valid exercise of the police power by a municipality, if such power has been delegated to it by the state. *Harrisburg v. Pennsylvania Teleph. Co.*, 15 Pa. Co. Ct. 518; *Lancaster v. Edison Electric Illum. Co.*, and *Philipsburg v. Central Pennsylvania Teleph. & S. Co.*, *supra*; *Postal Telegr. Cable Co. v. Baltimore*, 79 Md. 502, 24 L. R. A. 161; *Chester v. Western U. Telegr. Co.*, and *Western U. Telegr. Co. v. Philadelphia*, *supra*.

But the exercise of such power must not conflict with the Federal Constitution granting exclusive rights of regulation of interstate commerce to Congress, as will be seen later. As to power of state to control or impose burdens by license taxes, or

vantage in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. It provides that "the said city shall have the right, at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with 20 per cent added thereto," and the manner of ascertaining the value by appraisers is provided. Said section has this further provision: "If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby re-

newed and extended for the further period of thirty years after the expiration thereof." Section 7 punishes any person or body corporate who interferes with the privileges granted to said company or exercises like acts or privileges, by a forfeit and fine to said company of \$1,000 for every such offense, and makes each day's continuance of such offense a new offense. Section 8 exempts the company from the operation of §§ 6, 7, 13, 14, 15, 18, and 20 of art. 1 of "An Act Concerning Corporations," approved November 23, 1855. The sections of the act of November 23, 1855, here referred to, are contained in chap. 34, Rev. Stat. 1855, pp. 371-374. Section 9 is as follows: "This

otherwise on such companies when doing an interstate business, see *note* to Postal Telegr. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161.

Another exercise of the police power in regulating the operation of electric lines is found in the statutes requiring telegraph and telephone companies to supply equal facilities to all who desire to use them, including other telegraph and telephone companies. *Croswell, Electricity*, chap. 14. These statutes are a valid exercise of the police power of the state. *Atlantic & P. Telegr. Co. v. Western U. Telegr. Co.* 4 Daly, 527; *United States Telegr. Co. v. Western U. Telegr. Co.* 56 Barb. 46; *Smith v. Gold & S. Telegr. Co.* 42 Hun. 454; *Bradley v. Western U. Telegr. Co.* 17 Fed. Rep. 534, *note*; *Metropolitan Grain & S. Exchange v. Chicago Board of Trade*, 15 Fed. Rep. 850; *Shepard v. Gold & S. Telegr. Co.* 38 Hun. 338; *Western U. Telegr. Co. v. Call Pub. Co.* 44 Neb. 336, 27 L. R. A. 622; *Sterrett v. Philadelphia Local Telegr. Co.* 18 W. N. C. 77; *Davis v. Electric Reporting Co.* 19 W. N. C. 567; *Cain v. Western U. Telegr. Co.* 18 Cin. W. L. Bull. 287; *New York & C. Grain & S. Exchange v. Chicago Board of Trade*, 127 Ill. 153, 2 L. R. A. 411; *Marine Grain & S. Exchange v. Western U. Telegr. Co.* 22 Fed. Rep. 23; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Telegr. Co.* 66 Md. 309, 59 Am. Rep. 167; *State, American U. Telegr. Co., v. Bell Teleph. Co.* 36 Ohio St. 236; *Commercial U. Telegr. Co. v. New England Teleph. & Telegr. Co.* 61 Vt. 241, 5 L. R. A. 161; *State, Baltimore & O. Telegr. Co., Bell Teleph. Co.* 23 Fed. Rep. 539; *State, Postal Telegr. Cable Co. v. Delaware & Atlantic Teleph. & Telegr. Co.* 47 Fed. Rep. 433, *Affirmed sub nom. Delaware & A. Telegr. & Teleph. Co. v. State, Postal Telegr. Cable Co.*, 50 Fed. Rep. 677, 3 U. S. App. 30; *Bell Teleph. Co. v. Pennsylvania, Baltimore & O. Telegr. Co.*, 7 East. 672; *People, Postal Telegr. Cable Co., v. Hudson River Teleph. Co.* 19 Abb. N. C. 486.

These statutes requiring telegraph and telephone companies to supply equal facilities have been questioned only in respect to telephone companies where a contract had been made to give the exclusive use of the telephone service for telegraphic use to a single company. In one case only such a contract was sustained, but in other cases it was held invalid as against the statute. As to these, see *note* to *Com. v. Petty (Ky.)* 29 L. R. A. 791.

Other forms of police regulation of the operation of electric lines are found in the statutes requiring telegrams to be kept in inviolate secrecy by the operators (*Croswell, Electricity*, § 436), and preventing outsiders from tapping the wires, or otherwise gaining information as to the contents of telegrams or hearing telephone messages (*Id.* § 439), and statutes exempting telegraph operators from jury duty. *Id.* §§ 440-442.

An instance of the application of police regulation to electric railways is found in the statute requiring screens or enclosures on the front of the car to protect the motorman in cold weather. 31 L. R. A.

Ohio Laws, 1898, p. 220, §§ 1, 2; *Minn. Gen. Laws* 1893, chap. 63, §§ 1-3.

These statutes have been held to be valid exercise of the police power. *State v. Hoskins*, 58 Minn. 35, 25 L. R. A. 759; *State v. Smith (Minn.)* 25 L. R. A. 759; *State v. Nelson*, 52 Ohio St. 83, 26 L. R. A. 317; *State v. Nelson*, 31 Ohio L. J. 220.

V. Limitations of the police power.

The police power has been previously shown to be an inherent power of the state to impose such regulations upon the use of property and the conduct of individuals as will promote the peace and safety of the community. As the people are the source of universal power in government, it results that there are no limitations to the exercise of the police power except such as have been voluntarily imposed by the people in the constitutions adopted by them in the several states, or in the Federal Constitution.

a. Limitations in state Constitutions.

Several provisions of the Constitutions have been alleged in various instances to conflict with the exercise of police regulation of electric lines in different forms of the exercise of this power.

1. Impairment of obligation of contracts.

It has been alleged in some cases that the provisions of a state Constitution which prohibit the passage by the legislature of any statute impairing the obligation of a contract, render unconstitutional laws which require electric lines to be placed underground, because the franchise which the electric company has from the municipal authorities to erect its poles and string its wires in the streets is a contract. This contention has not been sustained. The police power of the state exercised for the safety and welfare of the inhabitants, overrides any contracts between individuals, or even contracts between corporations and the state, in the charter granted by the state to the electric companies, or the franchises granted to such companies, either directly by the state, or mediately through the municipal authorities. Moreover, statutes which require electric wires to be put underground do not impair any contract in the grant to the companies of the right to construct their lines in the streets, for the grant of the right to carry their lines through the streets was made originally subordinate to the convenience of public travel, and still remains in full force to this extent, and the exercise of it is merely regulated in such way as to insure the safety and comfort of the inhabitants. *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 598; *Monongahela v. Monongahela Electric Light Co.* 12 Pa. Co. Ct. 529; *Western U. Telegr. Co. v. New York*, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533; *American Rapid Telegr. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *United Lines Telegr. Co. v. Grant*, 137 N. Y. 7.

act shall take effect from its passage, and shall continue in force for thirty years." The act of March 8, 1857 (Laws 1857, p. 599), is as follows:

"An Act Supplementary and Amendatory of an Act Entitled 'An Act to Incorporate the Laclede Gaslight Company.' Be it enacted by the general assembly of the state of Missouri as follows:

"Sec. 1. The act to which this act is amendatory is hereby amended as that the words 'sole and exclusive,' in the 5th section of the act are stricken out.

"Sec. 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the 6th section of the before-recited act, to

pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

"This act to take effect and be in force from and after its passage."

The act of March 26, 1868 (Laws 1868, p. 187), was entitled "An Act to Amend an Act to Incorporate the Laclede Gaslight Company, approved March 2, 1857," and is as follows:

"Sec. 1. The said Laclede Gaslight Company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the 5th

2. Deprivation of property without due process of law.

In several cases it has been urged that the acts which require electric wires to be placed under ground deprive electric companies of a species of property, namely, the right under their franchises to construct their lines in the streets, and that this deprivation is without due process of law. This contention cannot be sustained even if the franchise rights are considered as a species of property, for such rights are subordinate to the convenience of travel, and the statutes are simply a regulation of the mode of enjoying this species of property in the manner most consistent with the safety and comfort of the public. *Monongahela v. Monongahela Electric Light Co.* 12 Pa. Co. Ct. 529; *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454; *People, New York Electric Lines Co., v. Squire*, 107 N. Y. 593; *United States Illum. Co. v. Hess*, 19 N. Y. S. R. 883; *United Lines Teleg. Co. v. Grant*, 137 N. Y. 7; *Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533.

3. Class legislation.

In several instances statutes which require electric railways to put screens or boxes on the front of their motor cars to protect the motormen from the weather have been objected to as unconstitutional as being class legislation in states whose constitutions forbid such legislation. The claim has been that as such statutes apply to electric cars only, and not to horse cars or cars propelled by other animals, they are in effect class legislation, but the courts in all these cases sustained the statute, holding that it was not class legislation because it applied to all the railways of the kind to which it was intended to apply. *State v. Hoskins*, 58 Minn. 35, 25 L. R. A. 759; *State v. Smith* (Minn.) 25 L. R. A. 759; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317; *State v. Nelson*, 31 Ohio L. J. 220.

b. Limitations in Federal Constitution.

A strong effort has been made in various cases involving the exercise of police powers of state governments in the regulation of electric companies, to invoke the aid of the Federal Constitution as prohibiting such regulation. The provisions of the Federal Constitution which have been relied upon to effect this prohibition have been: (1) Those which prohibit any state from depriving any person of property without due process of law (14th Amend. § 1); (2) which prohibit enactment by states of any law impairing the obligation of contracts (art. 1, § 10); (3) which restrict to the action of the Federal government any regulation of commerce among the several states (art. 1, § 8); and (4) which give jurisdiction of patents to the Federal courts. *Ibid.*

The police power of the states in its relation to the Federal Constitution, is often called one of the reserve powers of the states, under article 10 of the 31 L. R. A.

Federal Constitution, which provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 308.

The question then arises, if this reserve police power which is in reality one of the attributes of sovereignty residing in the people of the state, and not delegated by it to the Federal government, comes in conflict in its practical application with any provision of the Federal Constitution, whether the state or the Federal power shall be held superior.

The Federal courts have with unanimity recognized the existence of the police power as one of the reserve powers of the states, and say that the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights, and state legislation strictly and legitimately for police purposes does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided expressly or by implication to the national government. An instance of this is *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. ed. 1115, 1116, sustaining state regulation and test of patented oil.

But nevertheless, state statutes enforcing police regulations may sometimes trench upon the Federal jurisdiction, and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. *Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 533.

The state, when providing by legislation for the protection of the public health, public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. In any case where a state statute enforcing police regulations is alleged to come in conflict with the Federal Constitution, the Federal courts will take jurisdiction of the case and inquire into the real purpose and objects of the statute in question, and if it is in its scope an interference with any of the powers delegated to the Federal government, the Federal courts will declare it so far forth unconstitutional and void. *Ibid.*

Taking up now the several instances in which conflicts between the Federal Constitution and the police power of the state have occurred, they may be grouped as follows:—

1. Statutes requiring electric wires to be put underground.

2. Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.

section of the act to which this act is amendatory, and may at any time lease, sell, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

"Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

"Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis Gaslight Company; and the 6th section of said act to which this act is amendatory, is hereby repealed.

"Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede Gaslight Company, approved March 3, 1857, is hereby repealed.

"Sec. 5. This act shall take effect from its passage."

Relator represents further that under the charter rights granted by these general acts it is, and for a long time has been, engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of its public streets by electricity; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large

3. Statutes regulating telephone prices and requiring service on equal terms to all.

4. Statutes imposing license fees on telegraph companies.

1. *Statutes requiring electric wires to be put underground.*

The chief point in which it is alleged that these statutes are in conflict with the Federal Constitution is in their application to telegraph lines. The telegraph occupies a peculiarly favored position under the Federal Constitution, as construed by the United States Supreme Court. That court has decided that the telegraph is a means or instrument of interstate commerce. *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

And Congress, having by its statutes given the telegraph a right of way over all post roads of the United States (U. S. Rev. Stat. §§ 5263 *et seq.*), no state can exclude it from its occupation of such roads with its line. See *note to Kindel v. Beck & P. Lithographing Co.* (Colo.) 24 L. R. A. 311.

Therefore when, under the provisions of the New York subway act, the state authorities ordered the telegraph lines underground, the telegraph companies immediately raised the objection that this act deprived them of their right of way over the post roads under the Federal Constitution. The court of appeals of New York state, however, held that the ordering the wires underground was merely a proper police regulation of the enjoyment by telegraph companies of their Federal rights, saying: "The precise scope and range of operation of these sections within a state are not quite apparent, and cannot be easily defined. But this much, at least, must be true, that under them no telegraph company could interfere with the use of the streets and highways of the state, except under regulations prescribed for the control of all telegraph companies within the state, nor could such companies interfere with streets and highways in the state so as materially to impair their usefulness as ordinary highways. Nor could these congressional acts deprive the state of its control over its highways, and its right to regulate their use under the police power for the public welfare. The laws of Congress are perfectly satisfied by the permission granted to the plaintiff, of which it is perfectly feasible for it to avail itself, to place its electrical conductors in the subways constructed beneath the surface of the streets." *American Rapid Teleg. Co. v. Hess*, 125 N. Y. 641, 13 L. R. A. 454.

And the Federal courts take the same view. "Nevertheless persons and corporations enjoying grants and privileges from the United States, exercising Federal agencies, and engaged in interstate commerce, are not beyond the operation of the laws of the state in which they reside or carry on their business; and it is only when these laws incapacitate or unreasonably impede them in the exercise of their Federal privileges or duties, and 31 L. R. A.

transcend the powers which each state possesses over its purely domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction. . . . The statutes which the defendants are proceeding to enforce unquestionably belong to the category of police regulations, the power to establish which has been left to the individual states. But statutes of this class may sometimes trench upon the Federal jurisdiction; and when their provisions extend beyond a just regulation of rights for the public good, and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. The state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Morgan's L. & T. R. & S. Co. v. Louisiana Bd. of Health*, 118 U. S. 462, 464, 30 L. ed. 241, 242. . . . It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant [telegraph company] by the law of Congress. The privilege to maintain telegraph wires over and along post roads is not to be construed so literally as to exclude regulations by the state respecting location and mode of construction and maintenance, which the public interests demand; but it is to be construed so as to give effect to the meaning of Congress, which was to grant an easement that would afford telegraph companies all necessary facilities, and which to that extent should be beyond the reach of hostile legislation by the states. Thus interpreted, the grant is no more invaded when the regulation requires the wires to be placed in conduits underground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community, such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at different distances apart, or at designated places along the street." *Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 562, 3 L. R. A. 449, 2 Inters. Com. Rep. 533. To the same effect, *H. Clausen & Sons Brew. Co. v. Baltimore & O. Teleg. Co.* 2 Am. Elec. Cas. 216.

But the right of a telegraph company to maintain its wires along the structure of an elevated railroad which constitutes an independent post road is sustained, although with some doubt, by Judge Wallace in the above case of *Western U. Teleg. Co. v. New York*. He says: "Inasmuch as the maintenance of the wires of the complainant upon the structures of the railway company is not

part of the inhabitants thereof; that in order to fulfil its obligations to the city and the public under its charter, it has erected and maintains expensive and costly plants for the manufacture and distribution of gas, as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained, and now maintains, a system of pipes laid underground along the streets of the city of St. Louis, as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing, or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires, strung upon poles along the streets and alleys of said

city, which poles and electric wires have been and are maintained and used by relator without objection by said city or the authorities thereof for the distribution of electricity, as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of disturbing electric currents,

at present attended with any public inconvenience, and the question is one of sufficient novelty and importance to be considered by the court of last resort, any doubt should be resolved in favor of the complainant for the purpose of its temporary protection."

The underground statute has also been alleged to be in opposition to the Federal Constitution for two other reasons which were brought before the Federal courts on a petition of mandamus by a corporation in New York which previous to the subway act had obtained franchises to lay underground conduits for electric lines. The subway act required all underground lines to be approved by the commissioners of electrical subways. The conduit company, the relator in the petition for mandamus, alleged that the imposition of this precedent requiring the approval of the subway commissioners upon its franchise already granted, injured the company in two ways (1) that it was thereby deprived of its property without due process of law, in opposition to the 14th Amendment to the Federal Constitution, and (2) that the act impaired the obligation of a contract in opposition to §10 of art. I of the Federal Constitution. The United States Supreme Court, however, did not sustain these claims, but held that the only effect of the statute was to regulate the manner of enjoying their rights. *New York, New York Electric Lines Co., v. Squire*, 145 U. S. 175, 36 L. ed. 666.

2. Statutes imposing penalties upon telegraph companies for not transmitting and delivering messages properly.

The statutes which have been enacted in many states imposing certain duties upon telegraph companies, such as transmitting messages with due care and dispatch, and delivering them promptly, and with due care, and in some instances without charge for delivery in limited districts, and imposing penalties upon the company for noncompliance, have been brought before the Federal and state courts in a number of cases, by telegraph companies, as being an interference by state legislation with interstate commerce, so far as they are applied to omissions or delinquencies occurring outside of the state enacting the statutes. The most important case upon this point is *Western U. Telegr. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 602. The supreme court of Indiana held that the state statute was valid because it did no more than require the telegraph company to perform under a penalty the duties imposed upon it by the common law, and this case was followed in the same state by others decided on the same ground. On appeal to the Supreme Court of the United States, however, that court held that such a statute could have no effect, so far as regulating the actions of the telegraph company outside of the state of Indiana was concerned, for if it did it would become a regulation of interstate commerce. *Western U. Telegr.*

Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306.

But several state courts distinguishing the *Pendleton* Case have held that a statutory penalty for delay in delivering a message within the state, although it may have been sent from another state, is not an interference with interstate commerce. *Western U. Telegr. Co. v. Tyler*, 90 Va. 297, 4 Inters. Com. Rep. 481; *Western U. Telegr. Co. v. Bright*, 90 Va. 778; *Western U. Telegr. Co. v. James*, 90 Ga. 254; *Western U. Telegr. Co. v. Bates*, 93 Ga. 352.

On the other hand, an Indiana statute providing penalties for default or mistake in transmission of messages was construed to be inapplicable to messages sent into the state from other states, on the ground that the contracts were made outside of the state. *Rogers v. Western U. Telegr. Co.*, 122 Ind. 305; *Western U. Telegr. Co. v. Reed*, 96 Ind. 195; *Carnahan v. Western U. Telegr. Co.*, 99 Ind. 526, 46 Am. Rep. 175.

That telegraph messages between points in the same state do not constitute interstate commerce because of the fact that they traverse another state on the route is decided in *State, Railroad Commission, v. Western U. Telegr. Co.*, 113 N. C. 213, 22 L. R. A. 570, sustaining the power of railroad commissioners to make rates for telegraph lines.

An Indiana statute allowing special damages for negligence of a telegraph company was sustained in *Western U. Telegr. Co. v. Fenton*, 52 Ind. 1, although the message was sent from another state. A question is suggested whether such special damages are a part of the remedy merely within the proper sphere of state regulation, although the transaction constitutes interstate business.

A state statute requiring a telegraph company to furnish sufficient facilities to do business both for individuals and other telegraph lines, and to do it promptly and impartially, is held valid in *Connell v. Western U. Telegr. Co.*, 108 Mo. 450, deciding that this does not interfere with interstate commerce, but the case also holds that such a statute does not apply to a delivery of a message in another state.

The fact that a telephone line extends into another state and belongs to a foreign corporation is held not to exempt it from state control in respect to service and rates for persons within the state. *Central U. Teleph. Co. v. State, Falley*, 118 Ind. 194. To the same effect were *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, and *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201, but those cases did not discuss the interstate character of the business.

3. Statutes regulating telephone prices and requiring service on equal terms to all.

Attempts have been made by telephone companies to sustain the position that state statutes fixing maximum telephone rates and requiring the company to give equal service to all on equal terms are opposed to the right granted the Federal government by the Constitution to protect the rights

and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans, and is now ready to do so with as much dispatch and as little inconvenience to the public as possible. Relator states further that respondent was street commissioner of said city, and under its charter and ordinances had supervision and control of its streets, and the enforcement of ordinances relating thereto; that, after notice to said commissioner of its intention to do so, on the 30th day of October, 1894, the relator commenced excavating on said streets for the purpose of laying its electric wires underground, but was prevented from so doing by respondent, acting in his capacity as street commissioner; that thereupon relator applied to respondent for a permit to make such excavation for such purposes, which was denied it. Respondent made return to said writ, and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city, and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return, and motion to strike out other parts, the following issues of law were fairly framed: First. Is the act of March 26, 1868, unconstitutional, as being in conflict with § 2, art. 8, of the Constitution of Missouri of 1865? Second. Is said act void as being in conflict with § 25, of art. 4 of said Constitution? Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2, 1857? Fourth. Do the powers granted relator include the right to manufacture, sell, or distribute electricity for lighting purposes? Fifth. Has relator the right, under its charter, to place its wires underground, without the assent of the municipal authorities, and without compliance with the requirements of the valid ordinances of the city?

1. The object to be accomplished by the writ is to require Murphy, as street commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the

public streets of the city, as may be necessary for the purpose of laying its electric wires underground. The constitutionality of the acts under which relator claims corporate existence is put in issue by the answer of respondent, and demurrer thereto. Respondent also charges that, though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence as fixed by the charter and general laws of the state. The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the street commissioner. We will not, therefore, consider, or express an opinion upon, any question involving the right of relator to exercise the rights or enjoy the franchises which appear to have been granted under the acts of the general assembly mentioned in the statement.

For the purpose of discussing the other questions involved, we will then assume, without deciding or intimating an opinion, that relator is an existing corporation possessing all the powers, rights, and privileges its charter purports to confer upon it. It is insisted by relator that under its charter it acquired from the state a vested right to the use of the streets of the city of St. Louis under which to lay its pipes for the transmission of gas or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authorities; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right cannot be interfered with unreasonably by the city. With the views we take of this question, we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has for a number of years, under contracts with the city, been lighting its streets by electricity, con-

of inventors by the issue of patents. Const. art. 1, § 8. But this claim has been negatived by the state and Federal courts alike, for the reason that such statutes are merely proper police regulations of the manner in which the company owning the property protected by the monopoly granted by the United States shall enjoy such property in the locality in which it engages in business. On this point see full review of the cases in note to Com. v. Petty (Ky.) 29 L. R. A. 791.

4. Statutes imposing license fees on telegraph companies.

In many cases the state legislatures have imposed license fees either directly or by delegation through municipal authorities, upon telegraph and other companies for the privilege of occupying the streets with their poles and wires. The power to impose this fee is upheld when the fee is a reasonable payment either for the space occupied by the poles or for the inspection and care which the city gives them. *St. Louis v. Western U. Telegr. Co.* 148 U. S. 92, 37 L. ed. 380, 146 F. S. 465, 37 L. ed. 810, 39 Fed. Rep. 59; *Postal Telegr. Cable Co. v. Baltimore*, 156 U. S. 210, 39 L. ed. 399, Aff'g 24 L. R. A. 161; 31 L. R. A.

Allentown v. Western U. Telegr. Co. 148 Pa. 117; *Chester v. Philadelphia, R. & P. Teleg. Co.* Id. 120; *Western U. Teleg. Co. v. Philadelphia (Pa.)* 12 Atl. 144; *Philadelphia v. Postal Telegr. Cable Co.* 67 Hun, 21; *Philadelphia v. Western U. Teleg. Co.* 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728; *Philadelphia v. American U. Teleg. Co.* 167 Pa. 408; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *Croswell, Electricity*, §§ 890-893; *Harrisburg v. Pennsylvania Teleph. Co.* 3 Pa. Dist. R. 815, 15 Pa. Co. Ct. 518; *Berthlehm v. Pennsylvania Teleph. Co.* 12 Lanc. L. Rev. 204; *St. Louis v. Western U. Teleg. Co.* 63 Fed. Rep. 68.

The case last cited holds that \$5 per pole per annum is unreasonable when greatly disproportionate to the cost of the poles and wires and to the value of the adjoining property. For further particulars of these cases, see note to *Postal Telegr. Cable Co. v. Baltimore (Md.)* 24 L. R. A. 161, which includes also cases as to licenses for doing business, and other forms of taxation as burdens on interstate telegraph and telephone companies. As to exclusion of foreign telegraph and telephone companies from state, see note to *Kindel v. Beck & P. Lithographing Co. (Colo.)* 24 L. R. A. 311. S. G. C.

ducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets, without the assent of the municipal authorities thereof, and without compliance with valid ordinances of the city. Generally speaking, it is true, the legislature has supreme control of the streets of cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities. Subsequent to the act of 1868, under authority of the Constitution of 1875, the city of St. Louis adopted a charter whereby the state delegated to it the power to regulate the use of its streets, and the power to pass all ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures. In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city, and requiring the assent of the board of public improvement in respect to the manner in which electric wires, tubes, and cables should be secured or supported and insulated. It is charged in the return and admitted by the demurrer that the relator had never complied with the requirements of this ordinance. Relator insists that the provisions of the ordinance cannot apply to rights secured to it by the state long prior to the date of the charter. It is the well-settled present policy of the law of this state to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the Constitution prohibits the legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets. Mo. Const. § 20, art. 12. Again, the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires and other fixtures underground in any of its streets. Rev. Stat. 1889, § 2721. Electric wires, when charged, are recognized as being dangerous to life and property, and their use is therefore subject to police regulations. *Western U. Teleg. Co. v. Philadelphia* (Pa.) 21 Am. & Eng. Corp. Cas. 40, and note; Dill. Mun. Corp. § 698. The state cannot limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.'" *Stone v. Mississippi*, 101 U. S. 817, 25 L. ed. 1079. See 31 L. R. A.

Boyd v. Alabama, 94 U. S. 645, 24 L. ed. 302; *Metropolitan Bd. of Excise v. Barrie*, 84 N. Y. 657; *Lake Roland Elec. R. Co. v. Baltimore*, 77 Md. 881, 20 L. R. A. 126. Dillon says: "The citizen owns his property absolutely, it is true. It cannot be taken from him for any private use whatever, without his consent; nor can it be taken for any public use without compensation. Still he owns it subject to this restriction, namely: that it must be so used as not unreasonably to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally." Dill. Mun. Corp. 4th ed. p. 12, § 141. The grant by the state to relator, though construed to include the right to use electricity for illuminating purposes in respect to such right, was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis. Under its general police power, the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

2. But this is not the only reason why the city should, under its special power to regulate the use of its streets, and under its general police power, have the right to supervise and regulate the manner in which the electric wires of relator and all others should be placed and used in the public streets. The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right, under the general words used in the act of incorporation, to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets. The power delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it; and the art should be exercised, if at all, under the powers thus in force when it was brought into use. The following declaration of law was quoted approvingly in *Carroll v. Campbell*, 108 Mo. 559: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Fanning v. Gregoire*, 57 U. S. 16 How. 534, 14 L. ed. 1047. There seem to me much stronger reasons for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the

right to direct the manner in which the use should be exercised. Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public, and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to public convenience and private business, but, when not properly supervised and regulated, endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control. It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed underground, so as thereby to leave the streets safe and unobstructed. As a police regulation we have no doubt the municipal authorities would have a right to require this to be done in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires shall be placed underground. Without such regulation, relator, or any other corporation using electric wires, could place them underground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease, or dispose of any portion of said rights, privileges, and franchises to individuals, associations, or corporations intending or desiring to exercise the same within any portion of the limits named. Thus, under its charter, allowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires underground, and exclude the city from one of the most important of its municipal powers. The legislature could never have contemplated such a result. By giving the city the right to regulate the laying of electric wires underground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes, it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed underground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain. As the case is now presented, we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets, or which regulate the manner in which it may

be done. Respondent, under his official duties as street commissioner, properly refused to grant the permit demanded, unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied.

All the Judges concur; **Barclay, J.**, in the result.

Hermann NOWACK, *Resp't.*,
v.

William BERGER, *Exr.*, etc., of Eberhard H. Schweer, Deceased, *et al.*, *Appts.*

(.....Mo.....)

1. **Children cannot be deprived of their rights** in property given them by will by the fact that a contract by the testator to give property to their father, which was not carried out, is enforced against the estate.
2. **A party to a contract with a deceased person** as well as to a cause of action against his estate, is incompetent to testify in the case.
3. **An oral contract for the adoption of a child** as an heir may be recognized and enforced after performance of the consideration.
4. **The surrender of a child by his mother to the custody and control of a man** whom she marries in pursuance of an oral contract by which, in consideration of the marriage and of the services of the child, the husband agrees to give the child a share of his estate equal to that which an heir would inherit, constitutes an independent, additional and valuable consideration which will amount to part performance of the contract and take the case out of the operation of Rev. Stat. 1890, § 5186, prohibiting an action on a contract in consideration of marriage unless it is in writing.
5. **Marriage constitutes such part performance** by a woman of a contract in consideration of marriage as to prevent the operation of the statute of frauds in respect to the contract.
6. **The share which a person is entitled to from an estate** of a person who had agreed to give the former a specified share thereof cannot be diminished because of a gift by will of a portion of the estate to the children of the distributee.

(March 3, 1896.)

APPPEAL by defendants from a judgment of the Circuit Court for Gasconade County in favor of complainant in a proceeding to enforce an agreement by Eberhard H. Schweer, deceased, to leave property to plaintiff. *Modified.*

Statement by **Sherwood, J.**:

In this proceeding for specific performance, it is conceded by plaintiff: That the abstract of pleading prepared by defendants is correct, which sets forth: "(1) That he, the said Eberhard H. Schweer, should take, adopt, support,

NOTE.—The validity of contracts to give money or property after the death of the promisor is the subject of annotation to *Krell v. Codman* (Mass.) 14 L. R. A. 860.

and treat her son, this petitioner, at all times as his own natural child, and that plaintiff should at all times perform the duties towards said Schweer due from children towards parents. (2) That in case there should be no children born under his marriage with the said Augusta, that then the plaintiff should be sole heir to all the estate said Eberhard H. Schweer should have at his death, subject to the statutory legal rights of plaintiff's mother as widow; and that in case there should be children born of said marriage, that then plaintiff, upon the death of said Schweer, should receive and be given a share in the estate equal to what one of said Eberhard H. Schweer's own natural children would receive in case he were to die intestate; and that said Schweer should, during his lifetime, by last will or other means of conveyance, make disposition of his property accordingly." That, pursuant to said terms, said Augusta and said Schweer were married, on the 10th day of August, 1864. That said Schweer thereupon assumed control of plaintiff. That said Schweer required of plaintiff such services, and that plaintiff rendered to Schweer such services, as are due from a child to a parent. That plaintiff continued to live with Schweer until he approached his majority, when he was by Schweer induced to marry, and to move onto a tract of land described in the petition, being the same tract on which plaintiff now lives. That the marriage between the said Schweer and plaintiff's mother was dissolved by the death of Schweer, on the — day of February, 1892. That there were born of said marriage three children, defendants Henry E., Fred W., and Ferdinand Schweer. That the said Schweer did not in his lifetime make any provision for plaintiff in accordance with the alleged contract. That, on the contrary, he left a last will and testament, whereby he devised and bequeathed to each of his three sons certain real estate and personal property, and to his widow, defendant Augusta Schweer, such of his estate as she would have been entitled to in case he had died intestate, and to plaintiff's children, defendants Annie A., Henry E., Matilda, and Tina Nowack, the said real estate on which plaintiff now lives, and gave nothing to plaintiff. That said will was probated and letters testamentary issued to the defendant William Berger, now in charge of the estate as executor. That the personal property left by said deceased was worth \$18,635.11, and the real estate at least \$27,000. Specific performance of this contract was asked by plaintiff. The second count states substantially the same facts as the first count, except that the alleged contract between E. H. Schweer and Augusta Nowack is stated in somewhat different terms, as follows: That the plaintiff should be legally adopted by the said Schweer, and should perform all the duties and services towards said Schweer due from children towards parents; and that, upon the death of said Eberhard Schweer, if no children should be born of the marriage between the said Schweer and the said Augusta, plaintiff should inherit all the property which said Schweer might leave; and that, if there should be children born of the marriage, then plaintiff should have equal share with each of said children. And, except that, the second count 31 L. R. A.

states that, when plaintiff approached the age of majority, said E. H. Schweer, induced him to marry one Caroline Bartlett, upon a promise to give to plaintiff the farm on which plaintiff now lives, and renewed his promise that at his death he would give plaintiff sufficient to make him equal with his own sons; that, in reliance upon these promises, plaintiff married, on the 15th day of September, 1882 (before he had fully arrived of age), and went into possession of said real estate, and made lasting and valuable improvements thereon, by clearing land, erecting buildings, and planting an orchard, and continued to cultivate the same to the commencement of this suit; that, instead of giving plaintiff the said farm, said Schweer, by said last will, gave it to plaintiff's minor children, the defendants Annie, Henry, Matilda, and Tina Nowack, etc. With the exception of the minor defendants, who answered by their guardian, in usual way, the adult defendants answered as follows: "(1) A general denial of all the allegations of the petition. (2) That the contract alleged in both counts of the petition, and all matters alleged touching and concerning the same, was and is, and this action is brought to charge defendants upon, an agreement in consideration of marriage; and no such agreement, nor any note or memorandum thereof, was or is in writing, signed by the said E. H. Schweer, or by any other person by him thereto lawfully authorized."

Messrs. Kiskaddon & Meyer and John W. Booth, for appellants:

The alleged contracts of Eberhard Schweer, on which respondent's suit is founded, are mere oral agreements, made in consideration of marriage. They are therefore void under the statute of frauds.

Mo. Rev. Stat. 1889, §§ 5186, 6853, 6954.

Neither of the subsequent marriages was such a part performance as would take the case out of the statute. Each contract as proved is an entirety, and, marriage being the sole consideration moving Schweer to make such, then no acts of the said Schweer, or any other person, subsequent to the marriage, can be considered a part performance.

Finch v. Finch, 10 Ohio St. 501; *Henry v. Henry*, 27 Ohio St. 121; *Caton v. Caton*, L. R. 1 Ch. 137; *Montacute v. Marvell*, 1 P. Wms. 618; *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552; *Flenner v. Flenner*, 29 Ind. 564; *Wood v. Savage*, 2 Dougl. (Mich.) 316; *Brown v. Conger*, 8 Hun, 625.

The acts claimed to be a part performance must be of such a character that they show, (1) (without proof of the terms of the contract) that there must be a contract of some kind between the parties; and (2) (when the terms of the alleged contract are proved) that the acts are solely referable to that contract and no other, and would not have been done had it not been for that contract.

Paris v. Haley, 61 Mo. 453; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Rogers v. Wolfe*, 104 Mo. 1; *Charriot v. Sigerson*, 25 Mo. 63; *Sitton v. Shipp*, 65 Mo. 297; *Browne*, Stat. Fr. 4th ed. §§ 454 et seq.; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *Agnew*, Stat. Fr. 471; *Dung v. Parker*, 52 N. Y. 494; *Emmel v. Hayes*, 102 Mo. 186, 11 L. R. A. 323.

Where a stepfather assumes the status of a parent toward a stepchild, the presumption is that they hold toward each other the relation of parent and child. Services rendered for each other cannot be referred to a contractual relation between them. No such relation will be presumed to exist, but the contrary.

Schouler, Dom. Rel. 4th ed. § 273; *Gillett v. Camp*, 27 Mo. 541.

The terms of the alleged contract and the alleged acts of part performance must be clearly and definitely proved. Nothing can be left to mere inference. If an inference is allowable at all, it must be a necessary and inevitable inference, drawn from facts clearly and definitely proved.

Veth v. Gierth, 92 Mo. 97; *Taylor v. Williams*, 45 Mo. 80; *Paris v. Haley*, 61 Mo. 453; *Tedford v. Trimble*, 87 Mo. 226; *Wendover v. Baker*, 121 Mo. 273.

And the contract must be established in all its terms beyond a reasonable doubt.

Johnson v. Quarles, 46 Mo. 423; *Berry v. Hartzell*, 91 Mo. 132.

There is no mutuality in the contract proved. *Glass v. Roire*, 103 Mo. 513; *Waterman*, Spec. Perf. § 199.

The alleged acceptance by plaintiff of the farm given to him by his stepfather in alleged consideration of his marriage with Bartlett's daughter and without anything indicating that this farm was to be a part of the property to which plaintiff would be entitled, is inconsistent with the plaintiff's contention that he was to have an equal share with Schweer's children in all of Schweer's property, and is a waiver of the alleged earlier contract.

Tolson v. Tolson, 10 Mo. 736; *Fry*, Spec. Perf. 3d Am. ed. §§ 1003, 1008, 1015, 1017.

The minor defendants ought not to be deprived of their land.

Emmel v. Hayes, 102 Mo. 186, 11 L. R. A. 323; *Taylor v. Von Schraeder*, 107 Mo. 206; *Johnson v. Hurley*, 115 Mo. 513; *Browne*, Stat. Fr. pp. 480, 488, 490.

The contract must not only be proved in a general way but its terms must be so precise and exact that neither party could reasonably misunderstand them.

Wendover v. Baker, 121 Mo. 273; 2 Beach, Eq. Jur. § 584.

Mr. Robert Walker, for respondent:

A stepfather is not entitled to the services and earnings of a stepchild, nor under any obligations to support it. From the duty of a parent to provide for and support a child results the corresponding right of the parent to the earnings and services of the child.

Schouler, Dom. Rel. 3d ed. §§ 243, 273; 2 Kent, Com. pp. 193, 218; *Worcester v. Marchant*, 14 Pick. 510.

An agreement to make a will in a particular way is valid if supported by sufficient consideration, and although oral, if partly performed is enforceable.

Wright v. Tinsley, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 101; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *Fuchs v. Fuchs*, 48 Mo. App. 18.

A contract for the adoption of a child and leaving all of one's property upon such person's death to such child is a valid contract, 31 L. R. A.

and upon performance of the duties as an adopted child by such a child, such contract or agreement, although oral, is taken out of the statute of frauds and will be specifically enforced.

Sharkey v. McDermott, *supra*; *Healey v. Simpson*, 113 Mo. 340; *Teats v. Flanders*, 118 Mo. 689.

The agreement sued upon and proved in this cause was one not only in consideration of marriage, but also that Schweer should adopt the plaintiff and take the latter as his own child, and should upon his death leave his property to the plaintiff. Such contract, if in writing, would be a valid contract; and such contract after being completely performed on the part of the plaintiff's mother and plaintiff, and after Schweer had all the advantages from such performance, is not within the statute and will be specifically enforced.

Van Dyne v. Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq. 142; *Davison v. Davison*, 13 N. J. Eq. 246.

The agreement in this cause was based upon most meritorious and valuable consideration.

1 Throop, Validity of Verbal Agreements, § 719; *Miller v. Goodwin*, 8 Gray, 542; *Crane v. Gough*, 4 Md. 316; 1 Parsons, Contr. 5th ed. p. 431.

The statute of marriage contracts pleaded by appellants has only application to existing estates, and does not apply to transactions like the case at bar.

Mo. Rev. Stat. 1889, § 6853.

When a marriage has been contracted upon faith of a verbal promise equity should not then suffer the statute to be interposed as a shield in defeating the performance of such promise relied upon.

1 Throop, Validity of Verbal Agreements, § 720; *Durham v. Taylor*, 29 Ga. 166; *Jenkins v. Eldredge*, 3 Story, 181.

If outside of marriage there is an additional consideration, performance of which would of itself entitle a party to relief, the statute cannot then be interposed as a shield and defense.

1 Throop, Validity of Verbal Agreements, §§ 708, 718; *Agnew*, Stat. Fr. p. 124; *Dygert v. Remerschnider*, 32 N. Y. 629; *Crane v. Gough*, *supra*; *Satterthwaite v. Emley*, 4 N. J. Eq. 489, 43 Am. Dec. 618; *Riley v. Riley*, 35 Conn. 154; *Warden v. Jones*, 23 Beav. 494; *Bradley v. Saddler*, 54 Ga. 681; *De Biel v. Thomson*, 3 Beav. 469; *Marcell v. Lady Montacute*, Prec. in Ch. 526.

The contract sought to be enforced herein is definite and certain, and the terms are satisfactorily proved.

Vanduyne v. Vreeland, 12 N. J. Eq. 142; *Sutton v. Hayden*, 62 Mo. 101.

A contract should be supported rather than defeated.

2 Parsons, Contr. 5th ed. p. 503.

Plaintiff (outside of the farm on which he resided) had no right to ask any property from Schweer until after the latter's death. Prior to that time he could not by mere application waive any rights which did not accrue until after then.

Huffman v. Hummer, 18 N. J. Eq. 83; *Trabue v. North*, 2 A. K. Marsh. 361; *Melton v. Smith*, 65 Mo. 315.

Plaintiff would also be entitled to the farm

on which he lives by virtue of the gift and advancement thereof made to him upon his marriage by Schweer, and by virtue of taking possession thereupon of said farm and making lasting improvements.

Browne, Stat. Fr. 3d ed. § 216; *Dugan v. Gittings*, 3 Gill. 138, 43 Am. Dec. 806; *Wright v. Tinsley*, 80 Mo. 398; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250.

Sherwood, J., delivered the opinion of the court:

1. The testimony of Frederick and Henrietta Kotwitz (at whose house Augusta Nowack was then living, with the illegitimate son, the plaintiff, then some two years old) abundantly sustains the allegations of the petition as to the nature, terms, and scope of the agreement entered into between Eberhard H. Schweer, deceased, and said Augusta. There was no evidence to the contrary, and the lower court, after findings suitable to the occasion, decreed that "a child's share, or the one fourth part of all the estate and property of the said Eberhard H. Schweer, be decreed to plaintiff, subject to the right of dower of the widow, the defendant Augusta Schweer, in all the real and personal estate; that all the estate and property left by the said Schweer at his death is hereby declared in trust to be distributed as follows: That plaintiff receive the one-fourth part thereof, subject to the right of dower of the widow aforesaid; and that this one-fourth part comprise the said land on which he now resides, and which by the last will of said Schweer was given to plaintiff's children, and the balance of all property and estate be divided as directed in the last will of said Schweer; and that, for the purpose of dividing said property, contribution is hereby ordered of the defendants Henry P. Schweer, Fred W. Schweer, and Ferdinand Schweer, in proportion to the value and amount of property respectively given to each of them in said will; and that the executor of said Eberhard H. Schweer be adjudged to pay the costs incurred in this suit out of the estate of said Eberhard H. Schweer."

Inasmuch as the circuit court did not find plaintiff entitled to specific performance of the additional contract made with plaintiff as alleged in the second count in this petition, and did not decree performance thereof, and inasmuch as he is content with, and does not appeal from, the decree, it is unnecessary to consider the correctness of the ruling which omitted to specifically perform such additional contract. But while this is true, and while plaintiff is in no position to complain, yet it is otherwise as to the minor defendants, his children. To them the will of Schweer gave the farm on which plaintiff resided, and on which he had thus lived for some ten years at the time of Schweer's death. The contract made between plaintiff's mother and Schweer only entitled plaintiff to one fourth of whatever property, real or personal, Schweer had at the time of his death. Under such a contract, however, he was not entitled to have his share assigned in any particular portion of the property thus left. But his minor heirs were entitled to just what was devised to them by Schweer, estimated to be worth not over \$1,200. Of this right, de-

rived from the will of Schweer, they could not lawfully be deprived, even if the deposition of Frederick Kotwitz, taken before they were made parties to the proceeding, and which tended to prove the original contract, could have been received against them. That portion of the decree which sought to deprive these minors of their rights under the will, or, rather, which ignored those rights altogether, is therefore erroneous, and cannot be permitted to stand. As we understand the decree, although it is not entirely unambiguous, it provides substantially for the specific performance of the contract mentioned in the first count in plaintiff's petition; and in so far as it does this it is correct, and incorrect only to the extent already stated. If the points to be presently passed upon are ruled in plaintiff's favor, a decree, however, can be entered in this court which will put matters in proper shape in reference to the rights of all concerned.

2. The ruling was proper which denied the admissibility of Augusta Nowack as a witness. She was a party to the contract, as well as to the cause of action, and, by reason of this, was incompetent. *Wendover v. Baker*, 121 Mo. 273, and cases cited; *Lins v. Lenhardt*, 127 Mo. 271; *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meier v. Thieman*, 90 Mo. 433; *Berry v. Hurtzell*, 91 Mo. 132; *Leach v. McFadden*, 110 Mo. 584; *Messimer v. McCray*, 113 Mo. 382.

3. Such contracts as the one here in litigation, in so far as they relate to the adoption of a child and making him an heir, etc., have often been recognized and enforced in this state and elsewhere. *Sutton v. Hayden*, 62 Mo. 101; *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250; *Leach v. McFadden*, 110 Mo. 584; *Healey v. Simpson*, 113 Mo. 340; *Teats v. Flanders*, 118 Mo. 660.

4. It thus comes to be considered whether the contract now under consideration, owing to the peculiar circumstances attendant on its making, will prevent that feature of it mentioned in the next preceding paragraph from being specifically performed. It is urged here, as in the court below, that the contract between Augusta Nowack and Eberhard H. Schweer, being made "in consideration of marriage," and not being in writing, is void by reason of the provisions of § 5186, Rev. Stat. 1889; but this is an erroneous view of that section, because it does not make a contract in consideration of marriage void, but merely prohibits any action from being brought thereon, unless such contract "shall be in writing," etc. 1 Bishop. Married Women, § 807. There have been in England and in this country many decisions on the statute in question, involving the point now in litigation; but it seems to be settled by the weight of authority that, though a parol antenuptial contract is invalid when made solely in consideration of marriage, yet that such contract can stand if, in addition to the marital portion thereof, it has another feature, the performance of which may be reckoned part performance, and thus prevent defeat of the antenuptial agreement, because of not being in

writing, provided there was reliance on the promise which is made the basis for specific relief. *Taylor v. Beech*, 1 Ves. Sr. 297; *Ungley v. Ungley*, L. R. 4 Ch. Div. 78; *Browne*, Stat. Fr. 5th ed. §§ 217, 459a, and cases cited; *Fry*, Spec. Perf. § 595; 2 *Parsons*, Contr. 7th ed. 77, and cases cited; *Agnew*, Stat. Fr. 124; *Dy-gert v. Remerschnider*, 32 N. Y. 629; *Riley v. Riley*, 25 Conn. 154; 1 *Bishop*, Married Women, § 807; *Throop*, Validity of Verbal Agreements, § 708. Here Schweer, upon marriage to Augusta Nowack, would not have been entitled to the custody, service, and earnings of plaintiff, but for the latter being surrendered to Schweer by his mother, in furtherance of the parol agreement to that effect. *Schouler*, Dom. Rel. 5th ed. § 273. "This agreement being proved as aforesaid, and it having been also complied with, as shown by the testimony on the part of plaintiff, supplies such independent, additional, and valuable consideration as will, under the authorities cited, amount to part performance, and take this case out of the purview and operation of the statute of frauds. Although there is testimony that plaintiff, while about seventeen years old, on one occasion struck his stepfather with a stove-lid flter on the head, yet great provocation is shown for this, in that Schweer had called plaintiff's mother a "prostitute." Evidently, Schweer did not regard plaintiff a very undutiful or bad boy, or else his conduct some three years thereafter, in promoting the marriage of plaintiff with Bartlett's daughter, was very reprehensible conduct.

5. But the agreement between the parties may be looked at from an entirely different point of view. On all hands it stands confessed that marriage is a valuable consideration. Lord Coke says: "If a man had given land to a man with his daughter in frank marriage generally, a fee simple had passed without this word 'heirs,' for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity." Co. Litt. 9b. Elsewhere it is said: "Marriage is the highest consideration known in law." *Johnston v. Dilliard*, 1 Bay. 292. See also 4 *Kent*, Com. 464; 1 *Bishop*, Married Women, §§ 27, 775; *Ford v. Stuart*, 15 Beav. 499; *Greene v. Cramer*, 2 Con. & L. 60; *Fraser v. Thompson*, 1 Giff. 62. Marriage is regarded as one of the strongest considerations in the law, either to raise a use, found a contract, gift, or grant. *Holder v. Dickeson*, Freem. C. L. Rep. 96; *Smith v. Stafford*, Hob. 216a; *Waters v. Howard*, 8 Gill, 262. In a case which arose in Maryland, it was held that an agreement made by a father with his daughter in consideration of her marriage, and by way of advancement and marriage endowment, consummated by marriage, as then contemplated, could not be revoked by the father, *Martin*, J., saying that the daughter was regarded as a purchaser, as much so as if she had paid for the property an adequate pecuniary consideration, and that the consummation of the marriage was to be considered as the payment of the purchase money. *Dugan v. Gittings*, 3 Gill, 138. A similar ruling was made where a father promised a man about to marry his daughter that, on the marriage he would give him a sum of money, and the marriage having occurred, the father was 31 L. R. A.

compelled specifically to perform his promise. *Chichester v. Vass*, 1 Munf. 98, 4 Am. Dec. 531. Yet, notwithstanding this, it is ruled that, as between the parties to the wedlock, the celebration of the marriage is not such part performance as to take it out of the statute. 2 *Parsons*, Contr. 7th ed. 77; *Fry*, Spec. Perf. 3d ed. § 598. Commenting on this anomaly in equity jurisprudence, Judge Story says: "The subsequent marriage is not deemed a part performance, taking the case out of the statute, contrary to the rule which prevails in other cases of contract. In this respect it is always treated as a peculiar case, standing on its own grounds." 2 *Story*, Eq. Jur. 18th ed. § 768. See also note to section 720, *Throop*, Validity of Verbal Agreements, and cases cited; among them, *Durham v. Taylor*, 29 Ga. 166. "But though marriage be not, cohabitation may be, a sufficient act of part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife. Shortly before the death of the husband, his wife returned to him, upon the faith of a promise made by the husband to the wife and her trustee that, if she would do so, he would continue to pay the annuity, and would charge it upon his real estate. He died without having done so, and it was held that the contract could be enforced against the devisees of the husband, on the ground of part performance." *Webster v. Webster*, 1 Smale & G. 489, Affirmed 4 De G. M. & G. 437; *Fry*, Spec. Perf. § 597. This divergence between marriage and other valuable considerations in respect to the doctrine of part performance caused Vice Chancellor Malins to express his regret that such an exception was ever made. *Ungley v. Ungley*, L. R. 4 Ch. Div. 78; *Coles v. Pilkington*, L. R. 19 Eq. 174. In a case which came to the House of Lords, where the old rule that marriage was not part performance was in terms (though unnecessarily) reasserted, Lord Cottenham very forcibly presented the equitable ground for the contrary opinion, remarking: "The principle . . . of equity is this.—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately, plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal." *Hammersley v. Baron De Biel*, 12 Clark & F. 45. The true basis of specific performance being enforced is that, unless enforced, it would operate a fraud on the party who seeks its enforcement, it being impossible to restore such party to his *status quo*. *Browne*, Stat. Fr. §§ 448, 487, and cases cited; 2 *Story*, Eq. Jur. § 761, and cases cited. "The fraud," says Judge Wells in *Glass v. Hulbert*, "most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so

that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss." *Glass v. Hulbert*, 102 Mass. 85, 8 Am. Rep. 418. Now, it would seem that, marriage being such a valuable consideration, its celebration in conformity to a previous parol promise made, placing especially as it does the female contracting party in a situation where she cannot be restored to her former condition, ought to be regarded as such a benignant fraud upon her if such parol promise be not performed as a court of conscience should not tolerate, but acting on principle, rather than precedent, should decree the complete enforcement of such agreement, notwithstanding the statute. This is what courts of equity are doing in other cases every day, despite the statute, and no sound reason can be urged why a court of equity should grant relief in the latter class of cases, and refuse it in the former. Indeed, more cogent reasons appear to exist in favor of disregarding the statute in instances like the present than in ordinary cases. This view of the matter is also entertained by the learned author heretofore cited. *Browne*, Stat. Fr. § 459. Instances are by no means infrequent where contracts between husband and wife entered into before marriage will be enforced in equity, although they should be avoided at law; "for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract." 2 Story, Eq. Jur. § 1370, and cases cited.

6. For these reasons, inasmuch as we are not hampered by former rulings in this court on

this point, we hold that marriage in the circumstances disclosed by the record does amount to a valuable consideration and part performance; and that plaintiff having done on his part all that it was contracted by his mother he should do, the contract made by his mother for herself and him having been fully executed on their parts, this constitutes of itself a distinct and independent reason why the statute should not be allowed to obstruct the pathway to the relief plaintiff seeks.

7. The premises considered, a decree will be entered in this court in favor of plaintiff in accordance with the facts found by the lower court, giving him one fourth of all the real and personal estate left by Eberhard H. Schweer, and requiring contribution on the part of the three sons of Schweer; but this will be done subject, of course, to the rights of the widow as directed by the will. And, further, the decree must accord to the minor heirs of plaintiff what the will has directed should be theirs; but, of course, the devise to them cannot be permitted to diminish what plaintiff became entitled to under the agreement made by his mother with Schweer. Plaintiff will take in value, in real and personal property, precisely what he would have taken had his children not been mentioned in the will, to wit, the one-fourth part in value of all real and personal property of which Schweer died seised. Inasmuch, however, as those heirs have been compelled to come to this court in order to secure their rights, the cost of this appeal as between them and their father, will be taxed against him.

All concur.

Rehearing denied.

MISSOURI SUPREME COURT (In Banc).

Joseph R. EDWARDS, *Respt.*,

v.

A. A. LESUEUR, *Appt.*

(.....Mo.....)

1. **The establishment of the seat of government** of a state is a proper subject of constitutional control and therefore of constitutional amendment.
2. **Conditions imposed and powers delegated by a proposed constitutional amendment to change the location of the seat of state government** whereby, in addition to the vote of the people which the existing Constitution requires for an amendment, donations of property and the erection of state buildings to be approved and accepted by a commission are made a condition of the change of location, will not make the proposed amendment inoperative, since, upon the vote of the people adopting the amendment, the conditions will be imposed and the powers delegated by the Constitution itself.

3. **The power to select and afterwards to change its own seat of government** if deemed expedient is necessarily implied in a state Constitution providing for a Republican form of government not repugnant to the Constitution of the United States, and making no limitation upon its political or governmental power or the power to manage its own internal affairs.

4. **An implied contract against the removal of the seat of state government** from its original location is not made with property owners at that place by its location there.

5. **There can be no irrevocable law** to prevent the removal of the seat of state government, as this involves a governmental subject.

6. **A vote in favor of a proposed constitutional amendment taken by yeas and nays** and entered in full on the legislative journals in full compliance with the constitutional provisions on this subject is sufficient without having the resolution read on different days or in other respects taking the course required for ordinary legislation.

NOTE.—As to the power of the court to determine the question of the adoption of a state Constitution, see *Miller v. Johnson* (Ky.) 15 L. R. A. 524, and *note*.

For other cases as to adoption of constitutional 31 L. R. A.

amendments, see *State, Torreyson, v. Grey* (Nev.) 19 L. R. A. 134; *Seneca Min. Co. v. Secretary of State* (Mich.) 9 L. R. A. 770; *Worman v. Hagan* (Md.) 21 L. R. A. 716; *Livermore v. Waite* (Cal.) 25 L. R. A. 812.

(February 5, 1896.)

APPEAL by defendant from a judgment of the Circuit Court for Cole County enjoining him from proceeding to submit to the vote of the electors of the state a proposed amendment to the state Constitution which was intended to change the place of the seat of government. *Reversed.*

Statement by **Macfarlane, J.:**

This is a suit by plaintiff, as a property owner of Jefferson city, to restrain the secretary of state from discharging the duties enjoined upon him in respect to submitting to a vote of the electors of the state a proposal, passed by the last general assembly, for amending the Constitution so as to provide therein for the removal of the seat of government from the city of Jefferson to the city of Sedalia. The amendment was proposed under a concurrent resolution, and is as follows:

"Concurrent resolution submitting to the qualified voters of Missouri an amendment to the Constitution thereof, providing for the removal of the seat of government from the city of Jefferson to the city of Sedalia.

"Be it resolved by the house of representatives, the Senate concurring therein, as follows: At the general election to be held on Tuesday next following the first Monday in November, A. D. 1896, an amendment to the Constitution of Missouri shall be submitted to the qualified voters of the state in the following words: 'The seat of government shall be removed from the city of Jefferson and located at the city of Sedalia. Any person or persons may grant or donate to the state any land, sum of money, or other thing of value to be used for the purpose of erecting the necessary public buildings at the city of Sedalia, or may deposit with the governor sufficient securities or obligations to guarantee the erection of such buildings. Whenever a suitable capitol building, having the same or greater floor area and appointments as the present capitol and supreme court buildings, and equal thereto in stability and architectural merit, together with grounds of the same or greater area, and an armory building likewise similar or superior to the present armory, and an executive mansion likewise similar or superior to the present building used as the governor's residence, together with the grounds and appurtenances, shall be erected at the city of Sedalia, the same shall be accepted by a commission, consisting of the governor, secretary of state, auditor, treasurer, and attorney general, and such officers shall at once remove the public records and personal property to such new buildings, and the city of Sedalia shall thereupon become the permanent seat of government. The plans and location of the capitol, armory, and executive mansion and grounds shall first be approved by such commission. The county of Pettis and Sedalia township, in said county, may each vote an issue of twenty-five nontaxable 3 per cent bonds, not to exceed in amount, respectively for each, \$100,000, and such bonds may be ordered issued by a majority vote of those voting at a special election called for that purpose by the county court, and conducted generally in the manner provided by law for the issuing of bonds for the erection of court-

houses. Said county and township bonds shall be given to the state for the purpose of assisting in paying for the erection of the buildings provided for herein; and such bonds, if voted and issued, shall be delivered to the governor of the state, and held by him in trust for the benefit of any person or persons who may erect such suitable public buildings, to be given to such person or persons on their completion and acceptance. The commission hereby constituted shall have full power, by a majority vote, to carry out the provisions and intent of this amendment, and such new public buildings shall be completed, as near as may be possible, on or before the 1st day of November, A. D. 1899, unless such commission, for good cause, grant further time. The state shall in no manner become liable for, nor shall it pay any part whatever of the cost of the new public buildings herein provided for, and the county before mentioned shall pay the entire cost of moving the records and personal property of the state to the new public buildings, so that the state shall be at no expense whatever in the change of the seat of government."

It is charged in the petition that said resolution is, and if adopted, will be, invalid, for the reason that it does not provide that the same shall go into effect "as an operative amendment to said Constitution, upon its adoption by a majority of the qualified voters of the state voting in favor thereof, but, on the contrary, by its terms and provisions, its taking effect, and becoming an operative and binding part of said Constitution, is made to depend on the further facts or condition that some person or persons shall donate or grant to the state land or money or other valuable thing, for the purpose, or erect the necessary public buildings at the city of Sedalia for the use of the state, or shall deposit with the governor of the state sufficient securities or obligations to guarantee the erection of such building, and also on the further fact or condition that a suitable capitol building for the state of Missouri, having the same or greater floor area and appointments than the present capitol and supreme court buildings, and equal thereto in stability and architectural merit, together with grounds of the same or greater area than those now possessed by the state at the city of Jefferson, and also that a state armory and executive mansion similar or superior to the present ones owned by the state, together with grounds and appurtenances thereto, shall be erected or furnished at the city of Sedalia, and shall be accepted by a commission consisting of the governor, secretary of state, state auditor, treasurer, and attorney general of Missouri, and also on the further fact or condition that the plans and location of said new capitol building, armory, executive mansion and grounds therefor, shall be approved by said commission." It is further charged that the resolution is invalid, and, if adopted by the necessary vote of the people, would not become an amendment to the Constitution, for the reason that it was not read on three different days in each house of the general assembly, and did not take the course of a bill in said assembly. A further charge is that, by the act of Congress admitting the state of Missouri into the

Union, the action of the convention of the territory called in pursuance of said act, and the subsequent legislation of the state in accepting and acting upon the conditions of said act, the sea of government was established at Jefferson City, and cannot be changed without the consent of the United States. It was also charged, in substance, that under said enabling act, and the acceptance thereof by the people of the territory, certain lands were donated by the United States to the state of Missouri, upon which to locate its seat of government, and such lands were sold by the state with the assurance to purchasers that the seat of government would permanently remain at the city of Jefferson, and such purchasers, and their assigns, relying on the good faith of the state, made valuable and lasting improvements thereon, by reason of all which they acquired certain vested rights, which should be protected and preserved. A general demurrer to the petition was overruled, and, defendant refusing to plead further, judgment was rendered for plaintiff on the demurrer, and a perpetual injunction was granted. From this judgment defendant appealed.

Messrs. R. F. Walker, Attorney General, Lee & McKeighan, and John H. Bothwell, for appellant:

Missouri is a free and independent state, and all political power is vested in the people, from whom government originates, and who have the inherent, sole, and exclusive right to alter or revise their Constitution to any extent they may choose, subject only to the limitations of the Constitution of the United States.

Mo. Const. art. 2, §§ 1-3; Cooley, Const. Lim. 6th ed. chap. 3, pp. 41, 45; Black, Const. Prohibitions, pp. 44-49; Potter's Dwarrr. Stat. ed. 1871, 346-348; *Blair v. Ridgely*, 41 Mo. 63, 97 Am. Dec. 248; *Wells v. Bain*, 75 Pa. 39, 15 Am. Rep. 568; *Re Gibson*, 21 N. Y. 9.

The Constitution of this state is specific, careful, and complete in its provision for originating and holding a convention for revising and amending the Constitution; and where general revision or amendment is not considered necessary, the general assembly has full power to propose such specific amendments as a majority of the members elected to each house shall deem expedient.

Mo. Const. art. 15, §§ 1-3.

A proposed constitutional amendment need not be read in each House of the general assembly on three separate days, nor need it take the course of a bill.

Mo. Const. art. 5, § 14, art. 15, §§ 1, 2; Jameson, Const. Conv. 4th ed. §§ 541-543; 3 Cyc. of Political Science, pp. 802, 803; 1 Stimson, Am. Stat. Law, p. 133, §§ 990-996.

In proposing an amendment to the Constitution, the general assembly exercises delegated political power, not ordinary legislative authority. Its members may propose any specific amendment which they may deem expedient, and they are not limited by directions or restrictions made applicable by the Constitution to ordinary legislative acts alone.

Mo. Const. art. 15, §§ 1, 2; Borgeaud, Adoption and Amendment of Constitutions, pp. 183, 323; Jameson, Const. Conv. 4th ed. §§ 547-555, and cases cited; 1 Stimson, Am. Stat. Law, 31 L. R. A.

p. 133, §§ 990-996; 3 Cyc. of Political Science, pp. 802, 803; 1 Bryce, Am. Commonwealth, 2d ed. pp. 419-423; *State, Morris, v. Mason*, 43 La. Ann. 590; *Nesbit v. People*, 19 Colo. 441; *State v. Cox*, 8 Ark. 436.

Wide latitude is indulged in favor of propositions to amend state Constitutions:

Jameson, Const. Conv. 4th ed. chap. 8, Amend. Const. p. 9; *University of North Carolina v. McLeer*, 72 N. C. 76; *State, Torreyson, v. Grey*, 21 Nev. 378, 19 L. R. A. 134; *Re Gibson*, 21 N. Y. 9; *Collier v. Frierson*, 24 Ala. 100; *Constitutional Prohibitory Amendment*, 24 Kan. 700; *State, Hudd, v. Timme*, 54 Wis. 318; *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *Worman v. Hagan*, 78 Md. 152, 21 L. R. A. 716; *State, Morris, v. Mason, supra*; *Nesbit v. People*, 19 Colo. 441; *State, Woods, v. Tooker*, 15 Mont. 8, 25 L. R. A. 560; *State v. Cox, supra*.

State Constitutions now are often used to enact fundamental laws by ratification of the voters, which would otherwise be left to ordinary legislation or be in conflict with other provisions of the organic law.

Mo. Const. arts. 9-14; 1 Stimson, Am. Stat. Law, § 1, pt. 1, note; Borgeaud, Adoption and Amendment of Constitutions, Introductory note, pp. 9, 10, 40, 146-151; 1 Bryce, Am. Commonwealth, 2d ed. pp. 419, 429, 436, 438, 441, 442, and 447; Poore, Federal and State Constitutions, vols. 1, 2; *State, Morris, v. Mason, supra*.

No provision of the present or any former state Constitution has ever expressly established the seat of government at Jefferson City.

Mo. Const. 1820, art. 11, §§ 1-4; Mo. Laws 1821.

After the capital was established at Jefferson City, the people by express constitutional limitation subsequently withdrew from the legislative department the power to remove the seat of government by simple legislative act. But for that express limitation the seat of government might be removed by ordinary statute law, because the exceptions to a power granted mark its extent.

Mo. Const. 1865, art. 11, § 10; Id. 1875, art. 4, § 56; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 191, 6 L. ed. 69; *Brown v. Maryland*, 25 U. S. 12 Wheat. 438, 6 L. ed. 635; *Morris v. Powell*, 125 Ind. 281, 9 L. R. A. 326; *State, Lamb, v. Cunningham*, 33 Wis. 90, 17 L. R. A. 145.

Neither in the "enabling act," passed by Congress in 1820, nor in the "ordinance of acceptance" of the constitutional convention of the state, will be found anything which deprives or limits the state in its sovereign right to re establish its seat of government.

Act of Congress 1820, 1 Mo. Rev. Stat. pp. 47-50; Ordinance of Acceptance 1820, 1 Mo. Rev. Stat. 1889, pp. 51-63; Cooley, Const. Lim. 6th ed. pp. 473, 474; 4 Am. & Eng. Enc. Law, p. 403; 2 Beach, Inj. § 1390; *Armstrong v. Dearborn County Comrs.* 4 Blackf. 208; *Elwell v. Tucker*, 1 Blackf. 285; *Newton v. Mahoning County Comrs.* 26 Ohio St. 618, 100 U. S. 548, 25 L. ed. 710; *Alley v. Denson*, 8 Tex. 297; *Gilmore v. Hayworth*, 26 Tex. 89; *Harrell v. Lynch*, 65 Tex. 149; *Adams v. Logan County*, 11 Ill. 336; *Harris v. Shaw*, 13 Ill. 456; *Atty. Gen. v. Lake County Supers.* 33 Mich. 289.

If the expression of the will and desire of

the enacting power be complete and final, then the law is valid and binding when enacted, even where its terms provide for certain acts by others, and for certain facts or conditions to be ascertained or found before certain prescribed results shall follow.

Sedgwick Stat. & Const. L. 2d ed. pp. 135-138, and cases cited; Cooley, Const. Lim. 6th ed. pp. 98-101, 137-146, and cases cited; Mo. First Const. (1820) art. 11, §§ 1-4; Walton v. Greenwood, 60 Me. 356; State v. Parker, 26 Vt. 357; Pratt v. Allen, 13 Conn. 119; Lothrop v. Stedman, 42 Conn. 583; Newton v. Mahoning County Comrs. 26 Ohio St. 618; Starin v. Genoa, 23 N. Y. 439; Bank of Rome v. Rome, 18 N. Y. 38; The Aurora v. United States, 11 U. S. 7 Cranch, 382, 3 L. ed. 378; State, Park, v. Portage County Supers. 24 Wis. 49; Callam v. Saginaw, 50 Mich. 7; State, Maggard, v. Pond, 93 Mo. 606; Ex parte Suann, 96 Mo. 44; Lammert v. Lidwell, 62 Mo. 188, 21 Am. Rep. 411; St. Louis City & County v. Alexander, 23 Mo. 483; Moers v. Reading, 21 Pa. 188; Locke's Appeal, 72 Pa. 491; People, Vermule, v. Bigler, 5 Cal. 23.

The general assembly has necessarily the right to construe the Constitution in exercising its delegated powers, and the courts will presume that legislative acts based on legislative construction of the organic law are constitutional, unless it is shown that the legislative act was and is void because necessarily repugnant to some specific clause of the Constitution pointed out.

Cooley, Const. Lim. 6th ed. pp. 45, 54, 192-222 et seq.; State, Maggard, v. Pond, supra; Kelly v. Meeks, 87 Mo. 396; Phillips v. Missouri P. R. Co. 86 Mo. 540; State v. Addington, 77 Mo. 110; State, Harris, v. Laughlin, 75 Mo. 147; State v. Able, 65 Mo. 357; State, Circuit Atty. v. Cape Girardeau & S. L. R. Co. 48 Mo. 468; Stephens v. St. Louis Nat. Bank, 43 Mo. 390; Hamilton v. St. Louis County Ct. 15 Mo. 13; Edwards v. Williamson, 70 Ala. 145; Ex parte Selma & G. R. Co. 45 Ala. 696, 6 Am. Rep. 722.

Messrs. A. M. Hough, Jacob C. Fisher, J. W. Zevely, Karnes, Holmes & Krauthoff, Silver & Brown, W. S. Pope, J. R. Edwards, and H. Clay Ewing, for respondent:

Plaintiff, as a citizen and taxpayer of the city of Jefferson, and of the state of Missouri, is entitled to maintain this injunction proceeding to contest the validity of the proposed constitutional amendment, and, if the same be invalid, to restrain the secretary of state from taking the steps provided for its submission to the voters of the state.

Livermore v. Waite, 102 Cal. 113, 25 L. R. A. 312; State, Hughlett, v. Hughes, 104 Mo. 459; Francis v. Blair, 89 Mo. 291; Valle v. Ziegler, 84 Mo. 214; Ewing v. Jefferson City Bd. of Edu. 72 Mo. 436; Wagner v. Meety, 69 Mo. 150; Ranney v. Bader, 67 Mo. 476; Mathis v. Cameron, 62 Mo. 504; Rubey v. Shain, 54 Mo. 207; Neumeyer v. Missouri & M. R. Co. 52 Mo. 81, 14 Am. Rep. 394; State, Circuit Atty. v. Saline County Ct. 51 Mo. 350.

The proposed amendment, in the form submitted, is not authorized by the Constitution, art. 15, §§ 1, 2.

The Constitution being amendable only in 81 L. R. A.

pursuance of the provisions contained in the Constitution itself, the mode prescribed is the measure and the limit of the power to amend.

Russie v. Brazzell, 128 Mo. 93; State v. McBride, 4 Mo. 308, 29 Am. Dec. 636; Collier v. Frierson, 24 Ala. 100; Constitutional Prohibitory Amendment, 24 Kan. 700; Opinion of the Justices, 6 Cush. 573; State v. Seft, 69 Ind. 505; Re Constitutional Convention, 14 R. I. 649; Koehler v. Hill, 60 Iowa. 543; State, Stevenson, v. Tuffy, 19 Nev. 391; Wells v. Bain, 75 Pa. 40, 15 Am. Rep. 563; Oakland Paving Co. v. Hilton, 69 Cal. 479; State, Morris, v. Mason, 43 La. Ann. 590; Miller v. Johnson, 92 Ky. 589; Cooley, Const. Lim. 6th ed. pp. 42, 43; Jameson, Const. Conv. § 25.

The general assembly, in proposing amendments to the Constitution, does not act in the exercise of its legislative authority, but as a special agent empowered by an express grant.

Hatch v. Stoneman, 66 Cal. 632; Livermore v. Waite, 102 Cal. 113, 25 L. R. A. 312; Re Senate File 31, 25 Neb. 864; Nesbit v. People, 19 Colo. 441; Cooley, Const. Lim. 6th ed. pp. 42, 44; Jameson, Const. Conv. § 25.

The state legislatures exercising their ordinary legislative functions have all such powers as have not been surrendered or prohibited to them.

Hall v. Wisconsin, 103 U. S. 5, 26 L. ed. 302; Cooley, Const. Lim. 6th ed. 206.

The rule that all the presumptions are in favor of the constitutionality of an ordinary legislative enactment, and that it will not be held unconstitutional unless clearly so, obviously does not apply to constitutional amendments coming through the legislative department as a special agency, or having their origin in an express warrant.

Livermore v. Waite, supra; Oakland Paving Co. v. Hilton, 69 Cal. 489; Cooley, Const. Lim. 6th ed. pp. 39, 93, 94; Koehler v. Hill, 60 Iowa, 563.

The Constitution does not authorize or permit the legislature to propose an amendment thereto which will not, upon its adoption by the people, become an effective part of the Constitution, nor one which, if ratified, will take effect only at the will of other persons or upon the approval of such other persons of some specified act or condition.

Livermore v. Waite, supra.

The legislature is only permitted to submit an amendment, not something that is not an amendment, under the designation of an amendment.

Cooley, Const. Lim. 6th ed. p. 57, note.

The future event, the happening of the contingency, or the fulfillment of the condition on which a law, even in the case of an ordinary legislative enactment, takes effect, can afford no additional efficacy to the law; it must be "complete and effective when passed."

State, Dome, v. Wilcox, 45 Mo. 458; Lammert v. Lidwell, 62 Mo. 188, 21 Am. Rep. 411.

An unconstitutional enactment is not a law; it binds no one and protects no one.

Little Rock & Ft. S. Railway v. Worthen, 120 U. S. 97, 30 L. ed. 588.

Every department of the government, and every official of every department, may, at any time when a duty is to be performed, be re-

quired to pass upon a question of constitutional construction.

Cooley, Const. Lim. 6th ed. p. 54.

The proposed amendment is objectional because it involves the delegation of legislative power to the commissioners and other persons referred to therein.

Ruggles v. Collier, 43 Mo. 353; *St. Louis, Murphy, v. Clemens*, 43 Mo. 395; *Saline County v. Wilson*, 61 Mo. 237; *Matthews v. Alexandria*, 68 Mo. 115, 30 Am. Rep. 776; *St. Louis v. Russell*, 116 Mo. 248, 20 L. R. A. 721; *St. Louis v. Howard*, 119 Mo. 41.

The general assembly cannot by statute define the term "constitutional amendment" so as to bind the courts.

Cooley, Const. Lim. 6th ed. p. 57, note 1; *State, Baltimore, v. Kirkley*, 29 Md. 85; *Ruggles v. Collier*, *supra*; *State, Benton, v. Boice County Comrs.* 140 Ind. 506; *Folsom v. Township of Ninety-Six*, 59 Fed. Rep. 67; *Quaker City Nat. Bank v. Nolan County*, 59 Fed. Rep. 660, Aff'd in 66 Fed. Rep. 833.

A law may be within the inhibitions of the Constitution as well by implication as by expression.

Evansville v. State, Blend, 118 Ind. 426, 4 L. R. A. 93; Cooley, Const. Lim. 6th ed. p. 207.

And when it is, it is the duty of the courts to so declare.

Page v. Allen, 58 Pa. 338, 98 Am. Dec. 272; *People v. Gillson*, 109 N. Y. 389.

The state cannot under the act admitting it into the Union, and its ordinance accepting the same, change its permanent seat of government without the consent of the United States.

Congressional Act of Admission, Mo. Rev. Stat. 1825, pp. 35-39; Ordinance of Acceptance, Mo. Rev. Stat. 1825, pp. 40-42; *Lessieur v. Price*, 58 U. S. 12 How. 59, 13 L. ed. 893; *Lessieur v. Price*, 12 Mo. 14.

When a state descends from the plane of its sovereignty, and enters into a contract, it is bound like an individual.

Davis v. Gray, 83 U. S. 16 Wall. 232, 21 L. ed. 457; Cooley, Const. Lim. 6th ed. pp. 328, 330, note 4.

Macfarlane, J., delivered the opinion of the court:

1. It has been said that "the right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised, except in very clear cases; one department of the government is bound to presume that another has acted rightly." *Slate v. Addington*, 77 Mo. 117. The power and jurisdiction of the judiciary to declare a proposal for an amendment to the Constitution ineffectual, and to arrest its submission to the people, which we are now called upon to exercise, is coupled with far more serious responsibilities. To so declare would wrest from the people the expressly reserved power to amend their organic law as they may deem fit and expedient. In respect to the subject of amendments to the Constitution, that instrument declares: "The people of this state have the inherent . . . right . . . to alter and

abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided, such change be not repugnant to the Constitution of the United States." Const. 1875 art. 2, § 2. That all just government is founded upon the consent of the people is a maxim which has been held sacred by the American people since the Declaration of Independence, in 1776. Under our system, the people are the source of all governmental power. In recognition of this principle, the people of this state, first in delegated convention, and afterwards by their own voice, through the polls, proclaimed, in their bill of rights (§ 1), "that all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Upon the adoption of the Constitution of 1875 by a popular vote, the direct power of the people was withdrawn from governmental affairs; and the administration of the functions of government was delegated to the executive, legislative, and judiciary departments of state, to be exercised by officers selected by the people, with such limitations upon the powers of each as they saw fit to impose. But the right to govern was not thereby surrendered or abandoned. The power was reserved to resume control, either of any special subject-matter, by amendment of their organic law, or of the entire subject of government, by means of a constitutional convention. This reserved power is declared in §§ 1, 2, and 3 of article 15. Sections 1 and 2, relating to amendments, read:

"Sec. 1. This Constitution may be amended and revised only in pursuance of the provisions of this article.

"Sec. 2. The general assembly may, at any time, propose such amendments to this Constitution as a majority of the members elected to each House shall deem expedient; and the vote thereon shall be taken by yeas and nays, and entered in full on the journals. The proposed amendments shall be published with the laws of that session, and also shall be published weekly in some newspaper, if such there be, within each county in the state, for four consecutive weeks next preceding the general election then next ensuing. The proposed amendments shall be submitted to a vote of the people, each amendment separately, at the next general election thereafter, in such manner as the general assembly may provide. If a majority of the qualified voters of the state, voting for and against any one of said amendments, shall vote for such amendment, the same shall be deemed and taken to have been ratified by the people, and shall be valid and binding, to all intents and purposes, as a part of this Constitution."

It will be seen that no measure of power over any governmental subject has been wholly surrendered. Power is retained, and through the action of the general assembly, which is composed of the nearest representatives of the people, control may be resumed, over any subject-matter, and changes made in the organic law in respect thereto. It is true, the general assembly can only propose amendments under

the power delegated to it by the people. This power must be construed according to the general principles which govern courts in the construction of delegated powers. In the exercise of such power, every substantial requirement must be observed and followed, or there can be no valid amendment. In respect to the mode of proposal and submission, the provisions of the Constitution must be regarded as absolute. The courts should not hesitate to see that the Constitution is obeyed in these particulars. *State v. McBride*, 4 Mo. 306, 29 Am. Dec. 636. But whether the courts have jurisdiction to come between the people and their authorized and accredited agents and representatives, and arrest their will in respect to what the organic law should be, is an entirely different and more serious question. The Constitution is intended for observance by the judiciary as well as other departments of government. The judges are sworn to support the Constitution, and the provision for its amendment is as obligatory upon the courts as any other part of it. "The general assembly may, at any time, propose such amendments to this Constitution as a majority of the members elected to each House shall deem expedient," is the unequivocal letter of attorney given by the people. No stronger language could have been used to express authority as unlimited as the subject upon which the agent is authorized to act. The character—that is, the substance and extent—of the amendments is left entirely and exclusively to the discretion of the general assembly. The right to propose is as unlimited as is the right to adopt by vote of the people themselves. It is as unlimited as would be the power of a regularly called and constituted convention to propose specific provisions. The courts have nothing to do with the wisdom or policy of such proposal. The people have reserved the power of review to themselves. Amendments derive their force from the action of the people, and not from the action of the assembly which proposes them. The power—or, rather, the want of power—in the courts to review the policy or wisdom of constitutional amendments is thus expressed by Mr. Justice Brewer (then of the supreme court of Kansas) in *Constitutional Prohibitory Amendment*, 24 Kan. 709. "But the questions of policy are not questions for the courts. They are wrought out and fought out in the legislature and before the people. Here the single question is one of power. We make no laws; we change no Constitutions; we inaugurate no policy. When the legislature enacts a law, the only question which we can decide is, whether the limitations of the Constitution have been infringed upon. When a constitutional amendment has been submitted, the single inquiry for us is, whether it has received the sanction of popular approval in the manner prescribed by the fundamental law. So that whatever may be the individual opinions of the justices of this court as to the wisdom or folly of any law or constitutional amendment, and notwithstanding the right which as individual citizens we may exercise with all other citizens in expressing through the ballot box our personal approval or disapproval of proposed constitutional changes, as a court, our single inquiry is, have constitu-

91 L. R. A.

tional requirements been observed, and limits of power been regarded? We have no veto."

There can be no doubt that the question of the establishment of the seat of government is one which is a proper subject of constitutional control, and is therefore a proper subject for amendment. If the people had seen fit, they could have given power to the general assembly to change the seat of government upon any terms it might require. Indeed, the power might have been delegated to the governor, or this court, or to commissioners as was done by the convention of 1820. But no such power was granted, nor did the people remain silent on the subject, and thus leave the matter to the discretion of the assembly, but negatived such power by declaring, "The general assembly shall have no power to remove the seat of government from the city of Jefferson." Const. 1875, art. 4, § 56. It is plain that, in order to secure a removal of the capital, an amendment to the Constitution is necessary. The general assembly deemed it proper that the expediency of a removal to Sedalia should be submitted to the people. It is not seriously insisted that an unconditional proposal for removal would not have been valid. But it is insisted that the amendment, as proposed, is—and, though adopted by the people, would be—invalid on account of the conditions annexed thereto, and the powers delegated to certain officials. What has been said in reference to the unlimited discretion of the general assembly should be a sufficient answer to this objection. The objection is directed against the wisdom of the measure and its expediency. As has been said, these are questions upon which the people are to pass, and over which the courts have no power. The amendment derives its force from the people, and not from the legislature. If ratified, "it shall be valid and binding to all intents and purposes as a part of this Constitution" is the language of that instrument. Every condition and every delegation of power contained in the amendment will come direct from the people, as a part of the organic law. The people have placed no limitation on their own power in this respect. It will be observed, also, that the amendment does not propose to effect a change in the location of the seat of government, but to provide the means by which a change can be effected. It might have delegated the power to the general assembly to make the change. Instead of doing so, it has provided a means much more complicated, but which the courts are bound to uphold and respect. The people are to judge of the practicability of the methods proposed. If the amendment is adopted it ceases to be a mere resolution of the assembly and becomes, "to all intents and purposes," a part of the Constitution. The conditions will be imposed and the power will be delegated by the Constitution itself.

Much reliance is placed by the plaintiff upon the authority of the case of *Livermore v. Waite*, 102 Cal. 114, 25 L. R. A. 812, in support of his position. While we have great respect for the supreme court of California, and the distinguished jurists who compose it, yet if the opinion is to be taken as holding that, under such powers as our Constitution confers

upon the general assembly in respect to proposing amendments, a proposed amendment, which, by the terms of the Constitution, is to become valid and binding to all intents and purposes, upon its adoption by the people, will be ineffective because conditions are therein imposed and powers are thereby delegated, we are unwilling to give our assent to it. We do not deem it necessary to analyze that opinion, in order to show that no such principle was announced, though expressions used by the judge who wrote the opinion may be open to such construction.

2. The petition charges that, by the act of Congress admitting the state of Missouri into the Union, the action of the convention called in pursuance of said act, and subsequent legislation of the state in conformity to the conditions of said act, the seat of government was established at Jefferson City, and cannot be removed therefrom without the consent of the United States, or to the loss and injury of those who have purchased and improved property in reliance upon the obligation of the state to permanently maintain it there. The control of the United States is supposed to result from the terms of admission proposed by Congress and accepted by the convention. Section 6 of the enabling act (Rev. Stat. 1889, p. 49) provides "that the following propositions be and the same are hereby offered to the convention of the territory of Missouri, when formed, for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory upon the United States." These propositions (five in number) provided for grants of land by the United States to the state of Missouri. The fourth proposition is as follows: "Fourth. That four entire sections of land be and the same are hereby granted to the said state, for the purpose of fixing their seat of government thereon; which said sections shall, under the direction of the legislature of said state, be located as near as may be, in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States." These propositions were upon the condition that the convention should provide, "by an ordinance irrevocable without the consent of the United States, that every and each tract of land sold by the United States, from and after the 1st day of January next shall remain exempt from any tax laid by order or under the authority of the state." The convention of the territory in accepting the terms of admission, declared: "And this convention for and in behalf of the people inhabiting this state, and by authority of said people, do further ordain, decree and declare that this ordinance shall be irrevocable without the consent of the United States." The convention also framed a Constitution, article 9 of which was devoted to the subject of the seat of government of the state, and provided that the legislature should appoint five commissioners for the purpose of selecting the land to be donated, and also a permanent seat of government. If the four sections of land selected were not deemed suitable for a site, they were authorized to select another, and to purchase the necessary land. If the land selected was approved, the commissioners were authorized to lay out a town under the

directions of the general assembly. The commissioners were duly appointed by the general assembly; they selected land upon which the city of Jefferson is located; their selection was approved; a town was laid out; lots were sold by the state; and, by an act of the legislature, the permanent seat of government was located at the city of Jefferson, where it has since remained. The contention is that under those various proceedings the state became irrevocably bound to maintain its seat of government at Jefferson City, unless by the consent of the United States, and also that the property owners have secured vested rights in the location of the capital, which the state has no power to take from them, even by a constitutional amendment.

In answer to the first proposition, it may be said, in the first place, that no such condition was coupled with the proposal submitted by the act of Congress. The acceptance should not be construed to be broader than the offer. The irrevocable character of the ordinance must be construed to refer to the conditions which were required to be irrevocable. In the second place, the convention which accepted the terms proposed by Congress, and which formed the state Constitution, did not interpret the act as requiring that the seat of government should be located on the four sections of land which might be selected, for it provided that the commissioners might purchase other land upon which to locate its seat of government. The convention would hardly have made an irrevocable agreement, and immediately proceeded to violate it. Third, the act of admission required a copy of the Constitution, when framed, to be transmitted to Congress. We must presume that the convention did its duty in this regard, and that Congress knew the interpretation that had been given to the grant, and, as the state government has ever been recognized by the United States, that it was satisfied with such interpretation, and ratified it. In the fourth place, the plain terms of the compact negative any intention of the United States to control the state in the future changes of its seat of government. The fourth section of the act authorized the convention to form its own Constitution and state government, provided it should be republican in form, and not repugnant to the Constitution of the United States. No limitation whatever is placed upon its political or governmental power, or the power to manage its own internal affairs. The power, then, to select, and afterwards, if deemed expedient, to change, its own seat of government, is necessarily implied.

3. Nor have the property owners of the city of Jefferson secured such vested rights in the location of the city government, by reason of any implied contract with the state, as will prevent its removal. The Constitution of 1820 declared the exclusive right of the people to regulate the internal government of the state, and to alter their Constitution whenever deemed necessary to their safety and happiness. The reserved power is thus declared by the same convention that accepted the terms of admission of the state into the Union. By this declaration the convention clearly negatives the idea of an intention to bind all future

generations to forever maintain the seat of government at such places as might thereafter be selected by commissioners to be appointed by a future legislature. But neither the convention nor the legislature had power, in this respect, to irrevocably bind the people of the state. The right of the people to establish and remove their seat of government at pleasure involves a governmental subject, about which there can be no irrepealable law. An injunction was sought to prevent the removal of a county seat, on the ground that the citizens had secured a vested right therein, which a removal would violate. The case came before the Supreme Court of the United States. That court, speaking through Mr. Justice Swayne, after announcing the principle that one legislature could not bind another as to subjects of a governmental character, illustrated the proposition in this language: "If a state capital were sought to be removed, under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity, and a perpetual injunction. . . . A proposition leading to such consequences must be unsound. The parent and the offspring are alike." *Newton v. Mahoning County Comrs.* 100 U. S. 560, 25 L. ed. 711. The claim that property owners will be entitled to compensation in case of a removal is not involved in this proceeding. The power to remove the seat of government does not depend upon the right to compensation. On that question it would be improper for us to express an opinion in advance.

4. Another ground upon which the resolution is claimed to be invalid is that it was not

read on three different days in each House of the general assembly, and did not, in other respects, take the course required by the Constitution in ordinary legislation. The provision for adopting resolutions proposing amendments is distinct from and independent of all provisions which are provided for the government of legislative proceedings. The provisions are in themselves complete, and are not *in pari materia* with those required in the passage of a bill. The general assembly, in proposing amendments, does not, strictly speaking, exercise ordinary legislative power. It acts in behalf of the people of the state, under an express and independent power. The mode of its exercise is prescribed, and must be observed, but the assembly is not required to look outside its power of attorney to ascertain its duty. It is only required, and it is therefore only necessary, that the vote be taken by yeas and nays, and entered in full on the journals. That this was done is not disputed.

We are of the opinion that the proposed amendment, if adopted by the people in the manner prescribed by the Constitution, would be effectual as a part of the organic law of the state. We have not discussed the question whether the remedy by injunction is, in any event, available for the purposes contemplated in this case, because defendant has expressly waived that question, and requested a decision on the broader grounds, which we have accordingly considered.

The judgment of the Circuit Court is reversed.

Brace, Ch. J., and Sherwood and Robinson, JJ., concur. Barclay, J., concurs in the judgment for the reasons stated in paragraphs 1 and 4. Gantt and Burgess, JJ., do not sit.

VIRGINIA SUPREME COURT OF APPEALS.

Ex parte Richard M. LACY.

(.....Va.....)

1. **Pool selling is the only form of betting or wager that is punishable** by statute which prohibits bets and wagers of all kinds but the title of which is "An Act to Prevent Pool Selling and so forth."
2. **More than one object is not embraced in a statute** which makes it unlawful to make any bet or wager, or receive, record, register, or forward anything of value to be bet or wagered upon a trial of speed or endurance of any beast, to take place beyond the limits of the state, or to assist in so doing, although the title is "An Act to Prevent Pool Selling and so forth."
3. **The words "and so forth" in the title of a statute** cannot supply an omission when the title is less comprehensive than the body of the statute.
4. **A statute making it unlawful to**

NOTE.—For note on the subject of the locality of crime committed through the agency of the mails or of carriers, see *State v. Hudson* (Mont.) 19 L. R. A. 775.

31 L. R. A.

make or record a bet upon any race between animals in another state is a proper exercise of the police power of the state, and not an unlawful interference with interstate commerce.

5. **Forwarding money by telegraph to another state** to be wagered on a horse race to take place in a third state may be made a criminal offense in the state from which the money is sent, although it is lawful to make such wagers in the state in which the wager is made.
6. **A prisoner committed by a justice of the peace** for trial by the county court on the charge of a misdemeanor which is exclusively within the jurisdiction of the justice is entitled to release by habeas corpus.

(April 20, 1896.)

PETITION for a writ of habeas corpus to procure petitioner's discharge from the custody of the sheriff of Alexandria County to which he had been committed for alleged violation of the statute against pool selling. *Petitioner discharged.*

The facts are stated in the opinion.

Messrs. R. Walton Moore and Samuel G. Brent, for petitioner.

The act of the general assembly of Virginia is in violation of Va. Const. art. 5, § 15, which declares that "no law shall embrace more than one object, which shall be expressed in its title."

If the statute embraces more than one subject it is void, whether or not the subject is expressed in its title. *Thomp. Corp.* §§ 607, 608.

Although a statute may embrace but one subject, it is still void if that subject be not expressed in its title.

Anderson v. Com. 18 Gratt. 295; *Crawford v. Halsted*, 20 Gratt. 211; *Henrico County Supers. v. McGruder*, 84 Va. 828; *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 86 Va. 1; *Powell v. Brunswick County Supers.* 88 Va. 707; *Lescallett v. Com.* 89 Va. 878; *Ingles v. Straus*, 91 Va. 209; *Com. v. Brown*, 91 Va. 762, 28 L. R. A. 110; *Cahoon v. Iron Gate Land & I. Co. (Va.)* 23 S. E. 767.

The act makes it unlawful to bet or wager or to forward the money, thing, or consideration to be bet or wagered, upon the result of trials of speed taking place without the limits of the commonwealth. The title expresses the purpose or the object to be to prevent pool selling upon the result of trials of speed. Pool selling, which is the object expressed in the title, is not mentioned in the body of the act. At most pool selling is one particular kind of betting, and there are numberless modes of betting that do not resemble it in any way and must be pointed out by other language.

Com. v. Ferry, 146 Mass. 208.

The words "and so forth" must be confined to pool selling, and could not embrace any other mode of betting or wagering.

Cooley, Const. Lim. *55; *Fishkill v. Fishkill & B. Pl. Road Co.* 22 Barb. 634; *Ryerson v. Utley*, 16 Mich. 270; *Meisner v. Price*, 11 Ind. 199; *St. Louis v. Tiesel*, 42 Mo. 578; *State Hackett*, 5 La. Ann. 91; *Dano v. M. O. & R. R. Co.* 27 Ark. 565; *Myers v. Dunn*, 49 Conn. 76; *Smith v. Walker*, 98 Pa. 140.

Petitioner's detention is unlawful unless the process, *i. e.*, the warrant, is a justification of the officer.

4 Bacon, Abr. *Habeas Corpus*.

If it appear by the return of the writ that the party be wrongfully committed, or by one that hath not jurisdiction, or for a cause for which a man ought not to be imprisoned, he shall be discharged.

Ex parte Rollin, 80 Va. 314.

Messrs. Francis L. Smith and Edmund Burke, also for petitioner:

In such an act the title would not disclose the object of the law, but would be a cloak under which there would be concealed and hidden the real object of the enactment.

Com. v. Brown, 91 Va. 762, 28 L. R. A. 110.

If the title omits all reference to the main subject of the bill, it cannot give validity to the subject-matter thus ignored.

Rogers v. Manufacturers' Imp. Co. 109 Pa. 109.

The title and the body of the act above quoted have no relation either to the other.

State v. Shaw, 39 Minn. 153; *State v. Lovell*, 39 N. J. L. 458.
31 L. R. A.

Inconsistent laws passed the same day nullify each other.

King v. Justices of Middlesex, 2 Barn. & Ad. 818.

The acts are inconsistent because chapter 539 purports to prohibit the forwarding of money, etc., to be bet or wagered from any place in the commonwealth to any and every other place, whereas chapter 545 restricts the forwarding, etc., of money, etc., to be bet or wagered to definite and specified localities, to wit, to or for any race course.

State, Atty. Gen. v. Heidorn, 74 Mo. 410.

Chapter 545 must be assumed to have last received the approval of the executive because of its position in the public acts of assembly, it appearing, in the order of priority, six chapters subsequent to the other act and is therefore the final expression of the legislative will. It repeals chapter 539 by implication.

United States v. Tynen, 78 U. S. 11 Wall. 92, 20 L. ed. 154; *Fox v. Com.* 16 Gratt. 1.

Chapter 539 is obnoxious to that provision of the Federal Constitution which declares that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

Art. 1, § 8, subsec. 3.

The act of betting or making wagers on trials of speed of horses is not prohibited by the laws of West Virginia, and the laws of this state can have no extraterritorial operation in the absence of express compact between it and other states.

Hendricks v. Com. 75 Va. 934.

A statute of this state punishing betting on horse races did not apply to a case where the wager was made by telegraphic communication between a person in this state offering to make the wager and its acceptance by a person in another state.

Lescallett v. Com. 89 Va. 878.

The act of transmitting or forwarding money from one state to another state, to be there employed or used in a manner lawful by the laws of the latter state, is interstate commerce and cannot be regulated, restricted, or inhibited by the laws of any state.

Norfolk & W. R. Co. v. Com. 88 Va. 95, 13 L. R. A. 107.

Sunday laws which attempt to interfere with a company transacting interstate business on that day are void.

Adams Exp. Co. v. Board of Police, 65 How. Pr. 72; *Corey v. Long*, 12 Abb. Pr. N. S. 439.

A statute of the state of Iowa making it a criminal offense to import malt or spirituous liquors into that state was unconstitutional and void.

Almy v. California, 65 U. S. 24 How. 169, 16 L. ed. 644; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Re Rahrer*, 140 U. S. 559, 35 L. ed. 575.

A statute passed in the exercise of the police power of a state prohibiting transportation of game killed in the state to another state was unconstitutional because an unwarranted interference with commerce.

State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98.

The state was even powerless to tax the tele-

graphic message which petitioner was about to send.

Western U. Teleg. Co. v. Texas, 105 U. S. 466, 26 L. ed. 1069.

The act under discussion is in conflict with U. S. Const. 14th Amend. § 1.

Re Converse, 137 U. S. 631, 34 L. ed. 799; *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 801; *Eaker v. Portland*, 5 Sawy. 566; *Re Parrott*, 6 Sawy. 349; *Ah Kow v. Nunan*, 5 Sawy. 552; *State v. Williams*, 32 S. C. 123; *People v. Gillson*, 109 N. Y. 389.

Mr. R. Taylor Scott, Attorney General, *contra*.

Keith, P., delivered the opinion of the court:

This is a petition for a writ of habeas corpus, addressed to this court by Richard M. Lacy, who alleges that he is detained without lawful authority, and deprived of his liberty by one William H. Palmer, sheriff, and *ex officio* jailer of the county of Alexandria.

It seems that he was committed to the custody of a sheriff by virtue of a warrant, dated the 31st day of March, 1896, charged with violating an act of the legislature, approved February 29, 1896, which declares it to be "unlawful for any person or persons, or association of persons, corporation, or corporations, by any ways, means, or devices, to make any bet or wager, or receive or record or register, or forward or purport or pretend to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or by any ways, means, or devices to aid, assist, or abet in the making of any bet or wager, or the receiving, recording, or registering, or forwarding, or purporting, or pretending to forward any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of this commonwealth, or to aid or assist or abet in any way or in any manner in any of the acts forbidden by this act.

"That any person or persons or association of persons or corporation or corporations violating the provisions of this act shall be fined not less than \$200 nor more than \$500, and be imprisoned not less than thirty, nor more than ninety, days."

The warrant of arrest does not charge the defendant with having done any of the specific acts which the statute just quoted makes unlawful, but avers in general terms that the defendant with others named in the said warrant, was guilty of each and all of the acts forbidden therein, and the commitment commands the sheriff to deliver Richard M. Lacy to the custody of the jailer of the county of Alexandria, to answer an indictment for the offense thus described at the September term of the county court of Alexandria.

The petitioner claims that this statute is repugnant to art. 5, § 15 of the Constitution of Virginia; that it is repugnant to art. 1, § 8, cl. 3, of the Constitution of the United States; that it is inoperative because two laws received the signature of the governor upon the same 31 L. R. A.

day, which are inconsistent the one with the other, and as there is no means of determining which of the two is the last expression of the legislative will, that neither can be operative. the one repealing the other by necessary implication; that the warrant in this case is void, because it is vague and indefinite, and does not with sufficient certainty recite the offense with which the petitioner is charged, as required by § 3956 of the Code; and, finally, that the commitment is a nullity, because by § 4106 of the Code, as amended by acts of the general assembly of Virginia, approved March 5, 1896, it was the duty of the justice to try the prisoner for the offense with which he was charged, instead of committing him for trial by the county court.

The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner. The only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law.

A person held under proper process to answer for an offense created by a statute enacted within the constitutional power of the legislature cannot be discharged upon a writ of habeas corpus, however clear his innocence may be, but must abide his trial in the mode prescribed by law.

Is the statute under consideration repugnant to the Constitution of the state? Article 5, § 15, of the Constitution declares "that no law shall embrace more than one object, which shall be expressed in its title." This section has been recently construed by this court, which ruled that it was intended to forbid the use of deceptive titles as a cover for vicious legislation; to prevent bringing together in one bill subjects diverse and dissimilar in their nature and having no necessary connection with each other, and to avoid surprise in matters of which the title gave no intimation. See *Com. v. Brown*, 91 Va. 762, 28 L. R. A. 110; *Ingle v. Straus*, 91 Va. 209.

The title of the act in question is as follows: "An Act to Prevent Pool Selling, and so forth, upon the Results of Any Trials of Speed of Any Animals or Beasts Taking Place without the Limits of the Commonwealth."

A pool is defined by the Century Dictionary to be any horse racing, ball games, etc., "the combination of a number of persons, each staking a sum of money on the success of a horse in a race, the contestant in a game, etc., the money to be divided among the successful betters, according to the amount put in by each." It is therefore one of the forms of making bets or wagers upon horse races, while the statute makes "unlawful a bet or wager by any ways, means or devices, or the receiving, or recording or registering, or forwarding, or purporting, or pretending to forward, any money, thing, or consideration of value to be bet or wagered upon the result of any trial of speed or power of endurance or skill of animals or beasts which is to take place beyond the limits of the commonwealth." Without quoting further from the act, which is set out in full in the warrant, it sufficiently appears that it is far broader and more comprehensive than its title. It may be said to embrace the genus, while the title only sets out a particular species. The act makes unlawful almost every conceivable form of mak-

ing bets or wagers upon the results of trials of speed of horses, while the title only mentions the particular form of wager or bet known as a "pool" or "pool selling."

Cooley, in his work on Constitutional Limitations, speaking of the effect of such a constitutional provision as that under consideration, where the act is broader than the title, says: "In such a case it may happen that one part of it can stand, because indicated by the title; while as to the objects not indicated by the title, it must fail."

We do not consider the act as obnoxious to that part of the clause of the Constitution just quoted, which says that "no law shall embrace more than one object." The object of this law is the suppression of gambling, or that form of gambling where the bet or wager is made upon the speed or endurance or skill of animals or beasts, for as was said in *Ingles v. Straus, supra*, "if the subjects embraced by the act, but not specified in the title, have congruity or natural connection with the subject stated in the title, or are cognate or germane thereto, the requirement of the Constitution is satisfied." Were the title sufficiently broad to cover the objects declared in the bill, there would be, in our judgment, no repugnancy to the constitutional provision in question, because all the provisions of the act may fairly be regarded as in furtherance of a single object, "the suppression of gambling." The Constitution, moreover, is to be construed so as to uphold the law if practicable. All that is required by the constitutional provision is that the subjects embraced in the statute, but not specified in the title, shall be congruous, and have natural connection with, or be germane to, the subject expressed in the title. *Com. v. Brown, supra*.

There is no such incongruity of objects and purposes in the statute as to render it obnoxious to the clause under consideration. The act, however, is far broader than the title, and can therefore only be operative as to that part of it which is indicated by its title. In other words, the only offense which can be punished by virtue of this statute is the particular form of making a bet or wager known as "pool selling."

It is claimed upon behalf of the commonwealth that the defect is cured by the use of the words, "and so forth," but in this view we cannot concur. The provision of the Constitution is mandatory. We think it is a wise and salutary provision, but whether it be or not, it is the law of the land, and must be obeyed. To hold that the legislature could, by the use of such a phrase as "and so forth," supply an omission and cure an otherwise defective title, would be to fritter away the constitutional provision, and render it illusive and nugatory. See Cooley on Constitutional Limitations, 6th ed. p. 174. These words express nothing and amount to nothing as a compliance with this constitutional requirement. Nothing which the act would not embrace without them can be brought in with their aid. *Fishkill v. Fishkill & B. Pl. Road Co.* 22 Barb. 634; *Johnston v. Spicer*, 107 N. Y. 185.

We are of opinion, therefore, that while the body of the act is broader than its title, and 31 L. R. A.

the title is not aided by the introduction of the phrase just discussed, the statute is not wholly inoperative for repugnancy to the Constitution of the state, but is a valid law so far as it makes pool selling an offense, and prescribes the punishment for it.

I will now proceed to consider the alleged repugnancy of the act in question to art. 1, cl. 3, § 8, of the Constitution of the United States, which declares that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes. In discussing this branch of the case, I shall treat the subject as though the prisoner were charged specifically with the offense of selling in Virginia a pool upon a trial of speed of horses to take place in St. Louis, as he can under the statute be found guilty of none other.

It is conceded that the power thus conferred is, when exercised by Congress, exclusive in its operation. It is conceded that the abstention on the part of Congress from passing laws in the exercise of its power to regulate commerce is equivalent to an expression of its will that in those respects in which it can be reached and controlled by regulations of a general character it shall remain free. On the other hand, there is a reserve of power and duty in the states, the due exercise of which is essential to the maintenance of order, the preservation of health, and the promotion of good morals; in fact, almost the whole of the great body of municipal law which establishes and enforces the duties of citizens to each other is embraced within and known as the police power. In it is to be found, says Blackstone (4 Com. 162), the "due regulation and domestic order of the kingdom whereby the inhabitants of a state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good morals, and to be decent, industrious, and inoffensive in their respective stations." The professed object of all government is to promote the general welfare, and it cannot be denied that the subjects enumerated in the above extracts are of prime importance, not only to the welfare and happiness of men, but are essential to their very existence in a state of civilized society.

The object of the law is the suppression of gambling in its most attractive, seductive, and therefore the most dangerous of its many forms. That gaming is a vice which it is the right and duty of a state to forbid under severe penalties is recognized, I think, by the Codes of every state in the Union, if not, indeed, by those of all civilized communities.

"The right to legislate upon the subject of intoxicating liquors is acknowledged by every one, and is founded upon the fact that their use in excessive quantities leads, in large masses of cases, to crime, poverty and enormous suffering, and bears most harmfully upon the sum of the happiness of the human race. So in regard to lotteries in general. A widespread custom of indulgence in the purchase of tickets leads, among the poorer classes certainly, and also among others, to habits of recklessness, waste, and idleness; it cultivates a gambling spirit, and tends to a hatred of honest labor,

and to a desire to obtain riches or money without the necessary expenditure of industrious energy." *People v. Gillson*, 109 N. Y. 404.

The act in question would seem, then, to be in the performance of the obligation which rests upon the general assembly of Virginia to pass laws to suppress a recognized vice. There is no question that the police power must be exercised in subordination to the Constitution of the state, and *a fortiori* that it must not be in contravention of the Constitution of the United States. Now, as the proper discharge of the functions and duties entrusted to the national and state governments is necessary to the highest efficiency of both, it follows that in the development and growth of the two systems thus blended and interwoven and operating directly, each by its own force, upon the same individuals, wisdom and prudence must prevail in order that the happiest and best results may be achieved.

In the case before us there would seem to be no reason why any antagonism or conflict should result from the exercise within their appointed limits of the power on the part of Congress to regulate commerce among the states and the duty of the state to suppress a recognized offense against good morals. There can be none unless the transmission of money or other thing of value to be bet on a race to take place beyond the limits of the state be a subject of commerce which is entitled to shelter itself under the ægis of the Constitution of the United States, and to invoke for its protection the power to regulate commerce with which Congress was clothed to the end that legitimate intercourse between the states might forever remain free and unfettered.

In *Cohens v. Virginia* (a case, by the way, in which a lottery established by the Congress of the United States sought to set at naught a law of the state of Virginia, which forbade the sale of lottery tickets within her borders), it was said by Chief Justice Marshall: "To interfere with the penal laws of a state, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately and the intention would be clearly and unequivocally expressed." 19 U. S. 6 Wheat. 443, 5 L. ed. 300.

The same spirit happily still animates the Supreme Court of the United States. It fully recognizes the difficulty often-times presented of securing harmonious operation to the just and necessary powers of the Federal and state government, and with none of the provisions of the Federal Constitution is there more frequent opportunity for interference and conflict than under the commerce clause of the one and the police power of the other. The great truth must be recognized that the government of our people in its entirety consists of an "indissoluble union of indestructible states," and that as a consequence it is as much the duty of every department of the government of the United States to preserve in their full and unimpaired vigor those powers which, in the distribution of governmental functions, were

reserved to the states as to cherish and foster the growth and expansion to their conditions of highest usefulness those functions and duties which were confided to the Federal government. Though the power of Congress is held to be exclusive in its nature, and to embrace not only the subjects of commerce, but all the agencies and instrumentalities by which that commerce is to be carried on, we find the supreme court readily conceding in a number of instances, the free exercise of the police power of the state, though incidentally it might have the effect of interfering with, or to some extent regulating interstate commerce. For instances of this sort see cases cited in *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* (Va.) 24 S. E. 261, decided at this term, and *Com. v. Myers* (Va.) ante, 379, at the January term of this court. In the latter case it is said that "the right of the state to impose a license tax upon peddlers, where it operates uniformly upon all citizens, and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power, and is not a regulation of commerce under cover of that power, although incidentally it may have that effect, has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as against the nonresident, or with respect to the sales of articles manufactured in this state over similar articles manufactured abroad, the state laws are declared to be void, as repugnant to the Constitution of the United States."

Since that case was decided I have further investigated the authorities on the subject, and I am strengthened in the conviction that no decision of the Supreme Court of the United States can be found holding a state law invalid as being repugnant to the commerce clause of the Constitution which was enacted in the bona fide exercise of the police power of the state for the suppression of a recognized vice, or to prevent the sale of adulterated food, or the manufacture of food from impure materials, or to prevent the spread of disease among men or beasts. Under cover of the police power, efforts are constantly being made to promote some unlawful purpose, as in *People v. Gillson*, 109 N. Y. 403, where a law was held unconstitutional which, under the police power, undertook to forbid what was held to be an innocent act, and one which the legislature could not make criminal. The supreme court has held state laws to be void which impose tonnage duties—*Inman S. S. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118—and taxes on imports as in *Amy v. California*, 65 U. S. 24 How. 169, 16 L. ed. 644, and inspection laws discriminating in favor of the citizens of the state as against citizens of other states, *Voight v. Wright*, 141 U. S. 63, 35 L. ed. 638, or which in some of a great variety of modes endeavored to give to its own citizens, or to its own products, an advantage over the citizens or products of other states; and in some instances to favor one industry engaged in by its own citizens over an innocent but less favored occupation. An example of the latter is to be found in the case of *People v. Marr*, 99 N. Y. 377, 52 Am. Rep. 34. Not unfrequently it

happens that the police power is resorted to merely for purposes of revenue. In these and like cases, which might be greatly multiplied, the courts have held that they did not come properly within its domain.

While a state law which operates as a regulation of interstate commerce, or which affects it except incidentally, could not be upheld under the police power of the state, while laws pretending or purporting to be in the exercise of the police power, but which are but devices and schemes under cover of that power to accomplish some purpose forbidden to the state are void, yet state laws passed with the honest purpose of promoting the health, the morals, or the well-being of its citizens, are valid.

Contracts are peculiarly under the protection of the Constitution of the United States, which declares that no state shall pass a law impairing their obligation; and yet it is not pretended that a state may not prohibit the enforcement of contracts resting upon a vicious or immoral consideration, the enforcement of which would have a vicious and immoral influence. So, too, we think that to call into activity the inhibition upon the states to interfere with interstate commerce implied from the grant to Congress of the exclusive power to regulate it, the first thing to be shown is some subject of commerce which commends itself as at least not injurious to health or morals. In no case can the just and proper exercise of the police power of the state, acting with the honest purpose to protect the health and morals of a community, conflict with the proper exercise of the power in Congress to regulate commerce, unless the means of disseminating disease and encouraging vice are proper subjects of commerce.

It is insisted here, however, that inasmuch as the offense consists in forwarding a sum of money by telegraph to Wheeling, W. Va., to be wagered on a trial of speed of horses to take place in St. Louis, Mo., it not being unlawful, as it is claimed, to make such a wager in West Virginia, the act making it criminal is void, not only as being repugnant to the commerce clause of the Constitution, but as an attempt to punish the doing in West Virginia of an act lawful in that state.

We have said enough to show that there is, in our opinion, no repugnancy in the statute to the commerce clause of the Constitution. Upon the other point, we might content ourselves with observing, that, as we are not trying the issue of guilty or not guilty, but only whether there is lawful cause for the detention of petitioner disclosed by the warrant and commitment, the effect of the proof of the law of West Virginia, as of all other facts, must be postponed till the trial, but as an expression of opinion has been sought, and there can be no impropriety in giving it, we are willing to go somewhat into this branch of the subject also.

We do not perceive that the fact that the race upon which the wager is to be made is to be run in Missouri, and that the money is to be placed in West Virginia at all affects the question. It remains that by the statute the act is made unlawful here, and may be punished unless it be under the protection of the Constitution of the United States. With the laws of our sister states we have no concern, 31 L. R. A.

except in so far as they appear in this record, and they are not the proper subject of animadversion or criticism. If West Virginia has not legislated against this form of gambling, it is no concern of ours. Virginia has a right to repress and punish that which by the common consent of mankind is a vice, without regard to the laws of other states. To make a bet or wager upon a race to take place in Missouri is as injurious to good morals as though it were to take place within our own borders; nor is the quality or character of the act at all affected by the fact that a stage in the transaction takes place upon the neutral ground of West Virginia. The root of the evil is here, and here its baneful influence and example are felt. The act at which the punishment is aimed takes place in Virginia, and over it and the actors in it Virginia has complete jurisdiction, unless, as has been so often said, shelter and protection are found under the commerce clause of the Constitution of the United States.

Another objection taken to the warrant is that it is too vague and indefinite; that it is the right of a person accused of crime to be informed of the "cause and nature of the accusation against him."

Warrants of arrest are required to recite the offense charged, but the same particularity is not expected or required as in indictments or more formal papers. See 3 Rob. Pr., old ed. p. 10; Bishop, Crim. Proc. § 714.

While we think it would be better practice to state the offense more specifically than has been done here, we are not prepared to say that we would on that account alone be content to quash the proceedings and to discharge the prisoner.

The remaining ground of objection, however, is fatal to the warrant of commitment under which the prisoner is held. By § 4106 of the Code, as amended by an act approved March 6, 1896, justices of the peace are given "exclusive original jurisdiction of all misdemeanors occurring within their jurisdiction," and are authorized to inflict the same punishments theretofore imposed by county and corporation courts. By § 4107 an unrestricted right of appeal to the county or corporation court is secured where the accused can demand a jury, but the trial and judgment must in the first instance be before the justice. The effect of this statute is to take away from county and corporation courts the power to try misdemeanors as courts of original jurisdiction. It takes away their power to try misdemeanors, even in those cases where indictments or informations were pending. See *Dulin v. Lillard*, 91 Va. 718, where the effect of a similar statute is fully discussed and considered, and the authorities bearing upon it are collated.

For the foregoing reasons, we are of opinion, first, that on account of the insufficiency of the title of the act under consideration pool selling is the only form of bet or wager that is made punishable; secondly, that there is no repeal by implication, but the two acts of March 5, 1896, are in full force and effect, except as hereinbefore stated; thirdly, that the act under which the warrant in this case was issued is not repugnant to the Constitution of the United States; fourth, that it would be better practice to state the offense with more precision than

has been here observed,—especially in view of the fact that justices are now clothed with exclusive original jurisdiction to try misdemeanors, and the warrant gives to the accused the only information as to the nature of the offense with which he is charged; and, lastly, that the warrant of commitment under which the peti-

tioner is held in custody is void, because it was the duty of the justice to try the case, instead of committing the prisoner for trial by the county court, which is without authority as a court of original jurisdiction as to misdemeanors.

The prisoner must be discharged.

COLORADO SUPREME COURT.

Torrence WHITE, *Plff. in Err.*,
v.
FARMERS' HIGHLINE CANAL & RES-
ERVOIR COMPANY.

(.....Colo.....)

1. A canal used for the carriage of water for hire is affected by a public interest and subject to legislative regulation in respect to the distribution of the water.
2. A contract giving a consumer of water the right to draw and take from a canal all he may be entitled to on tender or payment of the amount due therefor, if the owner of the canal fail or refuse to comply with the contract, is not protected against legislative interference made by a subsequent statute prohibiting such acts and regulating the distribution of water from such canals, but giving a remedy for the enforcement of the right to receive all the water to which the contract entitles him.

(January 15, 1896.)

ERROR to the Court of Appeals to review a judgment reversing a judgment of the District Court for Jefferson County in favor of defendant in an action brought to enjoin defendant from drawing water from an irrigating ditch. *Affirmed.*

Statement by **HAYT**, Ch. J.:

This action was originally commenced by the Farmers' Highline Canal & Reservoir Company, as plaintiff, against Torrence White. It appears from the undenied allegations of the complaint that the plaintiff is a corporation organized and existing under the laws of the state of Colorado for the purpose of owning, operating, and maintaining an irrigating ditch, together with reservoirs, etc.; that said company was organized on the 3d day of December, 1885, and from and after its organization it has diverted a large amount of water from one of the public streams of the state known as "Clear Creek." This water has been principally used by farmers for agricultural purposes, it being the custom of the ditch company to carry water for hire for the defendant and a large number of agriculturists along the line of the ditch. It is alleged that the defendant is entitled to 45 inches of water, and no more. Notwithstanding such fact, it is averred that the defendant demanded 120 inches of water.

The company, averring its inability to comply with this demand, refused to supply the defendant with the same, or any part thereof in excess of 45 inches. Thereupon the defendant enlarged the opening in the box through which the water in his ditch flowed to his land, and wrongfully took from the canal 75 inches of water for his individual use in excess of the 45 inches which he was entitled to. It is further alleged that the taking of this additional amount of water was at the expense and damage of many consumers of water from plaintiff's ditch. It is also averred that the plaintiff company had in its employ an efficient and capable superintendent, whose duty it was to fix and adjust the various boxes through which water is supplied to the various lands receiving water from the said ditch; that this superintendent, in the discharge of his duties, apportioned the water strictly and properly according to the amounts to which each consumer was entitled. It is further alleged that, notwithstanding this fact, the defendant, after enlarging the capacity of the box or headgate used to supply his lateral ditch with water, continued to divert 120 inches of water. It is further averred that numerous other persons, tempted and led thereto by the evil example of the defendant, desiring to procure water for the irrigation of their lands in excess of the amount possible for the plaintiff to furnish threatened to follow the example of the defendant and at their will and pleasure take from said ditch various amounts of water, without consultation with the said superintendent, and against his opposition and remonstrance. Plaintiff seeks for injunctive relief restraining the defendant from taking from plaintiff's ditch water in excess of 45 cubic inches. Upon the filing of this complaint a temporary writ of injunction was issued in accordance with the prayer thereof. Afterwards the defendant filed his answer. It is unnecessary to set forth this answer in detail. It suffices to say that by it the defendant claims the right to take the additional 75 inches of water from plaintiff's ditch by virtue of a contract made with plaintiff's grantors on the 22d day of March, 1878, and duly recorded. This contract is fully set out in the opinion of the court of appeals. See *Farmer's Highline Canal & R. Co. v. White*, 5 Colo. App. 1. The answer also avers that the full amount of 120 inches of water was necessary to properly

NOTE.—On the question of the remedy as part of the obligation of a contract, see numerous authorities collected in *note* to *Best v. Baumgardner* (Pa.) 1 L. R. A. 356, and others in *note* to *Phinney v. Phinney* (Me.) 4 L. R. A. 348. The question is 31 L. R. A.

further discussed very elaborately in *Beverly v. Barnitz* (Kan.) *ante*, 74, the decision in which is reversed in 163 U. S. 118, 41 L. ed. —, by the Supreme Court of the United States.

irrigate the defendant's lands described in the schedule annexed to this contract, and that previous to taking the same he had tendered to the plaintiff \$120 in cash for this water, this being in full payment for 120 inches of water at the rate fixed in the contract. Upon the filing of this answer the defendant filed a motion to dissolve the injunction, and about the same time also plaintiff filed a general demurrer to the answer. Whether or not the demurrer was filed before or after the dissolution of the injunction, as hereinafter set forth, does not definitely appear from the record. The record shows that after the coming in of the answer the case was heard upon the pleadings and evidence introduced by both parties. This hearing was had before the district judge at chambers, in vacation. Some months thereafter, the cause coming on to be heard before the district court in term time, the demurrer to the answer was overruled, and, the plaintiff electing to stand by the demurrer, the answer was taken as confessed, and judgment entered for the defendant. From this judgment an appeal was taken to the court of appeals. A hearing in that court resulted in a reversal of the judgment of the district court, whereupon White sued out a writ of error, upon which the record was brought into this court.

Messrs. A. H. De France and A. J. Rising for plaintiff in error.

Messrs. Osborn & Taylor for defendant in error.

Hayt, Ch. J., delivered the opinion of the court:

The order dissolving the temporary injunction, being merely interlocutory, is not before this court for review, except as the result was repeated in the final judgment. So, likewise, the evidence taken upon the hearing at chambers in vacation is not open to review upon appeal or writ of error. When the case was regularly reached in the district court for final hearing and determination, that court was at liberty to, and did, as the record discloses, proceed to final judgment unembarrassed by its previous order. At this hearing a general demurrer was overruled to the answer, the court thereby deciding that the pleading constituted a good and valid defense to plaintiff's complaint. In this state of the record the cause must be reviewed solely upon the pleadings. The defendant, having tendered the schedule price of \$1 per acre for water for 120 acres of the lands embraced within the contract and described in the schedule annexed thereto, insists, as the water is necessary for the cultivation of his lands, that he is not only entitled to have that amount of water flow into his lateral ditch, but that he has the right to take the same, without let or hindrance from the ditch company, its superintendent, or any other water consumer. This right to actually divert water from the main canal in opposition to the will and against the protest of the plaintiff company and its superintendent is based upon the following provision of the written contract, set up in the defendant's answer: "That if the said ditch company, or the party of the second part, their assigns or successors, or whomsoever may be in control or management

of the said ditch, as the case may be, shall at any time wilfully or malignantly fail or refuse to comply with the terms of the indenture as to the furnishing of said water to said parties of the third part, or any or either of them, the party having right to demand and receive any part of said water for the uses aforesaid, upon payment or tender of payment at the proper time, and demand made in writing for such water, said tender or payment to be made to and said demand of the officer or agent, if any, appointed by the parties owning or managing said ditch, or, if there be no officer or agent appointed for the purpose of receiving such demand and payment, then such payment to be tendered to and demand made upon the president, secretary, treasurer, or superintendent of said ditch company, or person exercising control and management of the said ditch, it shall be lawful for the party so entitled to such water to draw from and take all such water as he may be entitled to at the time of such tender or payment, subject to payment therefor on demand made by the officer or persons authorized to receive the same." That part of this contract which attempts to give each consumer the right to determine the amount of water to which he is entitled, with permission to take the same regardless of the rights of other consumers or of the ditch company, was declared void by the court of appeals. The court bases its conclusion upon the following reasons: First. "It is a right incompatible with the right of control incident to the ownership of the property." Second. "It is against public policy, as tending to confusion and a breach of the peace in allowing parties to take whatever water they required, regardless of the rights of others having the same legal right." The court, being of the opinion that this provision of the contract was void, held that the lower court erred in refusing an injunction. Without reviewing the reasons given by the court of appeals, we think its judgment must be affirmed for a safer and better reason, *viz.*, the right claimed by the consumer is a right the exercise of which is positively prohibited by the statute of this state. In 1887 the legislature passed an act entitled "An Act Regulating the Distribution of Water, the Superintendence of Canals or Ditches Used for the Purposes of Irrigation, and Providing a Penalty for the Violation thereof." Sess. Laws 1887, p. 304. The first section of this act provides at what time water shall be kept flowing in ditches. The second provides that the owners shall keep their ditches in good order and repair, and that a multiplicity of outlets shall at all times be avoided, so far as the same shall be reasonably practicable. The location of such outlets is placed under the control of the superintendent. The third section provides that it shall be the duty of those owning or controlling such canals or ditches to appoint a superintendent, whose duty it shall be to measure the water from such canal or ditch through the outlet to those entitled thereto, according to his or her *pro rata* share. Section 4 fixes a penalty in case the superintendent or other person having charge of the ditch shall wilfully neglect or refuse to deliver water, etc., as by the act provided. Section 5 provides that the water com-

missioner, his deputy, or assistant shall promptly measure the water from the stream or other sources of supply into the irrigating canals, etc. The right to the use of water in the arid region is among the most valuable property rights known to the law. Where there are a large number of consumers taking water from the same ditch, the excessive use by some may absolutely deprive others of water at times when its application to the thirsty soil is absolutely necessary to prevent the total failure of growing crops. So, also, as between different ditches, if one, in case of scarcity takes from a public stream water to which it is not entitled, it must be at the expense of others. From the very nature of the business, controversies with reference to the use of water naturally led to unseeming breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that when private property is "affected by a public interest it ceases to be *juris privati* only." That a canal used for the carriage of water for hire in this state is affected by a public interest has been recognized by the repeated decisions of this court. Says Mr. Justice Helm in the case of *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 582: "Under the Constitution, as I understand it, the carrier is at least a quasi public servant or agent. It is not the attitude of a private individual contracting for the sale or use of his private property. It exists largely for the benefit of others being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same natural stream. It may exercise the power of eminent domain. Its business is affirmatively sanctioned, and its profits or emoluments are fairly guaranteed. But in consideration of this express recognition, together with the privileges and protection thus given, it is, for the public good, charged with certain duties and subjected to a reasonable control." Although it is difficult to define the boundaries of the police power of the state, such regulations as those prescribed by the statute under consideration are by the decisions of the highest courts declared to be within such power. In the *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, Mr. Justice Bradley referring to the *Granger Cases* [*Munn v. Illinois*], reported in 94 U. S. 113, 24 L. ed. 77, stated the principle as follows: "The inquiry there was as to the extent of the police power, in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power." In the case of *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989, it is said: "Whatever differences of opinion

may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals."

It is said, however, that as the contract under which the defendant claims in this case was executed prior to the passage of the act of 1887, the parties to this action are not bound by that statute; the argument of the plaintiff in error in this particular being that he has a contract right to take this water as he pleases, and that this is a property right with which the legislature cannot interfere. This argument has been advanced in many cases, but, we believe, never successfully, where, as here, it is in opposition to the police power of the state. The extent to which the police power of the state may go is well illustrated by the case of *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. In that case, by the act approved March 8, 1867, the legislature incorporated the Northwestern Fertilizing Company, to have continued succession and existence for the term of fifty years. By the act of incorporation the company was authorized and empowered to establish and maintain "in Cook county, Illinois, at any point south of the dividing line between townships 37 and 38, chemical and other works, for the purpose of manufacturing and converting dead animals and other animal matter into an agricultural fertilizer, and into other chemical products, by means of chemical, mechanical, and other processes." The company was also authorized to establish and maintain depots in the city of Chicago for the purpose of receiving and carrying off, from and out of the said city any and all offal, dead animals, and other animal matter which it might buy or own, or which might be delivered to it by the city authorities and other persons. The works of the company were located within a designated territory, at a place then swampy, and nearly uninhabited, but at the time of the suit forming a part of the village of Hyde Park. In March, 1869, the legislature passed an act revising the charter of the village of Hyde Park, and granting to it the largest powers of police and local government. In 1872 the village authorities passed the following ordinance: "No person shall transfer, carry, haul, or convey any offal, dead animals, or other offensive or unwholesome matter or material, into or through the village of Hyde Park;" fixing a penalty for the violation of this ordinance. After this time the village authorities caused the arrest of the engineer and other employees of a railway company who were engaged in carrying offal through the village to the chemical works. These men were tried and convicted for violating the ordinance, and fined \$50 each, whereupon the company filed its bill in the United States court to restrain further prosecutions and for general relief. When this case reached the Supreme Court of the United States, that court, in affirming the judgment of the state courts, held, among other things, that the charter was a sufficient license until revoked; but not a contract guaranteeing that the company should for fifty years be exempt

from the police power of the state, notwithstanding its business might become a nuisance by reason of the growth of population around the place selected for its works; third, that the charter afforded the company no protection from the enforcement of the ordinance. The case of *Buffalo East Side R. Co. v. Buffalo Street R. Co.*, 111 N. Y. 132, 2 L. R. A. 384, is directly in point upon this branch of the discussion. The contest in that case grew out of a contract between two street-railway corporations operating in the city of Buffalo. The contract provided, among other things, for the making of connections by each with the roads of the other "so long as it receives for the transportation of passengers the fare allowed on the 3d of May, 1872, and no longer;" each agreeing that it would charge the same rate that it was "permitted to charge by the statute in force, regulating the same on that day," and would make no changes in rates without the consent of the other party. After this contract was made, a statute was enacted making it unlawful for any street-railway company in Buffalo to charge more than 5 cents for each passenger, this being a sum less than that authorized by the statutes in force May 3, 1872. In obedience to this statute the defendant reduced its rates of fare to 5 cents, plaintiff claiming that such reduction was in violation of the contract. Upon these facts the court held that "the authority of the legislature in the exercise of its police powers cannot be limited or controlled by the action of a previous legislature, or by the provisions of contracts between individuals or corporations." As the charter under consideration in the case of *Northwestern Fertilizing Co. v. Hyde Park*, supra, did not exempt the corporation from the police power of the state, although the exercise of that power in the manner attempted necessarily compelled the removal of its works to an-

other location, and as neither the charter nor the contract between the rival street-car companies in the case of *Buffalo East Side R. Co. v. Buffalo Street R. Co.*, supra, prevented the reduction of fares by the legislature, so our act of 1887, governing the distribution of water by ditch companies carrying water for hire, is binding upon the parties to this action, notwithstanding the agreement of March 22, 1873. The authority of the legislature in the premises is now so well settled that we may well rest content with the citations of a few of the many cases in which it has been upheld. *Granger Cases*, *Boston Beer Co. v. Massachusetts*, *Sinking-Fund Cases*, *Northwestern Fertilizing Co. v. Hyde Park*, and *Buffalo East Side R. Co. v. Buffalo Street R. Co.*, supra; *Berthoff v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559; *Richardson v. Boston*, 65 U. S. 24 How. 188, 16 L. ed. 625; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 805; *West Wisconsin R. Co. v. Trempealeau County Supers.* 93 U. S. 595, 23 L. ed. 814. The statute does not affect the right of plaintiff in error to receive whatever water he may justly be entitled to under his contract, but where, as here, there is a controversy as to the amount of such water available for his use, he must bring his action upon the statute to determine such right, and in no event can he be allowed to ignore the company's superintendent and its reasonable regulations, and, in violation of the statute, enlarge the outlet to his lateral ditch, and take water from the company's ditch at will.

For the reasons given, the district court erred in overruling the demurrer to the defendant's answer and in refusing to reinstate the injunction upon the final hearing, and the judgment of the Court of Appeals is accordingly affirmed.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Respts.*,
v.

Simon BENDIT, Appt.

(.....Cal.)

**Signing another's name as his agent,
and adding one's own initials to show**

agency, in the presence of the person who pays over money on the faith of such signature, is not forgery, although the claim of authority is false and may constitute some other crime.

(February 20, 1896.)

A PPEAL by defendant from a judgment of the Superior Court for the City and

NOTE.—*Forgery by false assumption of authority in signing another's name as agent for him.*

The doctrine of the above case, denying that a signature of the name of another person made by one falsely assuming to be his agent and indicating the agency so that the person taking the instrument relies, not upon the signature of the person whose name the agent signs, but upon the agent's assumption of authority, is forgery, is fully sustained by the prior authorities.

One of these is that of *State v. Taylor*, 46 La. Ann. 1382, 25 L. R. A. 591, in which the headnote by the court says: "An apparent agent is not guilty of forgery though he had no authority in fact;" and in the opinion it says: "In fine we are persuaded, after an examination of a number of authorities, that an instrument which shows on its face that the person signed as agent of the drawer
31 L. R. A.

of a note cannot be the subject of forgery. The act has not one of the essentials of the crime of forgery,—a false making of an instrument apparently genuine. The falsehood, if there is falsehood, is in the agency, in assuming to act as agent, and not in forging an instrument."

In *State v. Young*, 46 N. H. 206, 88 Am. Dec. 212, the court says: "A man may make a statement in writing of a certain transaction, and may represent and assert ever so strongly that his statement is true, but if it should prove that by mistake he is in an error, and that his statement is entirely wrong, that could not be forgery; and suppose we go further, and admit that the statement was designedly false when made, and so made for the purpose of defrauding some one, it does not alter the case, it is no forgery." Again it says: "The writing or instrument must in itself be false, not

County of San Francisco convicting him of forgery. *Reversed.*

The facts are stated in the opinion.

Mr. Walter S. Hinkle for appellant.

Mr. W. F. Fitzgerald, Attorney General, for the People.

McFarland, J., delivered the opinion of the court:

The defendant was convicted of forgery, and appeals from the judgment and an order denying a new trial. The information charges that appellant on July 30, 1894, did unlawfully, feloniously, falsely, etc., and with intent to defraud, "make and forge a certain instrument in writing, in words and figures following, to wit:

"San Francisco, July 30, 1894. G. W. Hume & Co.—William Cluff Company, wholesale grocers and provision dealers, 18 to 22 Front St., corner Pine. Telephone 1819.

To balance.....
July 23. To bill rendered..... \$15 50
Discount 30

\$15 20

Wm. Cluff & Co., A. B."

It further charges, in brief, that on said July 30, he wilfully, fraudulently, etc., passed the said instrument, "as true and genuine," to one J. Deming, with intent to defraud G. W. Hume and J. Deming, doing business under the firm name of G. W. Hume & Co. The instrument is admitted by appellant to be a receipt for money, although there is nothing on its face which acknowledges such receipt.

genuine, a counterfeit, and not the true instrument which it purports to be." The point actually decided in this case, however, was that it was not forgery for one to make a false charge in his own book of accounts.

In respect to checks drawn by an agent and signed "per pro. The Preston Bank Co., G. T. Tully, submanager," the court says: "Even if Tully had had no authority to draw these checks, they would not, according to the English law, have constituted forgery as was held by the fifteen judges in *Reg. v. White*, 2 Car. & K. 404, 1 Den. C. C. 208, 2 Cox, Crim. Cas. 210, because the signature by him in his own name 'per pro curation,' etc., showed on its face all that it purported to be, and was not a false making." *Re Tully*, 20 Fed. Rep. 812.

In *Conner's Case*, 3 City Hall Rec. 59, on an indictment for forging corporation notes signed in the name of an individual who did not appear to be authorized to do that act, the mayor advised an acquittal on the ground that the case did not fall within the statutes as to forgery because the instrument was not such that any action could be sustained thereon, even if it had been genuine.

An indorsement on a bill of the words, "Received for Chas. MacIntosh & Co., Alex. Heilbonn, No. 9 Vine street, Regent street, No. 73, Aldermanbury," on which the bill is paid to Heilbonn, is not forgery even if he had no authority to indorse for MacIntosh & Co., and even if the words "Chas. MacIntosh & Co." were an imitation of the handwriting of a member of the firm, when the rest of the indorsement was in the undisguised handwriting of Heilbonn. *Re Heilbonn*, 1 Park. Crim. Rep. 429.

A signature to a deed in the following form, "James D. Holt by H. H. Wilson, his attorney in fact," made by Wilson under claim of authority

We do not deem it necessary to consider the points made by appellant that the information is insufficient, and that material errors were committed by the court in rulings upon the admissibility of evidence, for in our opinion there was no evidence sufficient to establish the crime of forgery. There was a conflict of evidence as to whether appellant was the person who did the acts testified to by the witnesses for the prosecution; but, assuming that appellant was identified as the person who did those acts, the acts themselves do not constitute the crime charged. The facts testified to were, in brief, these: The writing alleged to have been forged was sent by William Cluff & Co. to Hume & Co. the day before July 30, 1894, so that the latter might examine it, and be ready to pay when the collector of the former should call for payment. It was then simply an unreceipted account, with no name signed to it. On July 30, according to the People's testimony, appellant went to the business place of Hume & Co., and asked J. Deming, one of the partners, for the payment of this account. Deming asked him the amount, and, as he did not give the correct amount, Deming refused to pay. Appellant said there must be some mistake, and that he would see about it, and went out. Deming testified, "I naturally thought he was a collector for them." Deming afterwards went out himself, leaving Fannie A. Berry as acting cashier. Afterwards appellant returned, and Miss Berry paid him the amount of the account, and appellant receipted it, by writing, in the presence of Miss Berry, "Wm. Cluff & Co., A. B." She testified: "I saw him sign, 'William Cluff & Company, per

by power of attorney to sign the deed, is not forgery, although he had no such authority, and the deed is not a "false" "forged" deed within the meaning of Minn. Gen. Stat. chap. 96, § 2. *State v. Willson*, 25 Minn. 52.

One having general authority to fill out checks for his own purposes is not guilty of forgery by making such a check in excess of his authority. *People v. Reinitz*, 6 N. Y. Supp. 672.

Signing the name "Schouler, Baldwin, & Co." with a statement in answer to an inquiry that the members of the firm included Baldwin the signer, and a certain person named Schouler, although there is no such partnership, and though it is done with intent to defraud, does not make Baldwin liable for forgery when the party taking the instrument knows that the signature was not the personal act of Schouler, but sees Baldwin execute it and relies on his statement of authority to bind Schouler as a partner. *Com. v. Baldwin*, 11 Gray. 197, 71 Am. Dec. 708.

An instrument purporting to bind a county board of supervisors for the payment of a sum of money, and signed "Henry A. Mann, Treasurer," does not make Mann guilty of forgery, although he had no authority to make the instrument. *Mann v. People*, 15 Hun, 155.

The decision in *Mann v. People*, 15 Hun, 155, was affirmed by the court of appeals in 75 N. Y. 494, 31 Am. Rep. 482, in which the court declares: "One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. . . . The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another.

A. B.' I understood him to be the collector in the employ of the William Cluff Company, who came there to collect, and was authorized to collect, the bill." It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely purports to be the writing of another. The falsity must be in the writing itself,—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not. And there was nothing of the kind in the case at bar. There was no pretense that "Wm. Cluff & Co." was the genuine signature of that firm. It was written by appellant himself, in the presence of the party who paid the money. He added the initials "A. B." to it, and he was understood to be acting as the agent of the firm, and to have written the name "Cluff & Co." by himself as such agent. By these acts he may have committed some other crime, but he did not commit forgery. We have been referred to no authorities to the point that the signing of another's name as his agent is forgery, while there is a multitude of authorities to the contrary in text-books and adjudicated cases. "If a man accept or indorse a bill of exchange in the name of another, without his authority, it is a forgery. But if he sign it with his own

name, per procuration of the party whom he intends to represent, it is no forgery; it is no false making of the instrument, but merely a false assumption of authority." 2 Archbold, Crim. Prac. 819. The doctrine is fully discussed, and the views hereinbefore stated declared, in *Reg. v. White*, 2 Car. & K. 404. In that case the defendant brought a bill to a banker as from Tomlinson. The bill was not indorsed, but the defendant said he would indorse it. The banker wrote, "Per procuration Tomlinson." beneath which the defendant signed his own name. It was held that this false assumption of authority was not forgery, as there was no false making. It has frequently been held that "the false instrument should carry on the face of it the semblance of that for which it is counterfeited," although it is not necessary that the semblance should be exact. 2 Archbold, Crim. Prac. 866. This rule illustrates the nature of forgery. How, in the case at bar, could there be any question about "semblance?"

The American authorities are as pronounced on the subject as the English. In *Re Heilborn*, 1 Park. Crim. Rep. 484, the court, after having referred to other cases, says: "It might not be necessary to refer to these authorities, for it is the essence of forgery that one signs the name of another to pass it off as the signature or counterfeit of that other. This cannot be when the party openly, and on the face of the paper, declares that he signs for that other. There he does not counterfeit the name of the other, nor attempt to pass the signature as the signature of that other. The offense belongs to an entirely different class of

and not in making a counterfeit or false paper."

An insurance agent who stamped a policy ticket with a false date and issued it after the person whom it purported to insure had been accidentally killed, and did this to defraud the insurance company, although he had authority to issue such policies on live persons, was held guilty of forgery. *People v. Graham*, 6 Park. Crim. Rep. 135.

In the case of *People v. Graham* the court does not discuss the point that the agent signed his own name. It seems impossible to reconcile this decision with the others on the subject which deny that an agent's signing his own name can constitute forgery merely because he misused his authority or falsely assumed authority, unless the distinction is to be found in the fact that in *People v. Graham* the forgery consisted rather in a material alteration of the instrument, which was duly signed by the insurance company's officers, than a false making of an instrument.

Feigned signatures of the payees of warrants, signed to vouchers or receipts in order to obtain the warrants from the secretary of an institution, were made by the superintendent of the institution, and the warrants thereupon delivered to him by the secretary. On an application for the extradition of the superintendent on a charge of forgery it was contended on his behalf that the offense did not constitute forgery because the secretary who delivered to him the warrants knew that he was the person who signed the names of the payees to the vouchers, but the court sustained the right of extradition. Some of the judges agreed on the ground that there was some evidence of collusion between him and the secretary. Another reason considered by some of the judges was that the secretary was not the only person to be prejudiced by the act.

and that the payees of the warrants did not know that their signatures were being made by the defendant. *Re Phipps*, 8 Ont. App. Rep. 77, 4 Crim. L. Mag. 865.

In England it was early established that the signature of another's name without authority, but expressed to be per procuration and with the addition of the name of the person who made the signature, did not constitute forgery. The question was involved in the case of *Rex v. Maddocks*, 2 Russell, Crimes, 499, but did not reach a decision because the prisoner died before the case terminated.

But it was expressly decided in *Reg. v. White*, 2 Car. & K. 404, 1 Den. C. C. 208, 2 Cox, C. C. 210, that it is not forgery to sign the name of another, adding the name of the signer with the words "per procuration."

So, in *Rex v. Arscott*, 6 Car. & P. 408, it was decided that it is not forgery to sign one's own name to a receipt for another expressing that the money is received by the signer for such other person, although he may have in fact no authority to receive it.

A false postoffice money order signed "G. Jones, pro postmaster," was held a criminal forgery when the name was not signed by Jones and there was in fact no such person connected with the postoffice. *Reg. v. Vanderstein*, 10 Cox, C. C. 177, 16 Ir. C. L. Rep. 574.

But by 24 & 25 Vict. chap. 98, § 24, it is made forgery to sign the name of another person "by procuration or otherwise" with intent to defraud, and it was so held in case of a receipt signed "P. P. Susey Ambler, Wm. Kay." *Reg. v. Kay*, L. R. 1 C. C. 257, 30 L. J. M. C. 118, 22 L. T. N. S. 557, 18 Week. Rep. 934.

crimes." In *Mann v. People*, 15 Hun, 155, the court, in an elaborate opinion, in which the authorities and the arguments for an opposite view are fully reviewed and discussed, holds that "where one executes and issues an instrument purporting on its face to be executed by him as the agent of a principal therein named, he is not guilty of forgery, either at common law or under the statutes of this state, even though he has in fact no authority from such principal to execute the same." (We quote from the syllabus, which is a correct condensation of the opinion.) In *Com. v. Baldwin*, 11 Gray, 199, 71 Am. Dec. 703, the supreme judicial court of Massachusetts says: "It is not, said Sergeant Hawkins, the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. If the defendant had written upon the note, 'William Schouler by his agent, Henry W. Baldwin,' the act plainly would not have been forgery. The party taking the note knows it is not the personal act of Schouler. He does not rely upon his signature. He is not deceived by the semblance of his signature. He relies solely upon the averred agency and authority of the defendant to bind Schouler. So, in the case before us, the note was executed in the presence of the promisee. He knew it was not Schouler's signature." In *Com. v. Foster*, 114 Mass. 311, 19 Am. Rep. 353, the court says: "The falsity of the instrument consists in its purporting to be the note of some party other than the one actually making the signature. The falsity of the act consists in the intent that it shall pass and be received as the note of some other party." In *State v. Young*, 46 N. H. 266, 88 Am. Dec. 212, the supreme court of that state says: "To forge or to counterfeit is to falsely make, and an alteration of a writing must be falsely made to make it forgery at common law or by our statute. The term 'falsely,' as applied to making or altering a writing in order to make it forgery, has reference not to the contents, or tenor of the writing, or to the fact stated in the writing, because a writing containing a true statement may be forged or counterfeited as well as any other, but it implies that the paper or writing is false, not genuine, fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains,—a writing which is the counterfeit of something which is or has been a genuine writing, or one which purports to be a genuine writing or instrument when it is not." In *State v. Wilson*, 28 Minn. 52, the court, referring approvingly to *Mann v. People*, *supra*, says: "The court decided that this did not constitute forgery, and held, in substance, that when one executes and issues an instrument purporting, on its face, to be executed by him as agent of a principal therein named, he is not guilty of forgery, although he has in fact no authority from such principal to execute or issue the same. In fact, we have found no authority to the contrary, and the text writers uniformly lay down or approve of the same rule." There are numerous other authorities to the same point, but further citation is unnecessary. Of course, the averment in the information that the appellant uttered and

passed the said instrument "as true and genuine" is also, under the above views, unsupported by the evidence.

It is contended that the definition of "forgery" in § 470 of the Penal Code makes the crime different from forgery at common law, but, with respect to the question here under discussion, there is no such difference. At common law there were frequent embarrassing questions as to what kinds of writings were the subjects of forgery, while our Code, to avoid those questions, enumerates a very large number of writings as subjects of forgery. But as to what constitutes forgery of instruments which are subjects of forgery, the definitions at common law and by our Code are the same. "Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." 2 Bishop, Crim. L. 8th ed. § 523. In the notes to the section of Bishop just quoted, many other definitions are given, and it will be noticed that the leading descriptive words are "false making," or altering. In our Code the words are "every person who with intent to defraud another falsely makes, alters," etc., any of the written instruments enumerated. The definition is therefore essentially the same in both instances, and it is the same in the statutes of all the other states to which our attention has been called. But the meaning of the words "false making," when applied to forgery, is that hereinbefore stated. The broad and well-established distinction above set forth cannot be ignored by courts or jurors, even when, in their opinion, a more severe punishment should be imposed on a defendant than the one which the law prescribes for the offense of which he is guilty. As was said in *Mann v. People*, *supra*, "Whatever his misdeeds, he must not suffer for a crime which he has not committed." Forgery is a grave and exceedingly dangerous crime. A very large part of the business of civilized countries is done by means of negotiable instruments. These are rarely presented by the makers, but are paid to others on the faith that the signatures and the bodies of the instruments are genuine. The business of a bank would come to a standstill, if the paying teller would not pay any check until he could communicate with the drawer. Hence, if there were many successful forgeries, there would be the utmost confusion in business circles. Consequently forgery, no matter how small the amount involved, is made a felony. But obtaining money or other property by false pretenses, where the party defrauded gives credit, not to the genuineness of a writing, but to the person who deceives him, is made a misdemeanor or felony, according to the amount of money obtained by the false representation. For the foregoing reasons the judgment must be reversed, and, of course, another trial upon the theory on which the first trial was conducted would be useless.

The judgment and order appealed from are reversed.

We concur: **Temple, J.; Henshaw, J.**

INDIANA SUPREME COURT.

Allen T. LYNCH, *Appt.*,

v.

Isaac ROSENTHAL.

(.....Ind.....)

A sale of lots to be drawn by the purchasers, the advantages of location, character, size, or condition as between lots of the same class as arranged by the prices marked to be determined wholly by lot, while one prize lot is to be given to some one of the purchasers as the result of chance, is contrary to public policy and void.

(February 21, 1896.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Adams County in favor of defendant in an action brought to enforce specific performance of a contract for the purchase of real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. F. Mann, A. P. Beatty, France & Merryman, and Lafollette & Adair for appellant.

Messrs. Richard K. Erwin and J. R. Bobo, for appellee:

The contract sued on is a lottery.

United States v. Olney, 1 Abb. (U. S.) 275; *Governors of Almshouse v. American Art Union*, 7 N. Y. 228; *People v. American Art Union*, 13 Barb. 577.

The court cannot take any cognizance of a controversy arising out of it.

Burger v. Rice, 3 Ind. 127; *Madison Ins. Co. v. Forsythe*, 2 Ind. 484; *Collier v. Waugh*, 64 Ind. 456; *Mullikin v. Davis*, 53 Ind. 206; *Rothrock v. Perkinson*, 61 Ind. 39; *Keivert v. Meyer*, 62 Ind. 587, 30 Am. Rep. 206.

The whole matter is absolutely void.

Ind. Const. art. 15, § 8; *Swain v. Russell*, 10 Ind. 438; *Burger v. Rice*, *Madison Ins. Co. v. Forsythe*, and *Rothrock v. Perkinson*, *supra*; *Jones v. Noe*, 71 Ind. 368.

Hackney, Ch. J., delivered the opinion of the court:

This was a suit by the appellant against the appellee for specific performance of a contract for the purchase of real estate. The material features of the contract were that Lynch held a contract for the purchase of a tract of land lying adjacent to the corporation line of the city of Decatur, in Adams county, which land he was about to plat as an addition to said city, in accordance with a diagram then drawn, and made a part of the contract, exhibiting fifty-four lots. The appellee and others agreed, severally, by the express provisions of that contract, "to purchase of said first party [Lynch] the number of lots indicated by the number placed opposite" his name, "on the following conditions, to wit: The price of said lots shall be the same as shown by the annexed plat" (the prices varying according to classes and locations), "and whenever all of said lots are sold,

except the six lots . . . marked 'Reserved,' . . . and the lot marked 'To be Given Away,' then said second parties shall meet, and determine by lot the number of the lot or lots to be awarded to each respective subscriber, and shall also determine, in some manner to be agreed upon by themselves, the manner of awarding the prize lot. As soon as said lots are awarded, and it is determined in whom the respective ownership shall lie, then the said Allen T. Lynch shall make out and deliver to each party a good and sufficient warranty deed for each of said lots, to each of said subscribers." It is further stipulated that one half of the purchase price for any lot shall be paid or secured when the deed is delivered, and the other half when Lynch might build and put in operation, near the lots, a furniture factory of the character therein described. There were thirty-five subscribers for one lot each, the appellee being one of that number. Each of the three paragraphs of complaint alleges subscriptions for less than the whole number of lots for sale under said contract, and the waiver by all the parties of any requirement to sell all of such lots; that all of the subscribers, including the appellee, met and determined by lot which of the platted lots should be designated for conveyance to each subscriber, including a described lot for the appellee. And it is alleged, in detail, that the appellant complied with the requirements of the contract on his part; that he executed the required deed of conveyance to the appellee, and tendered it to him, and upon his refusal to accept it the same was brought into court for him. To the complaint the appellee filed seven answers in bar, the 3d, 4th, 5th, and 6th of which were sustained against the appellant's demurrer, and are here assigned as severally insufficient. The 3d answer pleads that all the lots agreed to be sold were not sold, and that the stipulation as to the sale thereof was not waived. This much of the answer presents the same question arising upon the 6th paragraph of answer. Counsel offer no objection to the sufficiency of either of these paragraphs in this respect, and we observe no objection to them. If all of the lots had gone into the hands of separate, bona fide purchasers, their prospective value would certainly have been greater than if but few had been sold and a large number left in the hands of a single owner. But, in addition to this feature of the 3d paragraph, it alleges that after said subscriptions were made the appellant and a number of subscribers met, and, upon the suggestion and assistance of the appellant and his attorney, certain of said fifty-four lots were awarded to the subscribers, severally, by placing the numbers of lots, severally, upon tickets, and placing them in a box, and then by placing the names of the subscribers, severally, upon tickets, and placing them in another box, whereupon two persons, who were blindfolded, drew simultaneously from the boxes a name and a number of a lot, until

NOTE.—On the question what constitutes a lottery scheme, see also *People v. Elliott* (Mich.) 3 L. R. A. 408, and *note*; *Yellowstone Kit v. State* (Ala.) 7 L. R. A. 599, and *note*; *Ballock v. State* (Md.) 8 L. R. A. 31 L. R. A.

671, and *note*; *State v. Bonell* (La.) 10 L. R. A. 60, and *note*; *Long v. State* (Md.) 12 L. R. A. 89, and *note*, 425; *State, Kellogg, v. Kansas Mercantile Assn.* (Kan.) 11 L. R. A. 430.

all of the names were drawn; and in each instance the lot whose number was drawn when a name was drawn was awarded to the subscriber whose name was so drawn, and constituted the selection of the lot to be conveyed to him; that at the same time, and in the same manner, said persons awarded the prize lot to one of the subscribers,—that is to say, they placed in one box thirty-four blank tickets, and one ticket marked "Prize Lot," and in the other box tickets containing, severally, the names of the subscribers, and, as names were drawn from one box, tickets were drawn from the other, until the name of one subscriber and the ticket bearing the "Prize Lot" appeared simultaneously, when that lot was awarded to such subscriber, and was thereafter conveyed by appellant to him. The contract, and the manner of its attempted execution, are alleged to have been void as against public policy. The 4th answer alleged that the prices of the lots, as marked upon the plat, were in excess of the actual values of the lots, and that the appellant, as an inducement to persons to subscribe, offered the chance of obtaining the prize lot in addition to that subscribed for; that appellant participated in the drawing, which was described as in the 3d paragraph. The 5th answer alleged the stipulations of the contract as to the selection of the lots subscribed for, and the awarding of the prize lot; that the lots were not of the values placed upon them; and that the values of those in any class were variant, so that one person drawing a lot at a given price might obtain one of greater or less actual value than that obtained by another subscriber drawing one of the same price. Appellant's learned counsel have not discussed their objections to these answers separately, but they have attacked them collectively as not disclosing the invalidity of the contract. They will be regarded, therefore, as having waived all other questions arising upon them.

The argument is not made that contracts tainted with the vice of lottery schemes are enforceable. That such contracts are against public policy, and that those who have entered into them shall have no relief, in the courts, to enforce those that are executory, or to recover that which has passed under such as have been executed, is without doubt. Const. art. 8, §15; *Burger v. Rice*, 3 Ind. 127; *Swain v. Busell*, 10 Ind. 438; *Rothrock v. Perkinson*, 61 Ind. 39; *United States v. Olney*, 1 Abb. (U. S.) 275, Fed. Cas. No. 15,918; *Whitney v. State*, 10 Ind. 404; *Crews v. State*, 88 Ind. 28; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *Riggs v. Adams*, 12 Ind. 199; 13 Am. & Eng. Enc. Law, p. 1187; Rev. Stat. 1894, §§ 2170-2172 (Rev. Stat. 1881, §§ 2076-2078). The important question here is as to the character of the present contract. Does it infringe this principle of public policy? This inquiry depends upon what a lottery scheme is. In *Hudelson v. State*, *supra*, it was held that where a merchant, with each sale of merchandise to the value of 50 cents, gave the purchaser the right to guess as to the number of beans in a glass globe,—the nearest guesser to receive a gold watch,—the transaction was a lottery. The court there quoted with approval several definitions of a "lottery," some of which are as

follows: "Whether the enterprise . . . be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise. *Lohman v. State*, 81 Ind. 15." "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." *Hull v. Ruggles*, 56 N. Y. 424. "A lottery is a scheme for the distribution of prizes by chance." *Dunn v. People*, 40 Ill. 465. In *Rothrock v. Perkinson*, *supra*, it was said: "It is well settled in this state that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void as against public policy;" citing, in connection with some of the cases we have cited, those of *Higgins v. Miner*, 13 Ind. 346; *Thatcher v. Morris*, 11 N. Y. 437. "Lot" is defined to be "a contrivance to determine a question by chance, or without the action of man's choice or will." *Chavannah v. State*, 49 Ala. 396; 13 Am. & Eng. Enc. Law, p. 1181. Webster's International Dictionary defines "lot" as "anything used in determining a question by chance, or without man's choice or will." If the property subject to distribution possesses unequal values, so that one's good or ill luck in the scheme of distribution may determine whether he shall receive more or less for his investment, the scheme is a lottery. *Dunn v. People*, 40 Ill. 465. Nor is it less a lottery because the person whose property is distributed, or the person who pays, does not personally participate in the drawing. *Fleming v. Bills*, 3 Or. 286; *Riggs v. Adams*, *supra*.

By the definite language of the contract in this case, the lot which the appellee agreed to purchase was to be determined by lot. It was to be one of the fifty-four parcels, to be designated wholly by chance, and without the will or choice of the appellant or the appellee. Whether he was to pay \$100 or \$300 was a question over which he had no choice, and the appellant was without control. Any advantage in the selection—by reason of location, character, size, or condition—of a lot from any of the various classes, as arranged by the prices marked, was not to be determined by the judgment of a subscriber or the seller, but depended wholly upon the chances to be settled by "lot," as the contract provided. Distribution by chance was never more certainly contemplated, and, if not so contemplated, the manner in which the appellee's alleged purchase was determined was never outwitted as a method of chance,—not even by the guessing upon the number of beans in the globe, for in that instance the person to be benefitted exercised his own judgment in determining upon a number. The method adopted was no less objectionable, as one of mere chance, than the methods of the old Louisville Library Association, or the more recent Louisiana Lottery. If there had been nothing in the contract directing the choice by lot, and the choice had been made in the manner alleged in some of the answers, every objection would prevail against it that would obtain if the appellee had been assigned a lot as the result of a game of cards, the

throwing of dice, or the turning of the roulette. In any one of these methods the result depends entirely upon chance, and excludes the exercise of the judgment. In the case of *Swain v. Russell*, *supra*, this court quoted with approval from *State v. Clarke*, 33 N. H. 334, 66 Am. Dec. 723, "that where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery." In the present case the subscriber is to get a lot more or less valuable, depending alone upon chance; and he is to pay for it a sum, more or less, depending alone upon chance. It was further said by this court in the case mentioned, referring to *Den, Wooden, v. Shottwell*, 23 N. J. L. 470: "Wooden had divided a parcel of land into fifty-eight lots, of unequal value, from \$50 to \$600 per lot, and disposed of them at \$75 each, and the particular lot of land to which each person was to receive a title was determined by lot. The supreme court of New Jersey say this was, both in form and substance, a lottery." The difference between that case and the present is merely in degree of advantage or disadvantage to the parties, in the amount to be paid, and the proportionate values to be received, as between those who make the payments. The method of distribution in either involves the objectionable feature of chance, upon which the choice of property of higher or lower value and greater or less price is determined without the exercise of the will and judgment of the parties. The manner in which the chances in this case were determined is even more objectionable. Here forty-seven lots were made the subject of choice for the selection of but thirty-five lots, and thereby added to the objection of distributing thirty-five lots by chance the further vice of placing the appellant's remaining twelve lots in the scale, and his ownership, with locations, character, and values, all depending upon the result of the drawing.

Another feature of the contract, and the manner of executing it, is in the offer and award of the "prize lot." Counsel for appellant seek to eliminate this feature of the contract, and to uphold that which remains, by insisting that this lot was a gift to all of the subscribers, without contract that it should go to any one by lot. If this were true, and the appellee was denied the benefit of that part of his contract by the appellant's conveyance to one of the subscribers in violation of the con-

tract, we are at a loss to determine how he (the appellant) is in a position to insist upon the enforcement of a contract which he has violated and rendered impossible of complete execution. But we do not agree with this view of the contract. It is stipulated that a "prize lot" is "to be given away," and is to be "awarded" in a manner to be determined. It is not stipulated that all of the subscribers shall become the owner of this lot, nor, in fact, that any one of them shall, but when the parties came together, with the knowledge and consent, if not the direct participancy, of the appellant, the contract is construed to mean that the "prize lot" is to be awarded to some one of the subscribers, who, by the result of chance, is proved to possess the luck to have his name and the "prize lot" ticket drawn simultaneously. This construction of the contract is ratified and acted upon by the appellant in the act of conveying the lot to the lucky subscriber. This construction of the contract renders certain that doubtful part of it which omitted to stipulate the person to whom and object for which the "prize lot" was to be awarded. It was to increase the interest of a subscriber, who, by subscribing for one lot, had the chance, for the same money, to get two lots. We find, therefore, that both the contract and the manner of attempting to comply with its terms were against good morals, forbidden by public policy, and void.

Appellant insists that the lower court erred in sustaining a demurrer to his reply to these answers, in which reply he alleged that, when he tendered appellee's deed, it was declined, not because the transaction was against public policy and void, but for the reason, then stated by him, that appellant had not complied with the requirement of the contract as to the building of a factory. Authorities to the proposition that one may not assert one defense out of court, and another in court, to the prejudice of the complaining party, are cited. We do not stop to consider the true doctrine of these cases. It is enough to say that one who asks equity must present clean hands in which to receive it. Here the appellant, from the beginning, had unclean hands. He originated, carried forward, and in this suit sought to enforce, a vicious contract. He is in no position to ask that equity estop his ally from exposing the vice of that contract, the enforcement of which public morals forbid. The evidence supports the judgment of the circuit court. There is no error in the record, and *the judgment is affirmed.*

TENNESSEE SUPREME COURT.

STATE of Tennessee, *Appt.*,
v.

H. S. OLD.

(95 Tenn. 723.)

A statute making it an indictable offense to vote without presenting to the judges

of election an original poll-tax receipt, or a certified duplicate copy thereof, or a certificate of a constable or deputy collector, or else an affidavit of the voter, that he has paid his poll-tax and that his receipt is lost or misplaced, is within the power of the legislature, even as applied to a voter who has actually paid his poll-tax, where the Constitution requires "satisfactory evidence" of such payment and also gives the legislature

NOTE.—The general question how far there is an absolute constitutional right of voting is presented 31 L. R. A.

in a note to *State, Allison, v. Blake* (N. J.) 25 L. R. A. 480.

power to enact laws "to secure the freedom of elections and the purity of the ballot box."

(March 23, 1896.)

APPEAL by the State from a judgment of the Circuit Court for Wayne County quashing an indictment against the defendant for illegal voting. *Reversed.*

The facts are stated in the opinion.

Mr. G. W. Pickle, Attorney General for the State.

No appearance for appellee.

Snodgrass, Ch. J., delivered the opinion of the court:

Defendant was indicted in the circuit court of Wayne county for illegal voting. The charge was that, in a certain election, held on the 15th of October, 1895, in the fourth civil district of Wayne county, to elect a justice of the peace, the defendant, being over the age of twenty-one years, and having had a polltax assessed against him for the year next preceding the election, which he had paid, did unlawfully vote in said election without furnishing to the judges thereof satisfactory evidence that he had paid said poll tax, to wit, that he did not present to the judges of said election his original poll-tax receipt, or a duly certified duplicate and copy of the same, or the duly authenticated certificate of a constable or deputy collector, as required by law, nor make affidavit in writing signed by him that he had paid his polltax and that his receipt therefor was lost or misplaced. This indictment was quashed on motion of defendant, and the state appealed in error.

The correctness or incorrectness of the judgment depends upon the question whether chapter 23 of the Acts of the Extra Session of the Legislature of 1891 is or is not constitutional. There is no doubt of the application of that act, nor is there any objection to the manner of its passage. On August 7, 1891, Gov. Buchanan issued his proclamation convening the general assembly in extraordinary session. The law in controversy was included in the call, and the manner of its subsequent passage by the legislature thus convened by the governor, its regular enactment by that body, and its approval by the governor, are not questioned. It was properly passed on the 18th and approved on the 19th of September, 1891 (Acts Ex. Sess. 1891, pp. 45-48). Nor is there any question of the validity of the indictment thereunder as to form or terms. The 1st section of the act provided "that chapter 222 of the acts of the regular session, approved March 30, 1891, regulating the elective franchise [which act was itself an amendment of the act of 1890, Ex. Sess. p. 67, chap. 26], in accordance with art. 4, § 1, of the Constitution of the state, be so amended as to require that the satisfactory evidence to be furnished by the voter to the judges of the election, whether general or special, whether national, state, county, or municipal, that he has paid the poll tax contemplated by the Constitution assessed against him, if any, for the year next preceding said election, shall consist of the original poll-tax receipt or

a duly certified duplicate and copy of same, or the duly authenticated certificate set out in § 8 [which provided for a trustee's certificate and its form], when said tax has been paid to a constable, and not to said trustee, properly certified by the trustee, or shall make affidavit in writing and signed by the voter that he has paid his poll tax and that his receipt is lost or misplaced, which affidavit shall be filed with the said judges and by them attached and made an exhibit to the returns of said election." The 5th section of this act provided "that any person voting, or any judge of any election permitting, knowingly, any person to vote, in the same without having first complied with the provisions of § 1 of this act [the section just quoted], shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than \$50 and imprisoned in the county jail or workhouse ninety days." A reference to the indictment clearly shows that it states an offense under this act, and, if the act be valid, is clearly good. The objection of the defendant is that the act is unconstitutional, and this involves the consideration of the constitutional provisions which it is urged, on the one hand, invalidate, and, on the other, authorize, this statute. These are embodied in art. 4, § 1, of the Constitution of 1870. That section reads as follows: "Every male citizen of the age of twenty-one years, being a citizen of the United States, and a resident of this state for twelve months, and of the county wherein he may offer his vote for six months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers of the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election where he offers to vote satisfactory evidence that he has paid the poll taxes assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law, without which his vote cannot be received. And all male citizens of the state shall be subject to the payment of poll taxes and the performance of military duty, within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box." Independently of the conclusion of this provision, it cannot be successfully denied, and is not disputed, that the legislature would have the right to make the furnishing "satisfactory evidence" of the payment of a poll tax a prerequisite of voting, and its nonfurnishing an indictable offense; and the original act of 1890, which we have cited, confined itself to these general terms. The first amendatory act of 1891 provided that the "satisfactory evidence" should consist of the original poll-tax receipt, or a duly certified copy, or an affidavit that the voter had paid his poll tax and that his receipt was lost or misplaced. Acts 1891, p. 436. The act we are considering enumerated these, and added provision for certificate when paid to a constable,—not an enlargement, but rather an explanatory provision, covering case of such pay-

ment, which might have been of doubtful construction under the first act of 1891.

The objection made to the act is not that the legislature could not prescribe that "satisfactory evidence" should be furnished, nor is it objected that the legislature (in prescribing that such evidence should be a receipt for payment, or a certified copy, or the affidavit of the voter that he had paid the tax and had such receipt, which was lost or misplaced) was requiring evidence not satisfactory, or evidence difficult to make, or which, in any event, could exclude the voter from the exercise of his right to vote. It is obvious that to require the original alone, or either the original or copy of receipt, as the only evidence, might make voting a matter of difficulty, and, in case of loss, an impossibility; but, when to these is added the provision that the voter's own affidavit of their loss is sufficient to enable him to vote without them, it is obvious that no hindrance is imposed to his free and unobstructed right of suffrage. It cannot be denied that the original receipt was good evidence, nor, in its absence, that a certified copy is good evidence. It is only in favor of the right, however, that the legislature makes them "satisfactory," for it might be true that a voter might have either, and yet not in fact have paid the tax. So, it is true that his affidavit might be false, and still it is made evidence. In other words, the legislature has left with the voter, unhampered and unhindered, the opportunity, as well as the right, to furnish such satisfactory evidence in the kind of evidence prescribed, and, having done so, has no more nor less discharged than it was authorized to do, its constitutional duty. If, under the guise of requiring satisfactory evidence, it had acted arbitrarily, and contrary to the spirit of the Constitution, if not to its letter, its action might well have been held void; but when it adopts, even under that part of the constitutional article requiring the offering of satisfactory evidence, only the production of that evidence which all mankind would deem to be such as the voter could easiest make, and which is most naturally expected to establish the fact to be shown, it could not be held that the legislature had transcended its power under the Constitution had the first clause of § 1 of article 4 stood alone. But the clause in question does not stand alone. It was obvious to the Constitution makers that fraud and force might be attempted in our elections, as they had been everywhere else; and so it was deemed proper, though it was probably not essential (for, in the absence of restriction by the Constitution, the legislature would have possessed general power on this subject, as all others of legislative nature), to add specific power to enact laws "to secure the freedom of elections and the purity of the ballot box," thus putting its constitutional authority beyond cavil under the general terms of the Constitution as to "satisfactory evidence." But under such terms, repeated only and literally in a statutory enactment (as was the case in the act of 1890), and leaving this phrase to be construed as might best accord with the capacity, judgment, and partisan bias (where it might exist) of all the thousands of judges of elections who would thereafter have to construe and give it effect,

31 L. R. A.

it is clear that no greater source of oppression and impurity of the ballot box could be conceived than might be originated in diverse and improper construction and exercise of such undefined power by the judges of election. Voters might be denied the privilege of suffrage upon the most false and flimsy pretenses of the insufficiency of their evidence of payment of poll tax, and, on the other hand, might be permitted improperly to exercise it upon the most unsatisfactory, and, indeed, upon no, evidence, provided the judges of election should hold themselves satisfied with whatever was offered or with none.

The framers of the Constitution, therefore, did not intend to leave the legislature, by any restriction, powerless to prevent this result, but especially, along with this declared authority to legislate on the poll-tax provision so as to designate the time preceding election for which it should be paid and ages within which it should be paid, authorized it, on this and all other subjects, to enact such laws as would secure the freedom of elections and the purity of the ballot box. Within proper limits the legislature is the judge of what such laws should be, and it was clearly within their province to say that this was such a law. *Cook v. State*, 90 Tenn. 407, 13 L. R. A. 183. It is obvious, too, that it is so in fact. We have already shown that the evidence which the act declares to be satisfactory is that most naturally and most easily obtainable and to be made by the voter, and that only which ordinarily and by common consent is assumed by all to be the acceptable evidence of the fact of payment. But we have also suggested that while, for all convenient and practical purposes, it is the most available and best evidence, it is not, in fact, the best. The best evidence which could be required, perhaps, by any judge of election, would be the actual payment in his presence, by the voter, of his tax to the collector. Now, suppose, under the Constitution, the legislature had no power to prescribe what should be satisfactory evidence, and the phrase left in general terms to the judges of election for their construction and their guidance, and that some or all judges would be satisfied with no less evidence than that suggested, it is obvious that such view would be subversive practically of the right of suffrage. So other modes of proof might be demanded,—as, that the voter should produce witnesses, to prevent imposition of forged receipts on the judges, and then witnesses of the good character of these, that the judges might be thoroughly satisfied. And so illustrations might be multiplied of the various constructions which, naturally and innocently, different judges of elections might put upon these words, to say nothing of the multiplied frivolous and false constructions which extreme partisan officials might give to them, to defeat or obstruct the votes of those who should be of another political party than that of the judges. And, too, in the matter of permitting voters to cast their ballots on "satisfactory evidence" of poll-tax payment, what a diversity of construction would prevail! In one case the mere statement of the voter would be deemed satisfactory; in another, not; and so of unsworn statements of other witnesses for the voter.

And, again, because some one of the judges or others knew, or did not know, that he had voted at a former election in same year, or because he was good for the tax, he is presumed to have paid it, or, being honest, that presumption is indulged; or because somebody would say that they had heard the collector say this tax was paid, or that all poll tax of the given county was paid, hence no special evidence in the particular case is required, etc. These illustrations, too, might be multiplied indefinitely, but the ones given are sufficient to show how differently and erroneously might be construed and applied the general terms used in the Constitution if it was not permitted to be given one easy, fixed, plain, and natural limitation by the legislature; or, speaking more accurately, if the legislature was not permitted to prescribe just, plain, easily observable offerings of proof as the "satisfactory evidence" of the Constitution, and thus destroy the facility to suppress the freedom of elections, and to sully the purity of the ballot box, which lurks beneath the dangerous limits of this general phraseology.

It was not only, therefore, within the power of the legislature, but it was the duty of that body, to pass some such law as would define this evidence, and compel judges of election to accept it when offered, in all cases alike, and thus enable every voter in Tennessee to cast his free and unhindered ballot, and, at the same time, to prevent the denial to any voter, however low and humble, ignorant or illiterate, of such right, by the adoption of such method of evidence as he could get, or if he could not get, could give himself, when he went to vote, and thus make it impossible for him to be cheated out of the privilege of voting, under the constitutional provision on this question. On the general question of the validity and strict binding effects of such laws as require, not merely the existence of certain facts, but particular proof of their existence to be made, as a prerequisite to voting, there is no doubt, and we refer to a few of the authorities where the question is more elaborately considered. It is too well settled now to need argument or extended statement. Paine, Elections, § 451; Brightly, Elect. Cas. p. 452; *Re Cusick's Election*, 136 Pa. 476, 10 L. R. A. 228; Cooley, Const. Lim. p. 758; 13 Pa. Co. Ct. 544; *Re Duffy's Election*, 4 Brewst. (Pa.) 531. And that a vote cast without such prerequisite proof of fact is illegal, though the fact existed, is well recognized. Some of the cases referred to, and numerous others, cover this proposition. These are on the general subject, but the express language of our Constitution is not (merely) that the voter shall pay, but that "he shall give to the judges of election satisfactory evidence of payment, without which his vote cannot be received." The statute, in pursuance of this provision, requires the giving of such satisfactory evidence, and makes the failure to do so an indictable offense.

The court makes neither the Constitution nor the law, but upon it is devolved the duty of applying them, and, so doing, we are left no alternative but to hold the indictment in this case valid.

The judgment of the Circuit Court is therefore reversed, and the case remanded for trial.

31 L. R. A.

Sims LATTA, Exr., etc., of W. H. Brown,
Deceased,
v.

Mary Lou BROWN.

(.....Tenn.....)

1. Other devisees must contribute to make up a deficit in a devise caused by a widow's election to take dower instead of a gift under the will, where the refused share of the widow given to the disappointed devisee is not sufficient to supply the loss to such devisee.
2. The right of remaindermen to be accelerated and immediately to enter upon and enjoy the use of land devised subject to a widow's life estate, when she refuses to take under the will, is subject to the superior right of a disappointed devisee whose share is diminished by the widow's election to have compensation for such loss by taking the life interest which the widow refuses.

(March 7, 1886.)

APPEAL by defendants, the Alexander children, from a decree of the Chancery Court for Maury County determining the rights of beneficiaries in the will of W. H. Brown, deceased, upon his widow's electing against the will and taking some of the devised property. *Affirmed.*

The facts are stated in the opinion.

Messrs. Vertrees & Vertrees, for appellants:

The interest which Mrs. Brown was given by the will may be sequestered to compensate Mrs. Taylor for the loss she has sustained by reason of Mrs. Brown's dissent and the allotment of part of her portion to Mrs. Brown as dower; but the interests of the Alexander children cannot be sequestered for that purpose.

Dower is the estate which the wife has by operation of law in the lands of her husband. *Combs v. Young*, 4 Yerg. 218, 26 Am. Dec. 225.

By Mill. & V. Code, § 3244, it has been restricted and limited to narrower bounds than those by which it was defined at common law, but as far as it goes it is still the same estate. This estate is one she is entitled to under the law, which no one can defeat.

Frost v. Etheridge, 1 Dev. L. 30; *Combs v. Young*, 4 Yerg. 229, 26 Am. Dec. 225.

Such, however, is not the case with respect to the widow's right in the personal estate.

Cannon v. Apperson, 14 Lea, 593.

When a widow dissents she shall be endowed as if her husband had died intestate.

Code, § 3251.

The mansion house shall be included in the dower estate.

Code, § 3247; *Vincent v. Vincent*, 1 Heisk. 333.

With the possibility of a dissent before him, and with certain knowledge as to the consequence which must follow, Dr. Brown made a will whereby he gave the mansion house to

NOTE.—The law as to the effect of a widow's election to take against a will upon rights of other persons in the estate is believed to be entirely found in the present case and in the note to *Jones v. Knappen* (Vt.) 14 L. R. A. 233, referred to by the court.

his daughter instead of his wife, and made no provision whatever against the disappointments which his daughter and grandchildren would suffer in the event his wife should dissent from his will. It must therefore be assumed that he intended the consequences of a dissent on the part of the widow to fall precisely where the law places them.

Re Vance's Estate, 141 Pa. 201, 12 L. R. A. 227.

The doctrine of election is founded on the same reasons and governed by the same rules when applied to a widow claiming dower as when applied to any other case.

2 Beach, Mod. Eq. Jur. § 1081; *Leonard v. Steele*, 4 Barb. 22; *Rutherford v. Mayo*, 76 Va. 117; *Jennings v. Jennings*, 21 Ohio St. 81.

One equitable or chancery consequence is that "compensation" is oftentimes allowed.

No court is authorized to make a new distribution for the sake of equality.

Re Vance's Estate, *supra*; *Gretton v. Harvard*, 1 Swanst. 441, note.

Equity will sequester the interest intended for the electing beneficiary, to compensate Mrs. Taylor for the loss. But no other interests than that can be sequestered.

1 Pom. Eq. Jur. 2d ed. § 517; 1 Woerner, American Law of Administration, § 119; *Gretton v. Harvard*, 1 Swanst. 441; *Jennings v. Jennings*, 21 Ohio St. 58; *McReynolds v. Counts*, 9 Gratt. 242; *Timberlake v. Parish*, 5 Dana, 352; *Sandoe's Appeal*, 65 Pa. 314; *Re Batione's Estate*, 136 Pa. 307; *Gallagher's Appeal*, 87 Pa. 200; *Jones v. Knappen*, 63 Vt. 391, 14 L. R. A. 293; *Colvert v. Wood*, 93 Tenn. 454.

A dissenting widow takes a distributive share of the personalty subject to the testator's debts and the expense of administration. It is not protected like the dower.

Code, § 3252; *Cannon v. Apperson*, 14 Lea, 556.

Legacies must abate ratably when necessary to pay debts and give the widow her third of the personalty remaining after paying debts.

Pritchard, Wills, § 471.

Mr. N. R. Wilkes also for appellants.

Mr. E. H. Hatcher for Mrs. Taylor.

Mr. L. B. Hughes for the Taylor children.

Wilkes, J., delivered the opinion of the court:

Dr. W. H. Brown, of Columbia, Maury county, Tenn., died, leaving surviving him his widow, Mrs. Mary Lou Brown, his daughter, Mrs. Maggie C. Taylor, and Lizzie C. and Willie B. Alexander, his grandchildren by a deceased daughter. He left a will by which he devised to his daughter Mrs. Taylor, for life, with remainder to her children, his residence, two storehouses and lots, and three other lots in Columbia. He left a farm of about 630 acres of land in Maury county, which, by his will, he divided into two equal parts, one half of which he gave to his widow for life, and the other half to the Alexander children, with certain limitations over in the event of their dying without issue. The half given to the wife, upon her death, was to be equally divided between Mrs. Taylor and the Alexander children, and the widow was given choice of the two portions. The personal

property was also bequeathed, but as it all was required to pay debts, it need not be further considered. The widow dissented from the will, and dower was thereupon assigned her, embracing the residence, one storehouse, and the rent of the other for four years, all of which was property given by the will to Mrs. Taylor. The farm was divided into two parcels, of unequal size, but equal value, and Mrs. Taylor was allowed to take choice, on the idea that she was substituted to Mrs. Brown's rights in this regard, and she chose lot No. 1, being the larger parcel. Upon the bill filed to wind up the estate and settle the rights of the parties, the chancellor decreed that Mrs. Taylor should take the lot No. 1 for life, as part compensation for what she lost by the dissent, and that injury further had resulted to her as a consequence of the widow's dissent, and that such further injury or damage should be borne by Mrs. Taylor and the Alexander children in the proportion which they took in value in the estate of Dr. Brown. The master made a report designed to show the respective values of the shares, but the court was of opinion that it did not sufficiently appear what the amount of Mrs. Taylor's loss or injury was, and the report was set aside, and the master was directed to report in dollars and cents what would be just compensation to Mrs. Taylor arising out of the dissent and allotment of dower. Taylor and wife excepted to the action of the court refusing to confirm the clerk's report, but did not appeal. The Alexander children, by leave of the court, appealed before the coming in of the second report. The court of chancery appeals held with the chancellor, that not only the property thus refused by the widow could be given to the devisee, thus disappointed, but that the other devisees must contribute *pro rata* to make good the deficit, if any, according to the respective values given to them, the land renounced by Mrs. Brown in this case being insufficient to make good to Mrs. Taylor the loss sustained by her in consequence of the dissent; and it is mainly upon the latter portion of this holding that the case is now before us, it being clear that the devise refused by Mrs. Brown must go to Mrs. Taylor to reimburse or indemnify her in her loss under the dissent, unless the doctrine of acceleration prevails in behalf of the Alexander children. The holding and reasoning of the court of chancery appeals is that, when the widow dissented, her right of dower attached and became an encumbrance on all the testator's lands, no matter to whom devised; and that it "hovered" over all of them as an encumbrance until assignment made, and, inasmuch as the assignment made in this case was exclusively out of property devised to Mrs. Taylor, that devised to the Alexander children was thus relieved of the encumbrance, and, upon broad grounds of equity, their shares must contribute *pro rata* to reimburse Mrs. Taylor for the loss sustained by her. This contention, thus presented, has not been directly adjudicated in Tennessee, but it is claimed that in principle it has been decided in favor of the holding of the court of chancery appeals. For the Alexander children it is earnestly insisted that by Mill. & V. Code, § 3247, it is provided that dower shall be so allotted

as to embrace the dwelling house, outhouses, buildings, and other improvements, or, if it be unjust to give the widow all the house, a proper part must be assigned, and, unless great injustice result on account of the value of the house, its value is not to be taken into consideration. *Vincent v. Vincent*, 1 Heisk. 333. It is therefore argued that the right of dower is not a common burden which hovers over all the land until it is localized by assignment in a particular locality, but that it must be so located as to embrace the mansion house and other improvements, although it may embrace other lands in order to make the amount to which the widow is entitled. Assuming the correctness of this contention, it is therefrom argued that when the testator made his will, giving his mansion house to Mrs. Taylor, he must have had in view the law that his widow could take it by dissenting from the will; and inasmuch as he made no provision for such contingency, he must have intended that in such event Mrs. Taylor should bear the loss so far as she could not be compensated out of the property devised to the widow, and which, upon her dissent, she renounced. On the other hand, it is insisted for Mrs. Taylor that, the renounced property having been exhausted without fully compensating the disappointed devisee, she has the right to call upon all the other devisees to contribute *pro rata* to make up this deficit, and thus execute the will of the testator and preserve the rights of each, so far as may be, under the changed condition of affairs.

There is no serious question made, and cannot be, that the dissent of the widow, and her election to take what the law gives her, instead of under the will, is followed by the usual consequence of an election in other cases, and that the property designed for her in the will must be sequestered and given to her for compensation, as in other cases of election. 1 Pom. Eq. Jur. 497-517; *Jennings v. Jennings*, 21 Ohio St. 56, 81; *Dean v. Hart*, 62 Ala. 310; *McKey-nolds v. Counts*, 9 Gratt. 242; *Kinnaird v. Williams*, 8 Leigh, 400, 81 Am. Dec. 658; *Sandoe's Appeal*, 65 Pa. 314; *Re Batione's Estate*, 136 Pa. 307; *Colvert v. Wood*, 93 Tenn. 454; *Cruftman v. Cauffman*, 17 Serg. & R. 26; *Callahan v. Robinson*, 30 S. C. 249, 3 L. R. A. 497; *Allen v. Hannum*, 15 Kan. 625; 6 Am. & Eng. Enc. Law, p. 255, and notes; *Ford v. Ford*, 70 Wis. 55; *Jones v. Knappen*, 63 Vt. 391, 14 L. R. A. 293. But, in order to sustain the holding of the court of chancery appeals in this case, there must be the further interposition of the doctrine of contribution between the devisees in order to make up the deficit, when there is such deficit, after applying the property devised to the widow, and refused by her. For the Alexander children, it is insisted that no such doctrine of contribution exists, but that only the general results of an election follow, and hence only the refused share of the widow can be given to the disappointed devisee. The learned court of chancery appeals, speaking through Judge M. M. Neil, cites *Henderson v. Green*, 34 Iowa, 437, also reported in 11 Am. Rep. 149, and the case of *Robinson v. Harrison*, 2 Tenn. Ch. 11, as conclusive upon the point presented. In the first case the testator devised the plantation on which he resided to

his wife, in lieu of dower, also certain personal property, and he gave 40 acres of land to Euretta Green, and 160 acres to Emily Booher, subject to the life estate of the widow. The widow dissented and took dower, and 80 acres of that assigned Emily Booher was given to her in the assignment, and 40 acres additional of Emily Booher's share was sold to pay debts. The court held that both devises to Mrs. Green and Mrs. Booher were specific, and that Mrs. Green's 40 acres must contribute also to the common burden of the widow's share upon her dissent. It will be noted in this case that all the lands, including the 40 acres given to Mrs. Green, were given to the widow for life, so that, to the extent of the life estate of the widow, it was simply sequestering that property given by the will to her, and not separate property given exclusively to a devisee, and it is conceded that all the property given to the widow may be sequestered under the general rule. It seems, however, that the court in that case did not limit the sequestration to the life estate, but held the entire 40 acres liable to contribution. The court also said that it was manifest from the terms of the will that the testator intended Mrs. Green should take her 40 acres burdened with the encumbrance of the widow's dower. We find no express language to this effect in the will, and the manifest intention must appear from implication or the general principles of law in such cases, if at all.

It is said that the later case of *Gainer v. Gates*, 73 Iowa, 149, is in conflict with the conclusions of the court of chancery appeals, and probably with the earlier case of *Henderson v. Green*, 34 Iowa, 437, 11 Am. Rep. 149. In it, Gainer devised all his lands, except his mansion and homestead, to his wife, and gave the homestead to plaintiff, and gave twelve legacies to twelve different legatees. The widow was, however, given a life estate in all the property, real and personal. The widow dissented and the homestead was assigned to her as dower, and this defeated the legacy to Gates. Suit was thereupon brought by Gates against the administrator and heirs to recover the value of the homestead thus lost. The effort in that case was to charge the estate with the value of the homestead, and the court held that indirectly this was an effort to recover from the heirs of the testator, and taking it out of the estate was making all contribute *pro rata*. The court said: "The law presumes that the execution of the will was with a knowledge of the law by the testator. He knew that nothing would pass to plaintiff except with the widow's consent. The law will presume that it was his purpose to make the devise contingent upon such consent; that his purpose and wish was that, if the wife did not hold the homestead, plaintiff should, but, if she did, plaintiff should take nothing by the will. If we may inquire into the purpose and wish of the testator, we can reach no other than this conclusion." The question of compensation under the general doctrine of election appears to have been ignored. This case is somewhat obscure, both in its statement of facts and conclusions of law, and was decided upon several grounds not applicable in this case. It was not an effort to recover from the legatees or devisees, but from

the administrator and heirs, and it appeared there was fund enough passing in residuum to the heirs to compensate for the loss, and it was this fund which was sought to be reached. The legatees and devisees were not before the court, and not affected by the holding. The court said: "We need not inquire whether this doctrine is applicable to the case of the widow and the beneficiaries under the will other than plaintiff, for the reason that no claim is made against them in this action. It is surely not applicable to the heirs, who will take the residue of the estate." And the court's conclusion was that the plaintiff could not recover against the estate, which was not bound by any contract to him. Mr. Farnham, the annotator of the Lawyer's Reports, cites this as one of the two cases out of harmony and line with the current of authority, and refers to it as a peculiar case. It clearly does not consider the right to contribution from the other legatees and devisees under the will; and the doctrine of compensation so uniformly held in other cases was not discussed, but was ignored, and the decision was placed upon other and different grounds. See *Jones v. Knappen* (Vt.) 14 L. R. A. 293, and notes.

The special question of requiring the residuary legatees and devisees or the heirs to make good such deficiency is considered in the cases of *Re Vance's Estate*, 141 Pa. 201, 12 L. R. A. 227; *Gallagher's Appeal*, 87 Pa. 200; *Timberlake v. Purish*, 5 Dana, 352. The gist of these decisions, as we understand them, is that the residuary legatees, and, by parity of reason, heirs, will be required to make good such loss, rather than specific legatees. In the case at bar this question does not arise, as there is no residuary fund, and no intestacy as to any property, and the effort is to enforce contribution among special devisees; that is, devisees of specific property.

Sandoe's Appeal, 65 Pa. 314, is much commented upon. In that case, Bard, the testator, gave to his daughters pecuniary legacies, to his son William his mansion place, subject to certain charges for his wife, and, if he died before twenty-one without issue, the mansion place to go over to Jefferson, his other son, in fee. The executors were directed to buy a farm for Jefferson, equal to the mansion place, if he desired it, and to sell other real estate for that purpose. The widow dissented. The assets were not sufficient to meet the provisions of the will. The court directed the pecuniary legacies to the daughters to be paid in full, and whatever deficit there might be after sequestrating the benefits intended for the widow, and selling the real estate specified in the will, should be paid out of William's mansion farm. It was evident from the whole will that the testator intended William and Jefferson to share equally in his estate. The decree directed the deficiency, after selling the other real estate, to be raised out of William's mansion farm, taking care, however, to preserve the equality of value between the two brothers. It appeared that William had received \$4,123.91 more than his share, and it is evident the clause in the decree had special reference to this feature, and intended it to be refunded if necessary; and we think the case not only holds and announces the general doctrine that the renounced share

of the widow shall be applied to the reimbursement of the disappointed legatee or devisee, but that the remaining devisee, William, must contribute to make up any deficiency so at all times to keep the shares of William and Jefferson equal, which was the primary intention in the will.

The case of *Robinson v. Harrison*, 2 Tenn. Ch. 11, is also referred to as sustaining the conclusion of the court of chancery appeals by that court. In that case the chancellor held that, when the personal assets were insufficient to pay debts and the widow's distributive share of one third, it was the duty of the executor to make the deficiency fall proportionately on all the specific devisees and bequests, and to account to the widow for the stock bequeathed to her, less her proportion of the loss, and he did not have the right to select one legacy to bear the burden of the widow's dissent, whatever may have been his right to dispose of the stock to pay debts. This case, it appears, was affirmed in the supreme court. It is assailed upon the ground that the court proceeded in that case upon the idea that the widow's "third" of personal estate was, like her dower, superior to the claims of creditors, which was incorrect, and that the legatees and devisees made no question or resistance, and such seems to have been the case. But this, we think, does not destroy the force of the decision, because the widow's right to her "thirds" is superior to the claims of special legatees under the will; and the court proceeded upon this idea in making the burden of the "thirds" fall equally upon all the special legacies, there being no general or residuary legacy. This was evidently what the court intended to decide in a case of legacies, making the widow's "thirds" occupy the place of dower in this case.

A very strong and ingenious argument is made upon the theory that the dower right before assignment is not an encumbrance "hovering" over the whole of the lands of the deceased. It is said that, upon the husband's death, the dower of the widow becomes a consummate or "vested right," which ripens on assignment into a freehold estate; and this is unquestionably correct. 2 Scribner, Dower, 8, 26, 28. But it is further insisted that it is a localized right to the mansion house, and not an encumbrance hanging over the whole estate, and that the mansion must be assigned unless great injustice would result, and even then a part of the mansion must be assigned, and hence it must be so localized as to rest on the mansion premises; and the testator, knowing this as a matter of law, intended that, if the mansion was taken by the widow, then Mrs. Taylor, to whom it was given, must lose it. Even if we were to concede the correctness of the proposition as to the first statement, that the widow must take the mansion in her dower assignment, the conclusion deduced is still a debatable proposition, and by no means follows as a logical result. But we are not prepared to assent to the correctness of the first proposition. We do not think that, prior to the allotment of dower, the widow acquires a freehold estate in the land at any place. She has no estate until assignment; afterwards she has. *Thompson v. Stacy*, 10 Yerg. 493; *Whyte v. Nashville*, 2 Swan, 364. She is not required to take the mansion

in her dower. She may waive it, and take dower elsewhere. The right to the mansion rests upon her choice alone, and it is not imposed upon her against her will. The heirs or devisees cannot require her to take it, but it is optional with her. If, in this particular case, she had elected to take the lands allotted to the Alexander children, would it be insisted that they would have been confined to the land refused by her to reimburse themselves? It is evident in this case that the testator did not intend his daughter and grandchildren should share equally in his bounty, but only in certain proportions, and this is not disturbed, but followed, by the conclusion reached by the court of chancery appeals; that is, the relative proportions of Mrs. Taylor and the Alexander children are attempted to be preserved as indicated in the will.

The guardian *ad litem* for the Alexander children presents still another view of the case, so far as their rights are concerned, which is that, by the will, they are remaindermen of a fourth of the tract of 630 acres of land offered to the widow for life by the will, but renounced and refused by her upon her dissent. It is insisted that, the widow having declined and refused to take this life estate in one half the land, the estates of the remaindermen were accelerated, and they became, immediately on her refusal, entitled to enter upon and enjoy this part of the land out of which the widow was, by the will, to have a life estate. This contention is based upon the holding of this court in *Robinson v. Harrison*, 2 Tenn. Ch. 11; *Waddle v. Terry*, 4 Coldw. 51; *Armstrong v. Park*, 9 Humph. 195; *Brown v. Hunt*, 12 Heisk. 405; *State v. Smith*, 16 Lea, 667. And this is unquestionably the general rule, but, under the facts in this case, the right or equity in Mrs. Taylor to compensation for her loss is superior to, and must prevail over, the right and equity of the remainderman to be accelerated. *Wood v. Wood*, 1 Met. (Ky.) 515; *Timberlake v. Parish*, 5 Dana, 352; *Jones v. Knappen* (Vt.) 14 L. R. A. 294, 295, and notes on page 295.

The decision of the Court of Chancery Appeals is affirmed, and the cause will be remanded to the chancery court at Columbia for the execution of the order made by that court, and the costs will be equally divided, as decreed by that court.

STATE of Tennessee, to Use of OVERTON COUNTY,

v.

Hardy COPELAND *et al.*, Appts.

(.....Tenn.)

1. An officer is not an insurer of the safety of public funds in his hands on a bond faithfully to perform his duties and to collect and pay over moneys, but responsible only for the exercise of good faith, diligence, prudence, caution, and a disinterested effort to keep and preserve the funds for those entitled.

NOTE.—As to the conflicting authorities on the liability upon an officer's bond for loss of money by bank failure, see *Wilson v. People*, *Pueblo & A. V. R. Co.* (Colo.) 22 L. R. A. 449, and note; also the case of *Fairchild v. Hedges*, *post*, 851.

31 L. R. A.

2. An officer is not to be considered as a debtor for public funds in his hands which he has no right to use in any way except for the purposes of his trust; and he holds them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities.

3. The liability of a county trustee who gives a bond faithfully to perform the duties of his office and collect and pay over school taxes, is fixed, not merely by the terms of his bond, but by the laws relating to his office.

4. A deposit of public funds in a bank of undoubted standing and reputation is not negligence or want of proper business prudence and caution on the part of an officer.

(March 2, 1896.)

A PPEAL by defendants from a judgment of the Overton County Chancery Court in favor of plaintiff in a proceeding to enforce liability on the county trustee's bond for money which he had not turned over. *Reversed.*

The facts are stated in the opinion.

Messrs. Vertrees & Vertrees, J. A. Barnes, W. W. Goodpasture, and W. H. Hussey for appellants.

Mr. G. B. Murray for appellee.

Wilkes, J., delivered the opinion of the court:

This is a bill against the defendant Hardy Copeland and others, as sureties upon his official bond as county trustee of Overton county, for school taxes deposited by him in the Nashville Savings Company, at Nashville, Tenn., called in the record and generally known as "Marr's Bank." Upon the hearing, the chancellor gave judgment against the defendants for \$3,119, and interest from October 12, 1895, and all costs, and the defendants have appealed and assigned errors. These assignments are as follows: (1) In finding that Mr. Copeland was not sufficiently careful and diligent; (2) in holding that Mr. Copeland should have acted only upon an examination of the bank, made or caused to be made, or upon knowledge; (3) in holding that Mr. Copeland, as trustee, was bound, in law, to account for and pay over this fund, unless it was lost by the act of God or the public enemy; (4) in rendering a decree against Mr. Copeland and his sureties for the full penalty of the bond, to be discharged upon the payment of \$3,119 and interest; (5) in rendering a decree against the defendants for said \$3,119, interest, and costs; (6) in not rendering a decree dismissing the bill.

Only two real questions are presented, the first of which is whether Copeland was an insurer of the safety of the funds in his hands, and the other whether, if not an insurer, he exercised that degree of care that he should have done for the safe keeping of the funds in his hands. We consider the first proposition primarily, for, if it be held that the trustee is liable for such funds in every event and under all contingencies, except when the loss arises from the act of God or the public enemy, then the latter question is immaterial, and need not be considered. The learned chancellor in the court below delivered a written opinion, from which the reasons and grounds of his decision may be gathered. He says: "I am fully satisfied that Copeland did not intend or ex-

pect to lose the money when he placed it in Marr's Bank, and he believed it was safe there until a very short time before the bank failed, and perhaps up to the date of its closing." The chancellor then adds: "In the view I take of the case, conceding that Copeland acted in good faith, believing that this bank was entirely safe, the question is, Can a trustee make such a defense avail him in case the money is lost by the failure of the bank?" And the chancellor finally says: "I am constrained to hold that the defendant Copeland and his sureties are responsible for the money under the facts of this case, both upon the ground that the defense set up in the answer that the bank had a good reputation, was an old bank of high standing, that the deposit was made in good faith and confidence, and lost by the failure of the bank and without negligence on the part of Mr. Copeland, was not good in law, and also that the facts do not establish that high degree of diligence that would excuse defendants from accounting for the money even under the rule requiring a 'faithful discharge of duty.' . . . This is not a question of intent. It is a question of diligence or negligence, in a legal sense." The question of the measure of liability of a public officer for funds in his hands is one of prime importance, and at the same time one upon which there is some diversity of opinion. In some cases, the liability of the officer is made to turn upon the terms of his bond and it is construed as having been enlarged, and made an absolute engagement to pay over the money in any event and under every contingency. In other cases, the officer is regarded as a debtor for the funds that go into his hands, and not a bailee or trustee of such funds. In other cases, the officer is held liable on broad grounds of public policy, and the obligations resting upon him are made absolute and unconditional, because a different construction would open up a door for fraudulent practices and evasions by public officials. The matter is forcibly presented in the notes to *State v. Harper*, reported in 67 Am. Dec. 363-373, and also in the case of *Wilson v. People, Pueblo & A. V. R. Co.* (Colo.) reported in 22 L. R. A. 451, and notes, where the several grounds of liability are referred to, and the cases cited under each.

Considering these grounds of liability in the order named, it is evident that the terms of the bond must have some weight in determining what the liability of the officer is. But the main object of the bond, under our law, is not to fix the limit of the officer's liability, but to superadd the security of the bondsmen to that of the principal. The liability of the bondsmen is outlined in the bond, but, after all, the extent of liability of both principal and sureties, and the obligations they are under, are fixed and limited by the statutes and laws relating to such officers. The bond required of the county trustee to cover school funds is a special one. Mill. & V. Code, § 712. The bond executed by the defendant is in these words: "Now, therefore, should the above bounden Hardy Copeland truly and faithfully perform the duties of the office of county trustee for the term of his office, and shall faithfully collect and pay over, within the time

and in the manner prescribed by law, to the proper officer designated by the laws of Tennessee to receive the same, all school taxes by him collected, or that ought to be collected during his said term of office, then his obligation to be void; otherwise to remain in full force and effect." The oath required of the officer is to the same effect as the bond. Mill. & V. Code, § 716. The trustee is required to keep the school funds separate from all others (Mill. & V. Code, § 1167); and to use it directly or indirectly, or to receive or agree to receive any fee or interest from any bank for the deposit or use of the money, is made a felony (Acts Ex. Sess. 1885, chap. 16). The bond does not, in terms, fix the extent of the officer's liability. That is regulated by law, and we are of the opinion that there is nothing in the terms of the bond or the requirements of the statutes that makes the officer liable as on contract to keep, at all hazards and under every contingency, and to pay over funds in his hands, but he is only obligated to pay according to law. Can he, under our law, be held as a debtor for the fund, and hence liable for it in any event? If so he is impliedly given the right to use the funds, to receive and retain interest upon them, and to use them as his own. In the cases holding this doctrine, it is laid down that, if the officer make a profit or interest by using the fund, he is not liable therefor, but the usufruct belongs to him. This is certainly not the theory of our law, which makes it a felony for the officer to use it directly or indirectly, or to receive or agree to receive any interest from any bank for the use or deposit of it; and not only is it contrary to the statute, but, in our view, it is an unwise policy to consider the officer as a debtor. He is a trustee charged by statute with certain duties and responsibilities, but having no right to use the funds for his own purpose or to make them his own.

The third class of cases so construes the bonds, and so fixes the duties of public officers holding public funds, as to make them insurers of the safety and forthcoming of the fund, upon broad grounds of public policy. The leading case holding this doctrine of strict accountability is that of *United States v. Prescott*, 44 U. S. 3 How. 589, 11 L. ed. 739. In that case the bond was conditioned to keep safely and pay over when required to do so, and the court held the officer liable although the funds were stolen without fault on the part of the officer. This was followed in *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319, where the condition of the bond was to pay over and account, and in *Boyden v. United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527, where the condition of the bond was to discharge all the duties, and, under the act of Congress, it was the duty of the officer to pay over. This was followed by the case of *United States v. Morgan*, 52 U. S. 11 How. 154, 13 L. ed. 643; *Berans v. United States*, 80 U. S. 13 Wall. 56, 20 L. ed. 531; *United States v. Keebler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574; *United States v. Watts*, 1 N. M. 553; *State v. Nevins*, 19 Nev. 162. The rule has been followed in many cases in the state courts, and evidently on the authority of the leading case. We cite only a few by way of illustration. In *State v.*

Moore, 74 Mo. 413, 41 Am. Rep. 322, the bond was "to perform all the duties," and the statute made it a duty to "deliver to his successor all money," and the officer was held liable for depositing money, as treasurer, in a bank of high standing that subsequently failed. In *Omrø Supers. v. Kaime*, 39 Wis. 468, the bond was "to faithfully discharge the duties," and "properly and legally disburse and pay all moneys," and the officer was held liable for a deposit in a bank of good reputation, but which afterwards failed. In *State v. Croft*, 24 Ark. 550, the condition was "safely to keep the money," and it was lost by failure of a bank reputed to be good, and the officer was held liable. See other cases cited in 22 L. R. A. 451, in the notes to the case of *Wilson v. People, Pueblo & A. V. R. Co.*, reported also in 19 Colo. 199, and 34 Pac. 944; *State v. Harper*, 67 Am. Dec. 363, and notes; 2 Am. & Eng. Enc. Law, p. 4661, 466m, notes 1, 2. It is evident that the chancellor followed the rule laid down in the *Prescott Case* and cases in harmony with it, and held defendants liable on grounds of public policy. He says:

"Ruin will occasionally fall upon an innocent man, but better this than to open a door for the escape of a dishonest custodian of the means wrung from the honest taxpayer for the support of the government and the education of the children." On the other hand and holding a modified or contrary doctrine, may be cited the case of *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89, decided in 1872, in which the case of *United States v. Prescott*, *supra*, was limited, and it was held that an officer would be excused by the act of God or the public enemy. It is there said: "The general rule of official obligations as imposed by law is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation." And again: "Where, however, a statute merely prescribes the duties of the officer as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility." By an act passed in 1866, the Congress of the United States provided that officers who lose public funds without fault or negligence may present the matter to the court of claims, and if that court find the fact to be that way, it shall be so certified, and the officer shall be given credit by the treasurer in his accounts. Since then, it has also been provided that certain classes of officers, like revenue collectors and clerks, shall deposit the funds in banks,—designated depositories of the United States. Consequently it appears that, when the act of 1866 and the decision in *Thomas's Case* are considered, the rule of liability with respect to United States

31 L. R. A.

officers is that they are not liable for public funds lost without fault or negligence on their part. It is evident that the rule laid down in the *Prescott Case* was considered too harsh and exacting, and Congress by the act of 1866 prescribed a different degree of liability.

There are other cases, however, which have not followed the *Prescott Case*, among which may be cited *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675. In this case it appeared that the county treasurer had deposited the public money in his hands in a savings bank. The bank failed, and the money was lost. The bank had a good reputation, and the money was deposited to his credit as treasurer. The court held that he was not liable. The court stated the rule of liability as to trustees, receivers, administrators, guardians, and the like, and then asks: "If it would be wrong in principle to hold a private trustee responsible for loss which no care of his could have prevented, would it not be equally wrong to hold a public officer responsible under like circumstances?" The question is answered in the affirmative by the opinion. *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284. In this case the county treasurer had money in his safe in his office. Robbers came in, and beat him up, and then robbed the safe. The court below ruled that it was no defense, but, on appeal, the supreme court held that it was a good defense, and that he was not liable. The case is well reasoned, and announces the rule of the common law. In reviewing the cases which follow *Prescott's Case*, Virgin, J., says: "Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in relation to the new born public policy, based upon supposed facility or temptation, which depositories of the public money are said to possess for collusive robberies. 'For,' as was said by Redfield, J., in *Bridges v. Perry*, 14 Vt. 262, 'we cannot believe that they are founded upon any just warrant, either of sound judgment or constant experience.'" This case was approved in the later case of *Strout v. Pennell*, 74 Me. 262. In Alabama it is held that a tax collector who, without fault, is robbed by irresistible force, is not liable for the money of which he is robbed. *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59. The court of appeals of New York considered the question in *People, Nash, v. Faulkner*, 107 N. Y. 477. In that case it appeared that the surrogate deposited moneys in his hands, which were the proceeds of judicial sales, in a private bank, which failed. He received interest on the fund, for the benefit of the litigants, but it was deposited subject to check or demand. The court recognizes the distinction between public funds and private moneys of litigants, and it also reviews the Federal cases in the light of the act of Congress of 1866 and the case of *United States v. Thomas*. The common-law rule of liability was declared to be the true one, and care and good faith to be the measure of liability. As the banker in that case was a man of good standing, and there was no negligence, the surrogate was held to be not liable. This case also recognizes the present condition of things.

—that it is the part of prudence to keep funds in bank, or the best and safest place. *Wilson v. People, Pueblo & A. V. R. Co.* 19 Colo. 199, 23 L. R. A. 149. In this case, a clerk of a court deposited the money in his hands as clerk in a bank of good standing. The bank broke, and the fund was lost. It was held that the clerk was not liable. Among other things, the court, through Goddard, J., said: "From the agreed facts it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and in doing so acted as prudent men ordinarily do with their own funds. The judgment of the court below must therefore be upheld, if at all, upon the principle that the conditions of his official bond imposed upon him an absolute obligation to pay the money when required, and that no exercise of diligence on his part will exonerate him from such obligation. Such is the contention of counsel for appellee, and for its support he relies on the case of *United States v. Prescott*, 44 U. S. 3 How. 578, 11 L. ed. 734, decided by the Supreme Court of the United States in 1845, as the leading case, and several other cases in that court, as well as some decisions by state courts, which approve and follow the doctrine therein announced. In these cases in which the rule contended for was sustained, the court had under consideration the liability imposed by the official bond of receivers of public money, and the conclusions arrived at were influenced largely by considerations of public policy. Whether the case at bar is sufficiently analogous to these cases to bring it within the rule therein announced it is unnecessary to decide, since the Supreme Court of the United States in a later case has very much modified, if it has not in effect overruled, the extreme doctrine laid down in its earlier decisions. In the case of *United States v. Thomas*, 82 U. S. 15 Wall. 387, 21 L. ed. 89, Justice Bradley, in speaking of the leading case of *United States v. Prescott*, *supra*, said: 'After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required: "The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it when required can discharge the bond." This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, . . . and as the money in the hands of a receiver is not his,—as he is only custodian of it,—it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law.' And, after reviewing the principal cases relied on by appellee, he further said: 'So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges, in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evi-

dently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing, and a condition to do the same thing, inserted in a bond. In the latter case, the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case.

The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default is made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes.' While the majority opinion distinguished the case under consideration from those preceding it, we think the reasoning of the learned justice who wrote the opinion logically and necessarily overrules the doctrine laid down in the former cases. If, as therein announced, the obligation imposed by the bond is absolute, and the officer was an insurer of the money received by him, how could the manner or cause of its loss affect his liability? Wherein is he more at fault when overpowered by one or two robbers than he is when intimidated by an army? Justice Miller refused to concur in the majority opinion, because it did not frankly overrule those cases and abandon the doctrine on which they rested, and in his dissenting opinion stated his personal views upon the question, as follows: 'When the case of *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 13 L. ed. 319, came before the court, I was not satisfied with the doctrine of the former cases. I do not believe now that, on sound principle, the bond should be construed to extend the obligation of the depository beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that, prior to these decisions, there was any principle of public policy recognized by the courts or imposed by the law, which made a depository of the public money liable for it when it had been lost or destroyed without any fault or negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safekeeping.' We believe the true rule is that a public officer who receives money by virtue of his office is a bailee, and that the extent of his obligation is that imposed by law; that when unaffected by constitutional or legislative provisions, his duty and liability is measured by the law of bailment. If a more stringent obligation is desired, it must be prescribed by statute: that his official bond does not extend to such obligation, but its office is to secure the faithful and prompt performance of his legal duties. Instances where the Constitution and

statutes of the state have increased the common-law liability of certain officers have been recognized by this court in two cases at least. In the case of *State v. Walsen*, 17 Colo. 170, it was held that, by the constitutional provisions, the state treasurer was made absolutely liable for state moneys received by him; and in the case of *McClure v. La Plata County Comrs.* 19 Colo. 122 (recently decided), it was held that a county treasurer, by virtue of the statute regulating the duties of his office, was a bailee with express and extraordinary liability. No constitutional or statutory provision in this state imposes a more stringent obligation upon a clerk of the district court than that imposed by the common law. This rule of common law, as laid down by Justice Story, is as follows: 'In respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence. If the property is lost or injured by any negligent or dishonest execution of the trust, they are liable in damages.'

The degree of diligence which officers of the court are bound to exert in the custody of the property seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services.' Story, Bailm. § 620. It is insisted in argument that this doctrine refers only to specific property, and does not apply to money deposited with the clerk, because it is assumed that he holds the relation of debtor to the fund, and therefore may use it as his own. To this we cannot agree. The money received by him is a trust fund, and a conversion of it to his own use would constitute embezzlement, and subject him to criminal prosecution. The defendant, Wilson, as appears from the agreed facts, did not mix the money in question with his own funds, or in any manner treat it as his own. He deposited it in the bank as clerk, and the bank had notice thereby that the money so deposited was held by him in his official capacity. At the time of the deposit the bank was in good standing. We think, under the circumstances, he is not chargeable with any fault that should render him or his sureties liable for the loss. The judgment of the court below will be reversed, with directions to enter judgment for defendants."

This principle has been recognized and announced in Tennessee. In *The Governor v. M'Even* (1842) 5 Humph. 265, it was declared that the liability of public officers is to be determined like that of private trustees; or, as Reese, J., expressed it, "the measure of fiduciary responsibility, in the view of a court of chancery, will be the same, whether arising from public or private relations." In *Peck v. James* (1859) 3 Head, 76, the rule was reaffirmed. James, the trustee of Granger county, moved against Peck, his predecessor in office, for a balance of school funds in his hands. Thereupon Peck filed a bill to be exonerated, on the ground that the money had been paid to him in bills of the Bank of East Tennessee, but that the bank broke before he was required to pay out all the fund, and while a balance of \$680 in these notes remained in his hands. It

was held that the trustee was entitled to be exonerated. "We think," said Caruthers, J., "the principle settled in the case of *The Governor v. M'Even*, 5 Humph. 265, must govern this. It is held in that case that 'the measure of fiduciary responsibility, in view of a court of chancery, will be the same, whether arising from public or private relations;' and that in the absence of bad faith, the same fair and equitable principles of adjustment which govern the subject of agency in general will be applied to and regulate the accountability of public agents." There are other cases where the officer and his sureties were held liable, but upon other grounds, which do not exist in this case. In *Hill v. Alston*, 12 Heisk. 569, the clerk and master of Shelby county was held liable for money lost by the failure of the bank in which it was deposited. It appeared that the money was deposited in his individual, and not in his official, name. The money so deposited was partly money he had received officially and partly his own private means. Interest was paid to him on these deposits. He was held liable on the ground that the money was deposited with his personal money to his individual credit, under an agreement to receive interest thereon. The inference is undeniable that, if the facts had been otherwise, the clerk would not have been held liable. In *Comfort v. Patterson*, 2 Lea, 670, the question was whether a clerk and master could set off a claim on account of a deposit made in a broken bank, against a note the bank held against him. The facts were that the deposit was to the credit of "M. L. Patterson, C. & M." It really consisted of (1) his individual means, (2) and costs to which he was entitled, (3) and funds received officially. A few days before the bank failed, he deposited \$1,500 of his individual means to the credit of this account. The note against which he pleaded the set-off was only for \$1,000. It was held that this plea of set-off was good. It was held that the clerk's "individual" share of the fund exceeded his indebtedness, and could be set off against it. The question was reserved whether he could set off the balance of the fund against an individual claim. It was said, by way of dictum, that funds of various cases, deposited in one general deposit in the officer's name as clerk and master, "without any designation of the case or party entitled," would be personal, and the words would be *descriptio personae*, "not altering the rights of either party."

We think that it is not in accord with the spirit of our decisions, whatever it may be elsewhere, nor with sound public policy, to hold a public officer liable for public funds as an insurer. His obligation is the same as that prescribed by the common law, which is that he discharge his trust with diligence, prudence, caution, and good faith, such as prudent persons bestow upon their own important affairs. This is the rule laid down in *Meecham*, Pub. Off. § 301; *Murfree*, Off. Bonds, § 197; *United States v. Thomas*, 82 U. S. 15 Wall. 342, 21 L. ed. 91; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284. Under such rule, a private trustee is not liable for money lost by the failure of a bank, when the reputation of the bank is good, and the money is deposited in good faith to the trustee's credit, separate

and apart from his own (1 Perry, Tr. 443; *Lietz v. Mitchell*, 12 Heisk. 676); and the same rule applies to an administrator (*Willeford v. Watson*, 12 Heisk. 476), or an executor (*Pritchard, Wills*, 699). It is difficult to see what just end or sound public policy can be subserved by adopting a different rule as to public officials. If a public officer is held to be an insurer against loss when he exercises the utmost diligence, caution, and good faith, it will result that no man of any financial standing or business prudence would accept a public trust which involves the handling of public money. There would be but little inducement to act honestly and in good faith, since neither would avail against an unforeseen and unavoidable casualty. We are of opinion that, under our statutes and decisions, a public officer intrusted with public funds is not an insurer against loss, but is liable only if he acts without proper diligence, caution, prudence, and good faith. We think this is the sound rule, notwithstanding the weight of earlier authority holding the contrary doctrine, and all or nearly all based upon the *Prescott Case*.

We proceed, therefore, to examine whether Copeland, the trustee, did exercise the proper diligence, caution, prudence, and good faith necessary to absolve him from liability for the loss in this cause. He had in his hands \$5,000 of public money, which he deposited in Marr's Bank on the 9th of February, 1893. He could not, at the time, lawfully pay it out, and it was his duty to keep it. Before making the deposit in that bank he consulted the judge of the county court of Overton county, and requested him to have the court designate a place to put the fund until he was called upon to pay it out, stating that he would put it anywhere the court would select. He advised with Mr. Windle, one of his bondsmen, and a good business man and merchant, as to where it should be placed, and Windle suggested that the local bank of Livingston, in Overton county, could be easily robbed, and advised that it be kept in some Nashville bank. The trustees of the county, for several years, had, as a matter of safety, deposited the public funds under their control in Nashville and Sparta. He conferred with many persons, who advised that it be placed in some good bank. Marr's Bank stood high at the time. Defendant's bondsman, Windle, recommended it. He was advised by Judge Goodpasture, a former resident of Overton county, a man of experience and substance, to select Marr's Bank, with the statement that he had been depositing in it for twenty-six years. He was then residing at Nashville, and depositing in it. It appears to have been the only bank in Nashville that did not close its doors in the panic of 1873. The reputation of the bank at Nashville, as well as elsewhere, was excellent. It had been in apparently successful operation for thirty years. Other bankers, lawyers, and business men of Nashville say that its reputation was above suspicion. The money was put to his credit as trustee, and was not mixed with any funds of his own. It remained until June 13, 1893, when Copeland attempted to draw it out. After persistent demands, \$2,000 was paid, and then the remaining \$3,000 was again persistently demanded. The whole of it was

all the time subject to check on demand. The bank could not pay the \$3,000 and suspended, and assigned on the next day, and proved to be totally insolvent, and only a *pro rata* of about 6 per cent, or \$180, has ever been received since its suspension. It is said, however, that the deposit was made with an understanding that Copeland was to receive 6 per cent interest on it, and interest was subsequently entered up on the account on the books of the bank, the amount being \$42.50, as of date March 31, 1893. Copeland denies positively that he ever received a cent of interest, directly or indirectly, or that there was any agreement that he should receive any. It appears to have been the custom of the bank to enter upon the pass book of the customer the fact that interest was to be allowed, when such was the agreement, and no such entry was made upon the pass book given to Mr. Copeland. There was, however, an entry made on the ledger of the bank, after the name of Copeland, trustee, "6 per cent." This is explained by Mr. Freeman, the bookkeeper, with the statement that the "country accounts" of the bank were, as a rule, interest-bearing, and he so entered it without any instructions to do so. Marr gives the same explanation. All the witnesses, Marr, Freeman, Copeland, and Goodpasture, state that no interest was to be paid; Marr's statement being somewhat indefinite and negative in character. It appears that, previous to this, Copeland had some funds in the local bank of Livingston, which offered to pay interest on the deposit, which Copeland refused; but he did accept a gratuity, as he says, a present, in consideration of his deposit, and a credit of 2 per cent was entered on his account on several occasions.

The statement of the president and cashier of the bank at Livingston are given, and from these we get the only intimation of fact which tends to show any want of good faith and unselfish action on the part of Copeland, outside of the book entry to which we have already referred. It appears that the defendant Copeland had \$1,700 on deposit in this bank, and drew it out only a day or two before making the deposit in Marr's Bank. He had kept his money in this bank for a year or two, and had been paid interest or a gratuity as before stated. It is argued from this, and the entry upon the ledger at Marr's Bank, that Copeland was to have interest from the latter bank at the higher rate of 6 per cent instead of 2, as paid by the Livingston Bank. Mr. Estes, the cashier of the Livingston Bank, states that, a short time before the failure of Marr's Bank, he met with Copeland in Nashville. At that time there was a financial panic all over the country, which had affected the country banks as well as the city banks of Nashville. The Capital City Bank of Nashville closed, and on the next morning witness had a conversation with Copeland, in which the distressed condition of all the banks was commented upon, and in that conversation Copeland stated that he had his money in Nashville, and was a little uneasy about it. Witness said to him, if he would take his deposit back to the Livingston Bank, he could check on it at any time, and he and Miller, the president, would go security for the bank, and allow 4 per cent interest on

the deposit. Copeland replied, "Can't you beat that?" and witness responded that he could not and would not; and Copeland thereupon replied, "I can beat that here in Nashville." He then adds, but in a very indefinite way, that he intimated to Copeland that Marr's Bank was unsound, and Copeland then referred to the Fourth National of Nashville, and left witness under the impression it was in the Fourth. A few days thereafter Copeland was in Livingston, and stated to witness that he had seen Miller, the president, and he had agreed to the proposition witness had previously made. On this occasion witness states that he again referred to the unsoundness of Marr's Bank. He proves that he and Miller, at that time, were worth \$20,000 of property free from incumbrance and subject to execution. On cross-examination he states that Copeland did not say, in the Nashville conversation, that he could do better because he could get a higher rate of interest. He was also examined as to the condition of the Livingston Bank, and stated that it had a capital of \$20,000; that it owed depositors, at the date Marr's Bank failed, \$37,307.04, and had cash \$4,527, and loan notes, \$28,700; that it had tied up in the Commercial National Bank, which had then failed, \$20,080.80; that after the failure of the Commercial National Bank the Livingston Bank borrowed all the money it could get, and paid 10 to 12 per cent for it from some parties, and lower rates to others, the cashier and president going the bank's security. Miller corroborates Estes in many particulars. He states, in addition, that he offered Copeland interest on his deposit, which Copeland declined, but said he would accept a gratuity; that they borrowed all the money they could get to tide their bank over the financial troubles. Copeland, being recalled, states that in the conversation at Nashville, no mention whatever was made of Marr's Bank, and only upon one other occasion, when Mr. Estes, referring to one of Marr's circulars, said that his bank would break some day. He corroborates Estes and Miller about the proposition to return the funds to the Livingston Bank, and that Miller and Estes would be securities, and allow 4 per cent interest, to which he replied he could beat that,—meaning that he could beat it by keeping the money safe, for he had examined into the condition of the Livingston Bank after the failure of the Commercial, and did not consider it safe, and knew that it was borrowing all the money it could get. He consulted with attorneys and others, and was advised not to return his money to the Livingston Bank, and in this he is corroborated by several witnesses. This is the substance of all the testimony as to the condition of the bank and the caution and care exercised by defendant Copeland in regard to it.

It is said that defendant had no right to deposit it in any bank; that by so doing he simply parted with the money, and made the bank his debtor; that he could not loan the money directly to a bank or an individual; that a deposit is virtually a loan; and that it should have been kept as a special deposit in some vault or safe. This argument, we think, is quite plausible, but is more specious than sound. If the money had been deposited in a vault of a bank, or in a safe, and lost, under the authorities

cited and relied on by plaintiff the defendant would still have been liable, even though it had been placed in a safe furnished for that purpose by the county or state authorities. *Jefferson County Comrs. v. Lineberger*, 3 Mont. 231, 85 Am. Rep. 462; *Wilson v. People, Pueblo & A. V. R. Co. (Colo.)* 22 L. R. A. 451, note. The question resolves itself into a business proposition, whether it is more prudent to deposit the money in bank, or place it as a special deposit in some vault or safe. The consensus of public opinion and the almost universal trend of business transactions are in favor of the former proposition, bearing in mind that the funds must be kept separate and apart, and must be put to the proper credit, and be subject to immediate check, and placed in a bank whose reputation is above question, and the deposit made in good faith, and not because of personal benefits or advantages which may accrue to the officer. Our act, making it a felony to receive interest upon money deposited in bank by a public officer, impliedly conceives that it may be deposited in bank. The liability of banks for special deposits is quite limited. If the deposit is for hire, then ordinary care only is required. If no hire or compensation is paid, only slight care is required, and the bank is only liable for gross negligence. 2 Am. & Eng. Enc. Law, pp. 95, 96, and notes. The law allows an officer no compensation to be used in the hiring of a special deposit.

We do not consider a public officer a special bailee, in the sense that he must keep the identical funds which he collects, and pay them out. If this be held, it must necessarily result in much embarrassment and confusion. In the first place, it would necessarily follow that the collector must receive only gold, silver, or such money as is a legal tender, for he could only require those who have demands against the fund to receive such legal tender. Again, he must handle this fund every time it becomes necessary to make a payment out of it, and thus expose it upon every occasion when it is necessary to handle it. It would also follow that he must have it in such shape, denominations, and amounts as would enable him to make the exact change necessary to pay each claimant; otherwise, he would be compelled to mingle other funds with it, and thus destroy its integrity as the original money received. It would prevent the giving of checks, which are so necessary to the prompt and proper despatch of business and keeping of accounts in everyday transactions.

The learned chancellor was of opinion that due caution and diligence were not used by defendant. He says: "In this case the defendant made no personal examination, nor did he have any examination made, as to the solvency of Marr's Bank, nor had the bank officials made any publication for a long while of its condition, as required by its charter. He took the opinion of his friends, whom he confided in; but the opinions given were not based upon any examination or actual knowledge as to the solvency of the bank." Nothing can be predicated, to the prejudice of the defendant, that he did not make or cause to be made a personal examination of the bank. Such an examination, except perhaps by an expert, would have resulted in nothing reliable. Nor would any

bank of standing submit to a personal examination by its customers. The standing of a bank can alone be determined by outsiders, by its mode of doing business and its reputation in business circles. The fact that it did not make the stated publications required by law is a circumstance to be considered, with all others, bearing upon the question of due caution in its selection, and must be considered in connection with the fact that, although the law stood upon the statute books, it had not been observed by state banks. The want of such publication is a failure to comply with the law, but, under the circumstances, not an indication of unsafe condition.

The conclusions to which we come, upon an examination of the entire record, are:

1. That the defendant was not an insurer of the safety of the public funds in his hands, but responsible only for the exercise of good faith, diligence, prudence, and caution, and a disinterested effort to keep and preserve the fund for those entitled.

2. That it was neither negligence nor want of proper business prudence and caution to deposit the funds in a bank of undoubted standing and reputation; and Marr's Bank, at the time of the deposit, had such standing and reputation.

3. The defendant Copeland cannot be considered as a debtor for the funds in his hands, but, on the contrary, had no right to use them in any way, except for the purposes of his trust; and he held them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities.

4. The measure of the trustee's liability is fixed by the laws relating to his office, and not

merely by the terms of his bond, and there is no unconditional obligation to pay under any and every contingency. The primary object and purpose of this bond are, not to fix or define the limit of his liability, but to superadd to his personal responsibility the security of his bondsmen; and the liability of both principal and sureties under the bond is fixed by the laws relating thereto.

5. The weight of the evidence is that there was no agreement that interest should be paid upon the deposit by Marr, and defendant Copeland was not influenced by this consideration to make the deposit in that bank.

6. The defendant Copeland was justified in not returning the funds to the Livingston Bank, when the president and cashier of that bank suggested that it be done. The proposition made by the president and cashier to induce its return was an illegal one, so far as interest promised was concerned, and was calculated to arouse suspicion as to the condition of the bank. Nor would it have been an act of prudence, under the facts in this record, to return the fund to that bank, in its condition at that time, even though it was secured by the personal indorsement of the president and cashier. The liability of the bank, as well as these officers, was at that time too great to warrant the trustee in putting his funds into their hands, even on the security offered.

7. The decree of the chancellor, in holding the defendant Copeland and his sureties liable for the funds deposited in the Nashville Savings Company, and which were lost by its failure, is erroneous under the facts in this record, and must be reversed, and the bill must be dismissed.

WASHINGTON SUPREME COURT.

James C. FAIRCHILD, *Appt.*,

v.
John B. HEDGES, Treasurer of Pierce
County, *et al.*, *Respts.*

(..... Wash.)

The loss of public money by a bank failure will not prevent liability of the county treasurer upon his bond to pay the money as the commissioners shall direct, although he was not negligent in selecting the bank and the county had not provided a suitable and safe place in which to deposit the money.

(February 27, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of defendants in an action brought to compel defendants to accept certain certificates of receivers of an insolvent bank in settlement of plaintiff's account as former treasurer of said county. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to the conflicting authorities on the liability upon an officer's bond for loss of money by bank failure, see *Wilson v. People, Pueblo & A. V. R. Co.* (Colo.) 22 L. R. A. 449, and *note*; also the case of *State, Overton, v. Copeland* (Tenn.) *ante*, 844, 81 L. R. A.

Messrs. Snell & Bedford, for appellant:

The various courts have taken two views upon the question of the liability of officers.

Mechem, Pub. Off. § 801.

Since *Marx v. Parker*, 9 Wash. 478, that question has been absolutely and finally settled in favor of the less stringent or bailee theory. The line of authorities holding in favor of the bailee theory are:

United States v. Thomas, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *People, Nash, v. Faulkner*, 107 N. Y. 477; *Albany County Supers. v. Dorr*, 25 Wend. 440; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Wilson v. People, Pueblo & A. V. R. Co.*, 19 Colo. 199, 22 L. R. A. 449; *McClure v. La Plata County Comrs.* 19 Colo. 122; *State v. McFetridge*, 84 Wis. 478, 20 L. R. A. 223; *Story*, Bailm. 620; *Perry, Tr.* § 441; *Bridges v. Perry*, 14 Vt. 262; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *Odd Fellows Mut. Aid Assn. v. James*, 63 Cal. 599, 49 Am. Rep. 107.

Such a deposit is not a loan even though the statute provides that the commissioners shall once a quarter count the money in the hands of the treasurer.

State v. McFetridge, supra; Moulton v. Mc.

Lean, 5 Colo. App. 454; *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *Wilson v. People*; *Pueblo & A. V. R. Co., Cumberland County v. Pennell*, and *People, Nash v. Faulkner*, *supra*; *Tillinghast v. Merrill*, 77 Hun, 481; *York County v. Watson*, and *Bridges v. Perry*, *supra*.

Messrs. Colner & Shackleford, for respondents:

Where a general deposit of money is made in a bank, the title to the money passes to the bank; the relation of debtor and creditor arises between the depositor and the bank.

The only duty of the bank is to pay the depositor a like amount of money upon demand. It is a loan.

Phenix Bank v. Risley, 111 U. S. 125, 28 L. ed. 374; 1 Morse, Banks & Banking, 3d ed. § 289; 2 Am. & Eng. Enc. Law, pp. 93, 94; *Story*, Bailm. 9th ed. 88; *State v. Keim*, 8 Neb. 68.

There is no difference in law between a loan to a banking corporation, copartnership, or company, and a loan to any other kind of a corporation, company, or copartnership, or to an individual.

There is no difference between a deposit with a bank and a deposit with a mercantile firm or copartnership.

Payne v. Gardiner, 29 N. Y. 146.

Any use of the public moneys except as authorized by law is unlawful.

Marr v. Parker, 9 Wash. 473; *State v. Krug*, 12 Wash. 288.

The treasurer is absolutely liable for the moneys entrusted to his care, and must account for and pay over the identical moneys received, or moneys of equal value and amount.

Throop, Pub. Off. 222, 223; *State v. Nevin*, 19 Nev. 162; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 323; *Perley v. Muskegon County*, 32 Mich. 131, 20 Am. Rep. 637; *Lowry v. Polk County*, 51 Iowa, 50, 33 Am. Rep. 114; *Griffin v. Mississippi Levee Comrs.* 71 Miss. 767; *Rose v. Douglass Twp.* 52 Kan. 451; *Wilson v. Wichita County*, 67 Tex. 647; *McKinney v. Robinson*, 84 Tex. 489; *Tillinghast v. Merrill*, 77 Hun, 481; *Ward v. School Dist. No. 15*, 10 Neb. 293; *Nason v. Directors of the Poor*, 126 Pa. 445.

Gordon, J., delivered the opinion of the court:

The appellant was, for four years prior to January, 1895, the qualified and acting treasurer of Pierce county, and the respondent Hedges succeeded him as such treasurer. The respondents Holmes, Rogers, and Bartholomew constitute the board of commissioners, and the respondent Gloyd is county auditor of said county. From the record it appears that, during his terms of office as such treasurer, the appellant deposited sums of money coming into his hands as such treasurer in various banks, some of which banks thereafter failed, and this proceeding was instituted by the appellant to compel the respondents to accept, in settlement of appellant's account as treasurer, certain receivers' certificates of insolvent banks. The petition asserts that the deposits were with the knowledge of the respondents, in accordance with his business custom; either the county of Pierce nor the

board of county commissioners of said county provided him with any safe place for keeping the funds; that the safest and surest manner of keeping them was to make a deposit of them in reliable banks of good standing in the community; that the several banks selected by him as places of deposit were of high standing and repute, etc. The lower court sustained respondents' motion to quash the affidavit upon which the application for a writ of mandate was based, and, the relator electing to stand thereon, judgment of dismissal was rendered, from which he appeals. For a better understanding of the nature of the controversy, we quote the following from the opening statement contained in appellant's brief, *viz.*: "The question at issue in this action is narrowed by agreement of parties to the consideration of the one question, to wit: 'Is the county treasurer of Pierce county, Wash., liable personally or upon his bond for money deposited in a bank which afterwards becomes insolvent, in a case where there is no charge of negligence or want of care in any degree against the treasurer, and where it is further admitted that the county has not provided a suitable and safe place in which to deposit the amount of money which may come into the treasurer's hands?'"

Appellant's contentions are: (1) That the treasurer is not the debtor or insurer of the money that comes into his hands, but only the bailee for hire, or trustee of an express trust, who was only responsible for the exercise of good faith and reasonable skill and diligence in the discharge of his trust; and (2) that there is no statutory or constitutional inhibition against depositing such funds in the banks for safe-keeping; that, under the circumstances, it was his duty to so deposit said funds; and that he would be liable for negligence only in selecting such depositories. Section 5, art. 11, of the Constitution of the state, requires that "the legislature shall provide the strict accountability of the said officers [referring to the county officers] for the fees which may be collected, and for all public moneys which may be paid to them, or officially come into their possession." The statute makes it the duty of the county treasurer to receive all moneys due and accruing to the county, and disburse the same in the manner provided by law, and requires him, before entering upon the duties of his office, to give a bond to the county, conditioned, among other things, that "all moneys received by him for the use of the county shall be paid as the commissioners shall from time to time direct, except where special provision is made by law for the payment of such moneys, by order of any court, or otherwise, and for the faithful discharge of his duties." 1 Hill's Code, § 211. An examination of all the authorities has satisfied us that, while such officers are bailees, "they are special bailees, subject to special obligations," and that "it is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility." *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89. "His liability is to be measured by his bond, and that binds him to pay the money." *Boyden v. United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527.

On this branch of the case, this court, in

Marx v. Parker, 9 Wash. 478, after reviewing the authorities bearing upon the proposition, said: "It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a bailee, or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have had no control. But in every such case it was held that his liability was absolute, and the true reason under *United States v. Thomas*, *supra*, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law." We take it that it is fundamental in the law of bailments that the amount of care which the bailee is required to take of the goods or property intrusted to him may be expressly fixed by the contract, and that it is only in the absence of an express agreement that the law presumes it to have been the intention of the parties that a bailee for hire (other than common carriers and the like) is required to exercise only ordinary care, prudence, and caution in the custody and control of the property with which he is intrusted. In the well-considered case of *Pine Island Bd. of Edu. v. Jewell*, 44 Minn. 427, the court says: "There is some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public moneys without negligence or fault on the part of the officers. While in some cases the rule of responsibility of bailees for hire has been applied, exonerating officers who have been found guiltless of negligence, this measure of responsibility is not generally accepted. The great weight of authority in this country will sustain the general propositions, with respect to the liability of such officers and their sureties for the loss of public moneys, that where the statute, in direct terms or from its general tenor, imposes the duty to pay over public moneys received and held as such, and no condition limiting that obligation is discoverable in the statute, the obligation thus imposed upon and assumed by the officer will be deemed to be absolute, and the plea that the money has been stolen or lost without his fault does not constitute a defense to an action for its recovery; that the rule of the responsibility of bailees for hire is not applicable in such cases; that, where the condition of a bond is that the officer will faithfully discharge the duties of the office, and where the statute, as before stated, imposes the duty of payment or accountability for the money, without condition, the obligors in the bond are subject to the same high degree of responsibility; and that the reasons upon which these propositions rest are to be found both in the unqualified terms of the contract and in considerations of public policy." In *Wilson v. Wichita County*, 67 Tex. 647, the court says: "It is too well settled to require discussion that an officer who is custodian of public money does not occupy the relation of a mere bailee for hire, who is responsible only for such care of the money as a prudent

man would take of his own. He is bound to account for and pay over the public money." In *Rose v. Douglass Twp.* 52 Kan. 451, the court says: "By accepting the office of township treasurer, McNabb assumed the duty of receiving and safely keeping the money of the township, and paying it out according to law. He or his sureties are bound to make good any deficiency which might occur in the funds which came under his charge, whether they were lost in the bank or otherwise." In *Griffin v. Mississippi Levee Comrs.* 71 Miss. 767, it is said: "The idea that the tax collector may make a general deposit of public money in bank, and thereby absolve himself from liability to pay over as he is by law required to do, is so utterly unreasonable as to need no combating. Like all others depositing funds in bank, the tax collector took the risks involved in so doing. The state looks to its officer, and the officer must look to his unreliable or unfaithful banker." In *Nason v. Directors of the Poor*, 126 Pa. 445, the court speaking through Chief Justice Paxson says: "The failure of the bank in which the defendant deposited the money is no defense. A receiver of public money, who has given bond for its safe-keeping, is not discharged from liability therefor by the failure of his banker." In *Ward v. School Dist. No. 15*, 10 Neb. 298, the court says: "It was Ward's duty, under the law, to keep the money securely. . . . The money was within his control, placed there by force of the statute, and if he saw fit to intrust it to the care of another, he did so at his peril." In *Taylor Dist. Twp. v. Morton*, 37 Iowa, 550, the defendant, as township treasurer, had given a bond conditioned (pursuant to the statute) that, "if the said M, as treasurer, shall faithfully and impartially discharge the duties of said office as required by law, then this obligation shall be null," etc. It was held that the defendant was absolutely liable for all moneys coming into his hands, and that he could not plead, as a defense, that the money was, without his fault or negligence, stolen from him, the court saying: "These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies which are already so frequent as to cause alarm." In *Com. v. Comly*, 3 Pa. 372, Mr. Chief Justice Gibson says: "The keepers of the public moneys, or their sponsors, are to be held strictly to the contract; for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant." In addition to the foregoing, the following cases are to the same effect: *Halbert v. State*, *Martin County Comrs.*, 22 Ind. 125; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 368; *New Providence v. McEachron*, 33 N. J. L. 339; *State v. Clarke*, 73 N. C. 255; *Jefferson County Comrs. v. Lineberger*, 3 Mont. 281, 35 Am. Rep. 462; *Thompson v. Township 16*, 30 Ill. 99; *McKinney v. Robinson*, 84 Tex. 489; *Tillinghast v.*

Merrill, 77 Hun, 481; *Baily v. Com.* (Pa.) 10 Atl. 764.

We think that, by the great weight of authority upon the question, an officer, such as a county treasurer, under our law, is held to the rule of strict accountability. As is said in *Thompson v. Township 16*, *supra*, "They know well, on assuming their positions, the hazards to which they are exposed, and they voluntarily assume the risks, and are paid for so doing." And if "it appears to be a harsh measure of justice to hold that the treasurer and his sureties are liable, on his official bond, for the money deposited under the circumstances disclosed in the affidavit of defense, and subsequently lost without his fault or negligence, it is impossible to reach any other conclusion without ignoring the authority of well considered cases." *Baily v. Com. supra*. We have examined all the cases cited in the able brief of the appellant bearing upon this proposition, but are unable to perceive that they are in conflict with the doctrine above laid down. A single case need only be referred to,—*Law's Estate*, 144 Pa. 499, 14 L. R. A. 103. It was there held that the guardian, who deposited the moneys of his ward in a bank believed by him to be solvent, was not liable for the funds so deposited upon the failure of the bank. We think that the distinction is very clear between the liability and duty of one receiving moneys as a guardian, for the benefit of a private individual, and the liability imposed by statute and by express undertaking upon a public officer as in the case at bar. As to the former, "he is merely the trustee or agent of the private parties interested in the money, and no greater or higher responsibility should be imposed upon him than would be imposed upon any agent or trustee. *People, Nash, v. Faulkner*, 107 N. Y. 488. The loss in this case was not occasioned by the act of God or a public enemy, and we are not called upon to decide whether, under the circumstances attending such a loss, the officer would be exempt from liability. This conclusion necessarily leads to an affirmance of the judgment entered below, and renders it unnecessary to decide whether a county treasurer may lawfully deposit the funds of his county in a bank or banks.

Affirmed.

Anders, Scott, and Dunbar, JJ., concur.

Hoyt, Ch. J., dissenting:

I am unable to agree with the conclusions of the majority, stated in the foregoing opinion. I think that money coming into the hands of a county treasurer, as such, belongs to the county, and not to the treasurer; that the relation of debtor and creditor is not created. He holds it as trustee for the county, and is only responsible for the exercise of such care in its safe-keeping as is required of a trustee for hire. Under the statute and the obligation which he gives, he is bound to properly discharge the duties of the office, one of which is to exercise due care in safely keeping the funds of the county. But it is a strained construction of such statute and obligation which makes him the guarantor of such safe-keeping.

R. A.

If it is a part of his duty to produce the money regardless of contingencies, he should be allowed to do what he pleases with it until called upon to so produce it. It is unfair and illogical to say that he is personally responsible for the safe-keeping of the money, and at the same time must make only such disposition of it as may be prescribed by the one for whom he holds it. The cases which have held public officers to be guarantors of the safety of funds coming into their hands are mostly from Federal courts, and have been largely induced by the peculiar language of the Federal statutes. To hold that the officer cannot make such disposition of the funds as he thinks proper, and yet must be responsible for its safe keeping, is so illogical and fraught with such hardship upon the officer that I am not willing to follow the cases which have so held. If the relation of debtor and creditor was created by the receipt of the money by the officer, so that he could dispose of it as he pleased, there would be reason in holding him responsible for its safe-keeping; but this would be against public policy. In my opinion all that our statute requires of a county treasurer is either that he should produce the money coming into his hands when required by law, or that he should show that he had exercised the care required of a trustee for hire and that it had been lost without fault on his part. Such has been the holding of the courts under statutes of the same substance as ours, where the bond required was to the same effect. See *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *Albany County Supers. v. Dorr*, 25 Wend. 440; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *Wilson v. People, Pueblo & A. V. R. Co.* 19 Colo. 199, 22 L. R. A. 449; *State v. McFetridge*, 84 Wis. 473, 20 L. R. A. 223; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59. These cases are directly in point, and many others could be cited; also, a large number which, though not deciding the exact question here involved, in principle sustain the contentions of appellant. *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89; *People, Nash, v. Faulkner*, 107 N. Y. 477; *McClure v. La Pluta County Comrs.* 19 Colo. 122; *Bridges v. Perry*, 14 Vt. 262; *Odd Fellows Mut. Aid Assn. v. James*, 63 Cal. 598, 49 Am. Rep. 107. See also *Story, Bailm.* 620, and *Perry, Tr.* § 441.

Did the appellant exercise such care when he deposited the funds in question, in due course of business, in a bank which, after diligent inquiry, he had reason to believe, and did believe, to be solvent? If what we have said as to the degree of care required of him is the proper measure of his liability, he was discharging his duty as to the fund when he was making such disposition of it as a prudent man would of his own; and, since it is a fact, of which we must take judicial notice, that the most prudent men keep their funds on deposit in such banks, it must follow that, when appellant did this with the funds of the county, he was exercising due care with reference thereto, unless he was prohibited by the statute from thus disposing of them. It may be fairly deduced from the statute that the county treasurer is prohibited from loaning the funds of the county; and if the depositing of the same in a

bank is a loaning, within the meaning of these statutes, the appellant had no right so to deposit the funds in question. That the depositing of money in bank is, for certain purposes, a loaning of it to the bank, so that the relation of debtor and creditor exists in regard thereto, is beyond question; but, in my opinion, to so deposit money is not to loan it, within the meaning of the statute as to the disposition of public funds. The loaning of money in the ordinary sense is a transaction by which, at the instance of the borrower, one parts with his funds for a consideration. A deposit in bank is of a different nature. Money is placed there primarily for other purposes than to secure interest thereon. The primary object is to secure its safe-keeping and availability whenever required, and for that reason it is not a loaning, within the ordinary acceptance of the term, and hence not within the provisions of the statutes. And so the courts have held. See *State v. McFetridge*, *supra*, and the other cases cited. In my opinion, the appellant was justified in depositing the money of the county in a bank; and if, in the selection of such bank, he used such care as a prudent person would in dealing with his own funds, and only so deposited it in banks which he had reason to believe, and did believe, to be solvent and safe, he should not be held responsible for loss occurring on account of such deposit. In my opinion, the judgment should be reversed.

Albert John ROTH by Guardian *ad Litem*,
Respt.,
v.

UNION DEPOT COMPANY, Appt.

(13 Wash. 525.)

1. **Kicking cars out of sight around a curve on a down grade without any person on them**, in a thickly settled community where it is the custom to use the tracks as a footpath without objection from the railroad company, where it is known that from 50 to 100 people a day walk upon the track, and the cars are not usually sent this way, is such gross and wilful negligence that the railroad company will be liable for a child killed by a car thus kicked, especially where two of them were kicked on parallel tracks at the same time, although the child had no right to use the track.
2. **A child should not be held to the same degree of care** in avoiding danger while walking on a railroad track as a person of mature years and accumulated experience.
3. **Negligence of a parent** cannot be imputed to a child in an action brought for the benefit of the child, injured by the negligence of another.
4. **A verdict of \$15,000** is not excessive for injury to a boy who was run over by a car and one of his legs crushed so that amputation was necessary.

(January 27, 1896.)

NOTE.—For negligence in kicking cars or making flying switches, see *note* to *Kentucky C. R. Co. v. Smith* (Ky.) 18 L. R. A. 63.
31 L. R. A.

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed*.

The facts are stated in the opinion.

Messrs. W. W. Cotton, J. M. Ashton, and Lester S. Wilson, for appellant:

The court erred in admitting evidence that other persons had walked upon the defendant's railway tracks without being molested, for the purpose of showing a license in the plaintiff.

A license cannot be shown solely by this evidence. It must also be shown that the user by the public was such, or the method of use or the means of use were such, that a person of ordinary intelligence would understand that he was authorized to enter thereon.

Kay v. Pennsylvania R. Co. 65 Pa. 269, 8 Am. Rep. 628; *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575; *Carrington v. Louisville & N. R. Co.* 88 Ala. 472; *Louisville, N. A. & C. R. Co. v. Phillips*, 113 Ind. 59; *Missouri P. R. Co. v. Brown* (Tex.) 18 S. W. 670; *Central Railroad v. Brinson*, 70 Ga. 207; *Blanchard v. Lake Shore & M. R. Co.* 126 Ill. 416; *Glass v. Memphis & C. R. Co.* 94 Ala. 581; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96.

License cannot be established by mere user.

Baltimore & O. R. Co. v. State, 62 Md. 479; *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457; *Wright v. Boston & A. R. Co.* 142 Mass. 296.

A person who enters the premises of another under a mere license must take the property as he finds it, and assumes all risks of injury to himself incident to the ordinary use and occupation of the premises by the owner.

Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Vanderbeck v. Hendry*, 34 N. J. L. 472; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 507, 22 Am. Rep. 112; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 368; *Davis v. Central Cong. Soc.* 129 Mass. 371, 37 Am. Rep. 368; *Benson v. Baltimore Traction Co.* 77 Md. 535; *Plummer v. Dill*, 156 Mass. 426; *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Buelow v. Chicago, St. P. & K. C. R. Co.* (Iowa) 60 N. W. 617; *Evansville & T. H. R. Co. v. Griffin*, 10 Ind. 225, 50 Am. Rep. 783.

The defendant company was under no greater obligation in regard to minors than to adults.

Baltimore & O. R. Co. v. Schwindling, 101 Pa. 258, 47 Am. Rep. 706; *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 378, 84 Am. Dec. 457.

The verdict is excessive and was due to passion and prejudice.

Ferguson v. Wisconsin C. R. Co. 63 Wis. 145; *Missouri P. R. Co. v. Dwyer*, 36 Kan. 58; *Masadillo v. Nashville & K. R. Co.* 89 Tenn. 661; *Western & A. R. Co. v. Young*, 83 Ga. 512.

Messrs. D. W. Henley and Fenton & Saunders for respondent.

Dunbar, J., delivered the opinion of the court:

The defendant is a railway terminal company in the city of Spokane. Its railway tracks and yards lie parallel with the Spokane river, near its north bank, in that city. North of the defendant company's yards and tracks there is an addition to Spokane city, on which lived, at the time the accident alleged in this case occurred, a number of families, variously estimated in the testimony at from twenty-five to fifty. The railway lines and switches of the appellant ran in a westerly direction across Washington street, at a right angle therewith, and near the north bank of and parallel with the Spokane river, and ran northerly from Washington street, thence in a northwesterly direction, making a short curve around a high bluff of rocks, and thence in a straight line to and beyond the east line of Mill street, of said city, extended north. At a point east of the east line of Mill street, so extended, the appellant had located a switch, from which diverged several side tracks, running parallel with each other, in an easterly direction, around said sharp curve. The railway tracks on the said switches were located on a down grade from Mill street, in an easterly direction, around the said sharp curve; and cars detached from an engine above the switches would, by reason of the down grade, run of their own momentum down to and across Washington street at a rapid speed. For many years before the construction of appellant's yards at this point, the people residing north of the appellant's right of way were in the habit of using several footpaths, which converged into a well defined path as they reached the appellant's right of way near Howard street, and the people residing between Washington street and Mill street were accustomed to go to the south side of the river by these footpaths, which converged into one path near Howard street, and thence directly down the right of way of the appellant to Washington street; and there was also a path leading across the tracks of appellant, running along the north bank of the river to Washington street; but, after the construction of appellant's tracks, the path leading from the tracks along the north bank of the river was abandoned as a footpath, and the people residing north of the tracks, after reaching the tracks, used the right of way of the company until they reached Washington street, it being a more convenient and shorter route to the city than any other way they could travel. It is insisted by the respondent, and the testimony shows without any doubt, that the appellant, and its servants and agents operating their cars at this point, knew of the existence of this footpath, and that the people of all ages residing to the north of the track were accustomed, at almost every hour of the day, to use this footpath and the right of way of appellant from the point where the path entered the right of way to Washington street; that it was not only used by the people who lived north of the tracks, but that it was used indiscriminately. On the 12th day of April, 1892, the plaintiff and respondent, Albert John Roth, a boy of nine years of age, while going down through this path on the right of way of appellant, was knocked down by a car, the wheels of which

passed over one of his legs, crushing it so that amputation of that limb became necessary. It seems that the appellant's agents, in switching the cars, sometimes, when help was short, instead of sending an engine down with the empty car, would, in railroad parlance, "kick" the car, and let it go down the track unattended by a brakeman; that it was not the usual way to send the cars unattended by a brakeman, but that they sometimes did so; and it is conceded that that was the manner of switching the cars at the time of this accident. It seems that, at the same time that the respondent, who was in company with his sister and another boy about his own age, came down the path, two cars were "kicked" down the track behind them on appellant's tracks, and the respondent, in order to avoid being injured by one of these cars, started to cross one of the tracks, and in doing so was run over by a car going down the track which he was attempting to cross. By reason of the close proximity of these cars, he became confused, and in attempting to escape from one, was run down by the other. Neither of these cars was attended by any person, but they were "kicked" down, through the cut around the sharp curve, out of sight of the employees who "kicked" them, and they acquired a considerable speed by reason of the down grade of the track. It is conceded that there was no brakeman or any person along the track to look out for the cars, or to warn any person who might be on the track way of danger. The respondent, at the time of the injury, lived with his father and mother, north of the track, and was accustomed daily to go to the south side of the river to sell newspapers to support himself and his family. An action was brought in his interest, by Frank Roth, his guardian *ad litem*, and a verdict was rendered for \$15,000 damages. Judgment followed, and an appeal has been taken to this court.

The overwhelming weight of testimony is to the effect that, for three or four years immediately preceding this action, it had been the custom of the people north of the track, and of others, to use this right of way as a footpath; that from 50 to 100 people passed over it daily; that this custom was known to the appellant; that it made no objection to it; and that it posted no notices warning people not to travel upon the path. There was some little testimony offered in defense to the effect that people had been told not to go through there, but this was a question of fact which was submitted to the jury, and, under the testimony, they were amply justified in coming to the conclusion that the travel was as alleged by the respondent. This condition of things was testified to, not only by numerous citizens, but by many of the employees of the company, or men who were employees during that time. One witness testified, "They used it just about the same as you would a sidewalk;" another, that persons traveling over this route could be seen every hour in the day. Witness L. N. Davis, who had worked for the company, and who lived in that neighborhood, testified, "Well, there is people, most all the time you would look out, traveling; especially at train time you would see them, all kinds of ways, going; see them taking little wagons, hauling

trunks through there, and baby carriages, and everything." This witness testified that that was the main pathway of all the people north of the track. So that the essential question in this case is. Was the respondent a licensee or a trespasser at the time he was traveling on the appellant's right of way, or does an acquiescence by a railway company in travel on its right of way imply a license? for it is an admitted fact in this case that the respondent was not there by special invitation of the appellant, that he was not there for the benefit of the appellant, but that he was there simply for his own convenience and pleasure. A number of cases are cited by the appellant to sustain the contention that, notwithstanding the fact that a railroad company acquiesces in such travel by the public, and does not take any steps to stop them, no implied consent to such use is established, and that such acquiescence does not vary the company's duties as to trespassers; and it may be conceded at the outset that a railroad company does not owe any duty to a trespasser, for there is no presumption that a trespasser, or a person without consent, actual or implied, will be upon the track.

We have carefully examined the cases cited by the appellant, and a majority of them we think can be easily distinguished from the case at bar. The case of *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 22 L. R. A. 575, was an action for running down the plaintiff at a point on defendant's track where it was crossed by a private way, along which she was traveling. The court instructed the jury that, as a matter of law, if people were accustomed to cross a railroad track at a certain place, and the company made no objection, license from the company was implied, and that such a license imposed a duty to use reasonable care to protect the crossers; and the court in that case simply held that this was a question of fact for the jury to determine. *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, was a case where a track was laid upon a public street, and the court held that the rights of the public and the railroad company respecting the use thereof were mutual, though those of the latter were paramount; that a person was not a trespasser who walked along such track, and if in so doing his foot became fastened in an opening which existed by reason of the negligent construction of the track, and he was run upon by a train of the railroad company which was negligently managed, he being without fault, the railroad company was liable for the injury sustained. This was what was decided in this case, though the court indulged in a general discussion of the subject involved in the present case, and said that, on the hypothesis that the place where the person received his injury was exclusively the roadway of the company, something must be superadded to the negligence of those in charge of the train in order to justify a recovery, and that a trespasser had no right to exact care from a railroad company. The question of license or acquiescence did not arise in that case, and was not discussed, and we can see nothing in the case, either of dicta or decision, which bears upon the case at bar. In *Missouri P. R. Co. v. Brown* (Tex.) 18 S. W. 670, the court held that evidence that a person had been in the habit of traveling on a

track, and that the engineer had seen persons on that part of the track, but no more frequently than on other parts of the track similarly situated, and that no measures had been taken to prevent such use of the track, was not sufficient to establish a license to the public to use the track. In that case the locality was remote from any station, and the court especially announced in its decision this fact, and the further fact that there was nothing in the facts of the case to show that the company assented to or knew of the use of the track by others, and that the facts of that particular case were not sufficient to establish an implied consent to the use of the track on which a license could be assumed to have existed, and the further fact that there was nothing in the testimony to show any acts of negligence on the part of the appellants, but, on the contrary, that it showed an entire absence of negligence,—a different case from the one under discussion, where the track was in a thickly settled locality, and where a uniform travel by the public had been established for a period of from three to four years. Persons are seen, not infrequently, by engineers, traveling on tracks in country places, and in districts where frequent travel is necessarily impossible; and, of course, the knowledge that a person occasionally traveled upon a track in such a place as that would not be sufficient to establish a license to the public generally, and that is all that was decided in that case. *Central Railroad v. Brinson*, 10 Ga. 207, seems to be a miscitation, as the case is not reported in that volume [70 Ga. 207]. *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96, simply decides that this is a question for the decision of the jury. In the case of *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 375, 84 Am. Dec. 457, there is no question of license or acquiescence discussed. The court held, in rather rabid language, that there was an intrusion upon the rights of the railway company; that the company had no reason to suppose that either man, woman, or child might be upon the railroad where the accident happened; that it had a right to presume that no one would be upon it, and to act upon the presumption. The main contention there was that the company did not blow the whistle of the locomotive. The court held that they were not bound, under the circumstances of that case, to do so. But this case is mentioned and distinguished by other subsequent cases in Pennsylvania, which hold that a license could be established by acquiescence. *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 568, was a case where a woman had been invited to attend a meeting held at a house of worship, and was injured by reason of the dangerous condition of the society's premises; and the court held that whether the plaintiff was in the exercise of due care, or whether the way was reasonably safe, were questions of fact for the jury. The case in no way bears upon the case under discussion. *Benson v. Baltimore Traction Co.* 77 Md. 535, was a case where the principal of a school had asked permission for a class of students to visit the company's power house, for the purpose of viewing the machinery; and in passing through the power house one of the students fell into a vat of boiling water, and it was there very properly held

that the traction company was under no obligation to especially provide against accidents. The court in its discussion of the question quotes the case of *Hounsell v. Smyth*, 7 C. B. N. S. 788, which case is quoted in several subsequent cases, where the court said, "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliffs,—surely, it would be absurd to contend that such permission cast upon the former the burden of fencing." But this case can have no bearing upon the question discussed here. It certainly would not impose the burden of fencing; but if, after he had given a person permission to walk on the edge of the cliffs where there was a single path, and no way of escape from it accessible, he had sent a blind car down the path after him, a different liability might reasonably have been established. *Plummer v. Dill*, 156 Mass. 426, decided that where a woman went to a building for her own convenience to inquire about a matter which concerned herself alone, she could not recover from the owner of the building for injuries received by striking her head upon a projecting sign placed on a post at the corner of the landing. This case seems to us clearly not to be in point. *Gibson v. Leonard*, 143 Ill. 182, 17 L. R. A. 588, was a case where the members of a fire patrol forced open the door of a building then on fire, and entered the main floor and basement; and, while using an elevator, the rope broke, and one of the patrolmen was injured. The owner of the building was not present, and did nothing to induce the entry. The court held that the owner of the building was not liable to the party injured, although the elevator and its appliances were not safely constructed and maintained. The court in its opinion says: "There is nothing in the case to indicate an invitation, either express or implied, to either enter the premises or use the elevator, and, there being no invitation or inducement on the part of appellee, no duty was imposed upon him to leave the elevator in such condition, when the building was closed at night, as that it could be operated with safety." It would seem that it would be stretching the law to hold that the owner of a building would reasonably contemplate an emergency such as the burning of the house, and that, by reason of the contemplation of such emergency, he should be held to have invited the patrolmen to use a dangerous appliance. The case of *Baltimore & O. R. Co. v. Schweindling*, 101 Pa. 258, 47 Am. Rep. 706, involves no question of license. The case of *Wright v. Boston & A. R. Co.* 142 Mass. 296, may tend to support the contention of the appellant, though it does not very clearly appear from the opinion what the real circumstances of the case were, or what the court would have held under the circumstances of this case. The case of *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, seems to decide squarely in favor of the appellant's contention that the simple acquiescence of a railroad company in the use of its track or right of way, by persons passing along it, as a footway, does not give such person a right of way over the track, and does not impose upon the company the duty of protecting or providing safeguards for persons so using its grounds; and this case was followed 31 L. R. A.

by the the supreme court of Illinois in the case of *Blanchard v. Lake Shore & M. R. Co.* 126 Ill. 416, and the supreme court of Maryland in the case of *Baltimore & O. R. Co. v. State, Allison*, reported in 62 Md. 479. These cases hold that the relative rights of the railroad company and the injured party are not changed by reason of the acquiescence on the part of the company in the use of its track or right of way, and it follows from the logic of the cases that the company would be held responsible only for such gross negligence as indicated wilfulness. The case in 71 Ill. 500, cites in support of its conclusion the case of *Philadelphia & R. R. Co. v. Hummell*, *supra*, and *Gillis v. Pennsylvania R. Co.* 59 Pa. 120, 98 Am. Dec. 317. We think the Illinois supreme court mistook the logic of those cases; and such was the opinion of the supreme court of Pennsylvania, which reviewed the *Hummell* and *Gillis Cases* in the case of *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628, and in some subsequent cases, and distinguished them from a case where license by user had been established.

Probably the strongest case supporting the views contended for by the appellant is the case of *Glass v. Memphis & C. R. Co.* reported in 94 Ala. 581, where it was held that the fact that persons living in the neighborhood of a railroad track are accustomed to walk upon the track without objection of the company does not make them any the less trespassers; that, where such track is used without the direct consent of the company, the company could be held only for negligence amounting to wantonness or an intention to inflict injury; and further held that such wantonness and intention could not be inferred unless the employees actually knew of the peril of the decedent, and failed to make reasonable effort to avert it. We think that all the cases cited can be distinguished, possibly, from the case at bar, so far as the doctrines announced are concerned, excepting this one; and this court, we think, went too far in holding that wantonness could not be inferred unless the peril of the decedent was actually known to the employees of the company. Conceding, for the moment, the doctrine that the plaintiff in this case was a trespasser, and conceding, further, that the defendant could be held only for gross negligence, we think the circumstances of this case did most emphatically indicate gross negligence; and we are of the opinion that, under the circumstances of the case, the defendant ought to be held to have presumed that when it threw a car out of its sight around a curve, on a down grade, in a thickly settled community, where it had knowledge that its track was used by from 50 to 100 people a day, somebody's life would be imperiled by this careless mode of switching its cars, and that it carelessly and wantonly placed itself in a position where it could not see the peril of the passers-by. The evidence shows that it was not its general custom to switch its cars in this way, but that it did so only occasionally, when short of men. The rule as laid down by many writers is that such a duty is imposed upon a railroad company in operating its trains as would be imposed upon an honest man in the transaction of his business. It seems to us that

no honest or humane person would be guilty of transacting his business in the reckless manner in which the appellant in this case transacted its. Duties are relative, and that which would not be a duty under certain conditions would become a most imperative duty under others. The people of modern times hold life and limb in too high regard to allow them to be weighed in the scale with mere convenience or selfish property interests. This is the sentiment of humanity, and a sentiment which ought to be reflected by the decisions of the courts. This appellant, to save the expense of an employee for a few minutes, hurled not only one, but two, blind cars down this right of way, regardless of the fact, which it must have known, under the circumstances, as shown by the testimony, that they were liable to cause the death or permanent injury of some one; and we think that this fact alone establishes gross and wilful negligence, notwithstanding the fact that none of the employees saw the danger of the plaintiff in this case; and, of course, under all the authorities, a railroad company is not allowed to run down and destroy a naked trespasser who is upon its track, but is held to be responsible for an attempt to prevent his injury after his peril is discovered. Very much more in accordance with the plainest principles of humanity was the doctrine announced in *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, viz., that those who are operating a railroad in a town or city, or through a thickly populated district, where there is occasion for people to pass along the track, and a usage to that effect, owe the duty of keeping a vigilant lookout for such persons at such places. See also *Glass v. Memphis & C. R. Co. supra*. The two Illinois cases which we have just noticed seem to have lost sight of the doctrine of comparative negligence, which was announced by the supreme court of Illinois in the case of *Illinois C. R. Co. v. Hammer*, 72 Ill. 347, and the opinion in 71 Ill. 500, *supra*, must be construed somewhat with reference to the principles enunciated in the later case, where it was held that, while it was negligence for a person to travel on the track of a railroad at its depot grounds, where everybody had notice that cars were constantly passing and engines switching cars, it was also negligence on the part of the company to have flying switches passing on a track, without an engine attached or a bell ringing or a whistle sounding; and, where both parties were at fault in these respects, it was for the jury to determine, under all the circumstances, whether the negligence of the plaintiff was slight and that of the defendant gross; and, if the negligence of the plaintiff was slight and that of the defendant gross, that the plaintiff could recover. The court in that case announced that the rule had not been at all times accurately stated, and that, inadvertently, courts had laid down the rule that a plaintiff who was guilty of negligence could not recover, but that the true rule was that he could recover, notwithstanding his negligence, if his negligence had been slight and that of the defendant gross; that where persons go upon or pass over the grounds connected with railroad depots, they are presumed to know that the place is dangerous, and hence are required to use care and pru-

dence commensurate with the known dangers of the place; but that, on the other hand, the servants of the company knowing that it is a place where persons are constantly passing, their duty to exercise caution and prudence is also enhanced. "In such places," says the court, "they must use more effort and precaution for the preservation of life and limb than at places where persons have no right to be and the employees have no right to expect to find them. While the great commercial and business interests of the country demand their protection, still the lives and personal safety of persons are paramount. All other considerations must yield to this, the first and greatest and most important of all rights, for which governments are organized and laws enacted." The court does not stop with the announcement that they must use more effort for the preservation of life and limb at such places than at places where persons have no right to be, but coupled with that is the further provision that they must use more precaution than at places where they have no right to expect to find persons. In the case at bar they did have a right to expect to find people on this track, where these two insensate objects were sent, without control, notwithstanding the fact that people had no legal right to be there.

In opposition to the doctrine announced by these few cases, however, we cite, first, the case of *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 3 Am. Rep. 628, where it was held directly that the company had the right to detach cars and send them on, without a brakeman, out of sight around a curve, but that this would be different when, by license to others and by sufferance, they permitted the public to enjoy a privilege of passage which would bring them into danger. It is true that in this case certain privileges were granted over the right of way to certain persons, for the purpose of unloading and shipping lumber, but this privilege was not granted to the plaintiff nor to the public in general, and cannot affect the principles announced in the decision. This was a case where a woman carried her nineteen months old child with her to where she went to wash, near the railroad track. After having crossed over the track to get some water she set the child down before a chair, and engaged again in washing. In three or four minutes she missed the child. It had strayed upon the track and was run over by a lumber car, which was detached and sent around a curve in the siding, on a slight down grade, unattended by a brakeman. Both of the child's arms were so crushed that they had to be amputated. "Conceding the right of the railroad company," said the court, "to the exclusive use of its tracks over the lot, . . . the true question is whether the circumstances created a different duty. The ownership of the lot gave to the company the right to use it as most convenient and expedient in moving its cars; and no one can gainsay the right to detach and send cars ahead without a brakeman, even out of sight and around a curve. But the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and, by sufferance, permitted the public to enjoy a privilege of passage which might bring their persons into

danger." The court then, after noticing the fact that the way was used to unload lumber, proceeds to say: "It also suffered its track to be used by a neighboring population as a way across the lot from one part of the city to another. . . . The presumption of a clear track at this place could not reasonably arise, . . . but greater precaution against injury to those thus permitted to use the lot and the tracks of the company became a duty." And, in speaking of the negligence in sending the car round the curve where people were liable to pass, the court said: "Its only purpose was to save a few hundred feet of travel to the engine, by detaching it from the car when in motion, and stopping the engine before it reached the switch, in order to permit it to run forward on the main track to hitch onto other cars. To save this short time and distance a life was periled and a serious injury inflicted." And the court, as we have before indicated, in reviewing the instructions of the court below, who relied upon the cases of *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457, and *Gillis v. Pennsylvania R. Co.* 59 Pa. 129, 98 Am. Dec. 317, distinguished those cases from the case then under consideration, and found that the trial court had erred in applying the principles enunciated in those cases to the case at bar, and, in quoting from the language of the court in the *Hummell Case*, this expression, "precaution is a duty only so far as there is reason for apprehension," says that that is the very feature which distinguished that case from the case under discussion. So, in this case, accepting that maxim, that "precaution is a duty only so far as there is reason for apprehension," and applying it to the circumstances of this case, it must be convincing to the mind of every reasonable person that there was reason for apprehension that a car, thrown around this curve, unattended, under the circumstances of the travel proved, would do incalculable damage to some traveler. *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542, was a case where a woman was walking across a high trestle, accompanied by two children. It was conceded that she was not there in the interest or for the benefit of the railroad company, but that she was there simply for the purpose of amusing and entertaining the children, and that they had to walk across this bridge or trestle on ties. While on the bridge they were overtaken by a passing train and were all killed. The testimony tended to prove that the bridge, for many years and up to the time of the accident, had been habitually and constantly used by men, women, and children, going back and forth through that part of the city, as a foot pathway, without any objection or warning by the company that it should not be so used, until after the accident. The court held that by reason of said acquiescence in the travel of the public, Mrs. Dacey, who was using the bridge with the children, was not a trespasser, that she was using it properly and lawfully, and that the defendant should be held to the ordinary rule of negligence. In *Swift v. Staten Island Rapid Transit R. Co.* 123 N. Y. 645, a New York case, it was held that the acquiescence of a railroad company in the habit of certain persons crossing its track at a place not

a public highway amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury; that the sufficiency of the warning required at such crossings is a question for the jury. The court, in the course of its opinion, says: "The legal principles applicable to the facts appearing here have been frequently enunciated by this court, to the effect that where the public have, for a long time, notoriously and constantly, been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license, and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury." It will be noticed that in these last two cases there is no question of any affirmative action on the part of the companies in granting licenses to people who travel on their tracks, but the decisions were based squarely upon the doctrine of acquiescence. In the case of *Troy v. Cape Fear & Y. V. R. Co.* 99 N. C. 298, the same principle was decided, and the court there, in discussing the proposition, and noting the contention of the defendant that the plaintiff's intestate was a trespasser in being wrongfully on the track, and that the injury was the result of his own wrong,—in which case *State, Bacon, v. Baltimore & P. R. Co.* 58 Md. 482, was cited,—said: "We think that upon a careful examination of the cases cited by counsel for the appellant, it will be found that in the most of them the injury was the result of the contributory negligence of the party injured, proximately causing it, and not resulting directly from the negligence of the defendant, and where they have gone beyond this, they are not in accord with the rulings of this court, nor in harmony with the current of authority,"—citing *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 58 Am. Rep. 512, where it was said that "where the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains so as to protect them from injury." To the same effect are: *Kelly v. Southern Minn. R. Co.* 28 Minn. 98; *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Philadelphia & R. R. Co. v. Troutman*, 11 W. N. C. 458; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 57 Am. Rep. 446. In the last-mentioned case the court, quoting from *Barry v. New York C. & H. R. R. Co.* *supra*, said: "The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but so long as it permitted the public use it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. . . . The company is an actor at the time in creating the

circumstances which imperil human life, and it would be an alarming doctrine that it was under no duty to exercise any care in the movement of its trains." See also *Delaney v. Milwaukee & St. P. R. Co.* 38 Wis. 67; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 676; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Barry v. New York C. & H. R. R. Co.* *supra*.

In fact, the overwhelming weight of authority seems to be to the effect that acquiescence creates a right which imposes upon the railroad companies the duty of ordinary diligence; and, as the instructions of the court on this proposition were all based upon this theory, and the objections to such instructions were based upon the opposite theory, it is not necessary to specifically review them. It is sufficient to say that we think the instructions were given in accordance with the great weight of authority.

And the instruction in regard to contributory negligence, we think, was also properly given. By the overwhelming weight of authority, a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine to hold that a child of inexperience—and experience can come only with years—should be held to the same degree of care in avoiding danger as a person of mature years and accumulated experience. In the simplest transactions of life we recognize this distinction. It is recognized by the law in all of the turntable cases. It was recognized by this court in the case of *Illwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, where it was held that the testimony of the company that it had been in the habit of leaving the turntables unlocked (in an action against such company for the death of a child of tender years) was not admissible. No court would hold that an adult who would deliberately put his feet down between the wall and a turntable when it was in motion, so that they would be ground off, was not guilty of contributory negligence. His experience would naturally teach him better. But everybody, and especially people who are employing dangerous agencies, must deal with children just as they are, and must take notice of their lack of judgment and lack of experience. The care or caution required is according to the capacity of the child, and this is to be determined, ordinarily, by the age of the child. In the case of *Mowrey v. Central City Railway Co.* 51 N. Y. 666, the court said: "The old, the lame, the infirm, or the young are entitled to have their condition and ability, mental and physi-

31 L. R. A.

cal, considered in diminution of the degree of care exacted of them." The rule is, however, laid down by Shearman & Redfield on Negligence, § 78, as follows: "It is now settled by the overwhelming weight of authority, that a child is held, so far as he is personally concerned, only to the exercise of such degree of discretion as is reasonably to be expected from children of his age." Another point made by the appellant is that it was not allowed to show that the accident was caused by the negligence of the parent. This being an action brought for the benefit of the child, and not for the benefit of the parent, the negligence of the parent cannot be imputed to the child. The only remaining question is as to the amount of the judgment recovered. It is contended by the appellant that the amount of the verdict is excessive, showing prejudice and passion on the part of the jury. We are not willing to say that \$15,000 will more than recompense the plaintiff for hobbling through life maimed and disfigured. We are aware that many courts have held, in similar cases, that the amount of this verdict was excessive, but we think it probable that if such injuries had happened to the judges themselves, or to members of their families, their views as to excessive damages would have undergone a radical change.

The judgment will be affirmed.

Scott and Gordon, JJ., concur.

Hoyt, Ch. J., dissenting:

I feel compelled to dissent from what is said in the foregoing opinion as to the effect of the railroad company's allowing, if it did allow, persons to travel along and across its right of way. In my opinion, railroad companies occupy the same relation to the real estate which they own as other owners of such property. The general rule that an owner of uninclosed real estate will lose no rights by reason of the fact that he allows a path to be made across it without objection on his part is too well settled to require the citation of authorities in its support. The plaintiff's own evidence in the case at bar showed that the right of way of the appellant, along and across which persons had been accustomed to pass, was open to the common and entirely uninclosed. Hence, under the general rule above stated, the railroad company could lose no rights by reason of persons having been allowed to travel upon it, even if it was shown that the highest officers of the company had full knowledge of their custom so to do. Upon the other questions discussed, I express no opinion.

CALIFORNIA SUPREME COURT (Department 1).

Vincent P. BUCKLEY, *Appt.*,

v.

Giles H. GRAY, *Respt.*

(110 Cal. 339.)

1. An attorney is not liable to a son for even gross negligence in so drawing the will of the mother as not to carry out her desires in the disposition of her property, even though the son suffers great pecuniary loss thereby, there having been no privity of contract between the son and the attorney.

2. The employment of an attorney by a mother to draw her will, in which a provision was made for one of her sons, is not a contract made for the benefit of the latter, within Civ. Code, § 1559, providing that a third person may enforce a contract entered into between others for his benefit, so as to entitle such son to recover from the attorney for his gross mistake in so writing the will as to deprive the son of the provision designed by the testator for his benefit.

(December 10, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for Sonoma County in favor of defendant in an action brought to recover damages for defendant's negligence in drawing a will contrary to the instructions of the maker, the result of which was to deprive plaintiff of property intended for him. *Affirmed.*

The facts are stated in the opinion.

Messrs. Blake, Williams, and Harrison for appellant.

Messrs. Haven & Haven for respondent.

Van Fleet, J., delivered the opinion of the court:

Action to recover for negligence of attorney in drafting and executing a will. The court below sustained a demurrer to the complaint, and, plaintiff failing to amend, judgment was entered against him, from which he appeals. The complaint alleges, in substance, that on October 5, 1888, defendant, an attorney at law, was employed by Mrs. C. M. A. Buckley, the mother of plaintiff, to draw her will, which she desired and directed to be so drawn as to leave all the residue of her estate, after certain specific legacies, to her two sons, then living, the plaintiff and one John P. Buckley, to the exclusion of the children of a deceased son of the testatrix; that in pursuance of such employment defendant on said day drew a will for said testatrix, and superintended and directed the execution thereof; that in the preparation of said will, and in directing the execution thereof, the defendant was guilty of gross carelessness and negligence in the performance of his professional duties, in this: that said will was so drawn as not to legally express the desires or direction of the testatrix as to the exclusion of said grandchildren, but in such manner that the latter were permitted under the will to take of her estate; and that in directing the execution of said will this

plaintiff, although named in said will as one of the devisees thereunder, was caused by the defendant to become one of the subscribing witnesses thereto, thereby rendering the provisions of said will as to the plaintiff void. It is further alleged that said John P. Buckley died before the testatrix; that thereafter, in May, 1891, said testatrix died without having revoked or altered said will; that the will was admitted to probate, and the estate of said testatrix duly administered; and that under the decree of distribution said grandchildren received one half of said estate, amounting to \$85,000, in which amount plaintiff alleges himself damaged, and for which he asks judgment against defendant.

We think the demurrer was properly sustained. In our judgment the complaint clearly fails to state a cause of action against defendant in favor of the plaintiff. It is to be observed that the action is not by the client, but by a third party, her son. It is a general doctrine, sustained by an overwhelming weight of authority, that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone,—that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties. The exceptions to this general rule, if they may be in strictness deemed such, are where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act. Responsibility for a fraudulent act is independent of any contractual relation between the guilty party and the one injured; and one committing a malicious or tortious act, to the injury of another, is liable therefor without reference to any question of privity between himself and the wronged one. Where, however, neither of these elements enters into the transaction, the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter. 2 Shearm. & Redf. Neg. §§ 562, 574; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621, and cases therein cited; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, and cases cited. In *National Sav. Bank v. Ward*, *supra*, the general rule above adverted to is exhaustively discussed, and its limitations stated by Mr. Justice Clifford, for the court. That was a case where a third party sought to maintain an action against the attorney for damages resulting to him from relying upon the correctness of a defective certificate of title to a piece of real estate furnished by the attorney to a client, upon the faith of which the plaintiff had loaned money on the property. In holding that the plaintiff could not maintain the action, it is there said: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.

NOTE.—As to right of action on a contract by a third person for whose benefit it was made, see *note to Jefferson v. Asch* (Minn.) 25 L. R. A. 257.

R. A.

Shearm. & Redf. Neg. § 215. Conclusive support to that rule is found in several cases of high authority. *Fish v. Kelly*, 17 C. B. N. S. 184." And after commenting upon the case of *Fish v. Kelly*, and the case of *Robertson v. Fleming*, 4 Macq. H. L. Cas. 167, 209,—from the latter of which cases Lord Wensleydale is quoted as saying that "he only, who, by himself or another as his agent, employs the attorney to do the particular act in which the alleged neglect has taken place, can sue him for that neglect, and that that employment must be affirmed in the declaration of the suit in distinct terms,"—the learned justice proceeds: "Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, 'the limit of the doctrine relating to actionable negligence,' says Beasley, Ch. J., 'is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the person sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies, if the ill effects of the negligence of men could be followed down the chain of results to the final effect.' *Kahl v. Love*, 37 N. J. L. 5, 8. . . . Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and Parke, B. very properly admits in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule. *Longmeid v. Holliday*, 6 Exch. 761-767. Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. 'These cases,' says the court in that opinion, 'occur where there has been a wrong done to the person, for which he would have a right of action, though no such contract had been made;' and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party, even if the father or friend of the patient contracted with the wrongdoer." In *Roddy v. Missouri P. R. Co. supra*, it is said: "The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties has been denied by the overwhelming weight of authority of the state and Federal courts of this country and the courts of England. To hold that such actions could be maintained would not only lead to endless complications in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume," citing *Winterbottom v. Wright*, 10 Mees. & W. 109, and a large number of other cases. "The rule is put upon two grounds, either of which is unquestionably

sound. One ground is given by the court in the opinion in *Winterbottom v. Wright*, 10 Mees. & W. 109, as follows: 'If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty.' The other ground is thus stated in the New Jersey case above cited: 'The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts.' Plaintiff, not being a party to the contract, cannot maintain this action on account of injuries resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them."

No authority has been brought to our notice contravening the rule as stated in the foregoing citations. Some, which at first glance might be so taken, will be found upon analysis to fall within one or the other of the exceptions noted, and not to infringe upon the general doctrine. Within such class fall the cases relied upon by plaintiff to support his general right to maintain the action. This case comes strictly within the general doctrine as above stated. No fact is alleged bringing it within any of the exceptions thereto. It is not alleged that defendant did the act charged maliciously, or through any evil intent, or with any fraudulent purpose, or that he did it in any affirmative sense. The complaint proceeds solely upon the theory that it was through negligence arising either from ignorance or carelessness, or both; and this, although it may be conceded that the complaint discloses an instance of the grossest ignorance on the one hand, or unpardonable carelessness on the other, and shows very grievous injury to plaintiff as a result, does not, within the principles above announced, make a case entitling the plaintiff to maintain the action. It is claimed, however, that the action can be maintained under the rule, expressed in § 1559 of our Civil Code, that a contract made by one person with another for the benefit of a third person may be enforced by the latter, the argument being that the employment of defendant by plaintiff's mother to draw her will was clearly for plaintiff's benefit, inasmuch as the latter was one of the objects of her bounty, as expressed in her will; and a number of cases are cited which are supposed to bring the case within that rule. But, in our judgment, that provision has no application to this case. It is intended to apply to instances where the contract is made expressly for the benefit of the third person, not where the third person is or may be merely incidentally or remotely benefited as a result of such contract. Such is the language of the Code, and such will be found to be the application of the doctrine in all the cases cited by counsel, or which have

come to our attention. The terms of § 1559 are: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." This rule, we are told by Mr. Pomeroy (Rem. & Rem. Rights, § 139), was originally adopted prior to the reformed procedure, being based partly upon considerations of convenience and partly upon a liberal construction of the nature of the contract, and the purpose of which was to avoid circuity of action, and to enable the real party in interest to sue. That author proceeds to give us illustrations of its application, and each instance given is a case where the contract was in express terms made for the benefit of the third party, and by reason of which the latter became the real party in interest. No such application of the doctrine as is here contended for is even remotely hinted at. The contract between the plaintiff's mother and the defendant, which was the subject of the breach, cannot be said in any legal sense to have been expressly made for plaintiff's benefit. It was a contract for employment of defendant's services as an attorney, to draft the will of Mrs. Buckley, the immediate purpose of which was for the benefit of the latter, to enable her to make disposition of her estate in accordance with her desire.

31 L. R. A.

Remotely, it is true, she intended plaintiff to be benefited as a result of such contract, by providing for him in her will. Such provision, however, could create no vested right in plaintiff until the death of the testatrix. Until that event the will remained purely ambulatory, and the provision for plaintiff could be at any time changed or withdrawn. It therefore created a mere possibility in plaintiff,—not a right which made him in law a privy to the contract. To hold that, by reason of the provision for plaintiff in the will, the contract is to be considered one made expressly for his benefit, is to confound the terms of the will with those of the contract. The latter alone was the subject of the breach, and by defendant's negligence in carrying out that contract the testatrix alone suffered legal injury. Although the ultimate consequential injury to plaintiff would appear to have been great, it was, so far as defendant is concerned, *damnum absque injuria*, against which the courts are powerless to relieve. In this view, it is not material to notice the other objections made to the complaint. The demurrer having been properly sustained, it follows that *the judgment should be affirmed*. It is so ordered.

Garoutte and Harrison, JJ., concur.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Third Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. PERSONAL RIGHTS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Constitutional amendment.

The adoption of a proposed constitutional amendment is discussed in various phases in a case which holds that a proposal to change the location of the seat of state government is not invalidated by making the change conditional on donations and the erection of buildings in addition to a vote of the people, although the existing Constitution requires such vote only. (Mo.) 815.

Unreasonable seizures.

The taking as exhibits on a criminal prosecution for causing the explosion of a boiler the boiler, engine, and other materials, although done under order of court, is held to be a violation of the constitutional protection against unreasonable seizures. (Mich.) 163.

Due process of law.

The constitutional requirement of due process of law is held to be violated by a statute providing for assessments on property without any notice to lot owners or opportunity to be heard. (Va.) 382.

Due process of law is held to be denied by a statute making the issue of improvement bonds which could be done without notice to the owners of property affected, within forty days after the assessment, conclusive of its validity. (Wis.) 213.

The owner of hogs is not deprived of property without due process of law by making it unlawful to allow them to run at large. (W. Va.) 131.

The right of a municipal corporation, such as an incorporated school district, to the protection of a constitutional provision as to due process of law against a statute attempting to take away a complete defense under the statute of limitations, is established in an Illinois case. (Ill.) 71.

A statute requiring railroad companies to carry freight for the same rates that any other company may carry it between the same points, without providing for any investigation of the matter, is held to be a denial of due process of law. (Neb.) 47.

Sunday.

The constitutionality of the statute prohibiting barbers to carry on business on Sunday except in two places within the state is sustained as an exercise of the police power to protect health. (N. Y.) 689.

Delegation of power.

The unconstitutionality of a statute attempting to delegate legislative power to an insurance commissioner by authorizing him to adopt a standard policy is declared in Wisconsin, following Minnesota and Pennsylvania decisions. (Wis.) 112.

Eminent domain.

Land owned by a railroad company but not actually in use or necessary for the enjoyment of its franchise is held subject to condemnation by another railroad company for whose use it is necessary. (Mont.) 298.

Voting.

A statute making it a crime to vote without certain documentary proof of the payment of a poll tax, or the voter's affidavit of such payment and of the fact that the required document has been lost or mislaid, is held valid, even as against a voter who has actually paid his poll tax. (Tenn.) 837.

The right of the mayor to vote in the election of an officer by the city council, of which he is declared to be a member, is limited to the case of a casting vote to break a tie, where the charter in general terms says that he shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote. (Me.) 116.

Taxes.

A mistake as to the location of lands whereby taxes are paid to a school district which has no right to them is held to give no right to recover back the taxes paid, either in favor of the taxpayer or of the other district in which he was taxable. (Ill.) 329.

A tax of 2 per cent on the gross receipts of a foreign building and loan association is held not to interfere with the freedom of commerce

or to deny the equal protection of the laws. (Ky.) 41.

Courts.

The appointment of a receiver by a Federal court is held ineffectual to prevent the subsequent sale of property under execution from a state court to satisfy a mechanic's lien, where the judgment establishing the lien had been rendered before the receiver was appointed. (Mo.) 335.

Power of the courts to interfere with the action of the governor or of a legislative commission of which he is a member, in respect to the selection of a site for a public institution and the letting of contracts therefor, is discussed at length in a case which denies the power of the courts to interfere. (Or.) 473.

Jurisdiction of a cause of action for negligence arising in Mexico was refused in Texas because the Mexican law applicable to the case was so different in respect to the judgment to be entered that the Texas court could not undertake to enforce it. (Tex.) 276.

The right of a state court to entertain an action on an undertaking given to stay proceedings on appeal in admiralty is sustained in an elaborate opinion reviewing the question of jurisdiction as between admiralty and other cases. (N. D.) 238.

The jurisdiction of a court of admiralty in a suit for death of a passenger by collision between vessels is sustained, where the state statute gives such right of action and makes it a lien on the vessel. (C. C. App. 9th C.) 715.

A judgment of a court which has jurisdiction of the matter, committing an infant to the custody of a board of children's guardians, is held not to be void on collateral attack though it assumes to act under an unconstitutional statute. (Ind.) 740.

Municipal corporations.

A constitutional limitation of city indebtedness to the amount for which income and revenue are provided in any year is held not to be violated by a contract to pay an annual sum for a period of years for disposal of sewage, if the annual sum is within such limit. (Cal.) 794.

A contract by city authorities for street lights for a term of five years payable monthly is held void under a statute prohibiting contracts or any other mode of binding the city beyond existing appropriations for the purpose. (Ind.) 743.

An unusual and important case respecting void annexation of territory to a city is that in which, on grounds of estoppel, the court refused to disturb the jurisdiction of the city after it had been exercised for several years. (Iowa) 186.

A statute in Massachusetts requiring a town which votes to establish an electric-light plant to purchase one already established, if there is such, is construed and enforced. (Mass.) 457.

License.

An ordinance imposing a license fee of \$10 per day on itinerant merchants is held void for unreasonableness, while a provision discriminating between residents and nonresidents of a city is also held void. (Ill.) 522.

A license tax on peddlers is held unconstitutional where it exempts manufacturers who

have paid a tax on capital, since this discriminates against nonresidents. (Va.) 379.

A statute giving municipal authorities discretion to license such persons as they think proper as transient merchants is held to infringe a bill of rights prohibiting exclusive public emoluments or privileges. (Conn.) 55.

Streets.

General authority to open streets and condemn land therefor is held sufficient to justify opening a street across depot grounds of a railroad company. (Iowa) 183.

Road commissioners in Massachusetts were held to be public officers, and not servants of the town, for whose acts the town was liable in the use of a steam drill for the repair of a road, although the work was ordered by county commissioners to be paid for by a special appropriation. (Mass.) 174.

The power of a city to compel proper insulation and support of electric wires laid in the streets is held not to be precluded by the prior grant of a franchise to a gas company to lay pipes or other things in the streets for lighting purposes. (Mo.) 793.

Officers.

The doctrine that there can be no *de facto* officer without a *de jure* office is repudiated by a decision that official acts by officers in an office created by an unconstitutional statute cannot be collaterally attacked before the statute has been authoritatively adjudged unconstitutional. (Ohio) 660.

The civil service provisions of the New York Constitution of 1894 are held to be self-executing so far as to require appointments made without compliance therewith to be held illegal by the courts, while the exemption of the department of public works from the civil service act, which existed under the old Constitution, is held no longer to exist and no re-enactment of the law is held necessary. (N. Y.) 399.

The liability of an officer for public funds which he deposits in a bank and which are lost by the bank's failure is held not to be that of an insurer, and to be measured by negligence or want of proper business caution. (Tenn.) 844.

Adopting the stricter and harsher rule which perhaps a majority of the cases follow, the supreme court of Washington holds a county treasurer on his bond although the money had been lost by failure of a bank in which he had deposited the money without any negligence. (Wash.) 851.

Water supply.

A statute regulating the distribution of water from canals is held valid as applied to a prior contract which gave the consumer the right to draw the amount of water to which he was entitled, if the owner of the canal failed to comply with his contract. The statute prohibited this and made ample provision for the distribution of water by persons appointed for that purpose. The contract right was held subject to the police regulation. (Colo.) 828.

A free supply of water to a house of correction chiefly controlled by a board and not by the city council is refused, where the water is furnished by an incorporated board having no source of revenue for the running expenses of

the waterworks except the water rates, although the city is required to pay any deficiency in the expenses of the house of correction, as this expense should be borne by all the taxpayers, and not by the consumers of water only. (Mich.) 468.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

A contract to buy its "requirements" of coal for a season, made by a lumber company, is sustained against the contention that it was uncertain. It is held to mean the amount needed, and not merely what the purchaser should choose to require. (Ill.) 529.

Statute of frauds.

A contract to furnish iron work for a brick building, to be made according to special designs, is held not to be for a sale of personal property within the statute of frauds. (Cal.) 508.

Marriage by a woman is held a sufficient part performance of a contract in consideration of marriage to take it out of the statute of frauds, and an additional part performance is shown where her child was surrendered to the custody of the husband and performed services for him under the contract. (Mo.) 811.

Banks.

The acceptance of a check is held necessary to give a right of action against a bank by the holder for refusal to pay it. (Ohio) 653.

Transferring an account in a savings bank to a new account in the names of the depositor and his wife jointly, subject to the order of either and to survivorship on the death of either, is held to partake somewhat of the character of an equitable assignment, and to give her the property on the husband's death. (Md.) 454.

Bills and notes.

An option for the extension of a note, indorsed upon the back, is held not to destroy its negotiability. (Ala.) 234.

Public policy.

A contract to secure the control of a corporation by the control of the voting of stock of other persons is held void on grounds of public policy. (N. D.) 557.

A sale of lots which were to be distributed by chance among the purchasers, with a prize lot to be given to one of them by chance, is held to be contrary to public policy and to be void. (Ind.) 885.

Sunday contract.

After the execution of a transaction by which forfeits were deposited on Sunday to se-

cure an invalid Sunday contract, the mere fact that this was done on Sunday will not give one party the right to recover back his deposit unless he had notified the holder not to pay it over before this was done. (Ala.) 792.

Attorney's fees.

The constitutionality of a statute giving attorney's fees in a particular class of cases is sustained as applied to actions against railroad companies for appropriating lands without paying compensation. (Minn.) 558.

Guaranty.

A guaranty of interest on a note is held to run only until its maturity. (Ark.) 121.

Insurance.

Death from inhaling illuminating gas while asleep is held to be within a policy although it provided against liability for death from inhaling gas or from anything accidentally taken, administered, or inhaled, or from accidents that bear no external and visible marks. (N. Y.) 696.

The fact that an insane beneficiary in a life insurance policy killed the insured under circumstances that would make the crime of murder if the beneficiary had been in his right mind is held not to defeat his right to the insurance. (Ill.) 67.

Carriers.

The duty of a carrier to furnish passenger cars on a regular passenger train, instead of a baggage car, is sustained unless the baggage car was the best that could be furnished and was made as safe as possible. (Md.) 313.

Oil and gas lease.

A provision that an oil and gas lease shall be void on the lessee's default is held to give him no option to set up the avoidance of the contract as a defense for his breach thereof, but merely to give the lessor a right to declare it void. (Ind.) 673.

Impairing obligation.

The change of remedy on a mortgage contract by extending the time for redemption on foreclosure is held in Montana and Kansas not to constitute an impairment of the contract obligation. (Kan.) 74; (Mont.) 721.

Accord and satisfaction.

A receipt in full given on payment of part of a claim only when there is no dispute about that part, but the other part is disputed, is treated as an accord and satisfaction. (Mich.) 171.

III. CORPORATIONS AND ASSOCIATIONS.

Nonuser of the franchise of a corporation and sole ownership of its stock are held insufficient to constitute a dissolution or vest title of the property in such stockholder. (Tenn.) 706.

A corporation is denied the right to hold corporate meetings in a state other than that in which it is created, for the purpose of organizing, electing officers, or performing any strictly corporate functions in organization; and it is 81 L. R. A.

held that it does not constitute a lawful corporation in the state where it thus organizes. (Fla.) 484.

The liability of a corporation for the fraudulent use of unanceled certificates of stock which had been surrendered and become mere vouchers, by an employee who extracted them from a safe, is denied, although they were in the hands of a bona fide holder. (N. Y.) 779.

Assurances that a certificate of stock is in a

condition for transfer, given on inquiry by a person in charge of the office of a corporation, are held to estop the company from denying its liability where on the faith of such assurances the genuineness of the certificate had been guaranteed. (N. Y.) 776.

The liability of directors for indebtedness of a corporation in excess of its capital stock is considered in a Tennessee case, in which the capital stock paid in is held to be the amount subscribed by stockholders and the indebtedness is held to include bonded indebtedness. (Tenn.) 593.

The power of a president and secretary of an electric-railway company to issue negotiable notes for the corporation is denied, and the exercise of the power by them is held to raise no presumption of their authority. (Ark.) 535.

The invalidity of a contract for the sale of the entire plant of a corporation for shares in another company is declared in a case which holds that affirmative relief may be granted against interference with possession of the property, where the scheme is repudiated before the property is surrendered. (C. C. App. 6th C.) 415.

Preference among creditors.

In harmony with the weight of authority sustaining preferences by insolvent corporations in favor of ordinary creditors, an Illinois case goes to the extent of holding that securities given to directors by a going concern, although insolvent, in order to obtain money loaned at the same time when the securities are given, will be valid. (Ill.) 265.

So, preference to directors of an insolvent corporation is held lawful even when the preferred creditor is a relative of some of the directors, or

when the preferred debts were guaranteed by the directors,—at least when it is not shown that they are able to respond to the creditor, or that the preference was for their benefit rather than that of the creditor. (Ill.) 269.

In South Dakota the preference of creditors by an insolvent corporation is denied in a case where the preference was to secure a debt for money borrowed by the company to purchase its own stock. (S. D.) 497.

Partnership.

Insolvent members of an insolvent firm are held to have no right to use the partnership property to pay their individual debts leaving firm debts unpaid. (Miss.) 470.

Name.

The right to the exclusive use of the name of the Grand Lodge of A. O. U. W. is denied to a seceding body which became incorporated, although the older body was unincorporated. (Iowa) 133.

A firm name may be used by a purchaser of the assets and goodwill of a trading partnership upon its dissolution, and where a corporation is organized it may include the firm name in its own. (Ohio) 657.

Religious society.

The rights of the minority of a Free Will Baptist society to prevent a transfer of the property of the society by action of the majority to the Baptist denomination are sustained in an Iowa case, although their manual of church government has a provision for dismissing a church in good standing to join another evangelical denomination, since this is regarded as applying to the church in the ecclesiastical rather than the legal sense. (Iowa) 141.

IV. DOMESTIC RELATIONS.

The liability of children to furnish support to poor parents, declared by a statute which provides no method of enforcing it, is held to make the children liable to the county when it has furnished necessary support. (S. D.) 461.

A statute making sentence to life imprisonment operate as an absolute dissolution of a marriage with the convict is held constitutional under a provision against legislative divorces; and a reversal of such a sentence for error is held not to restore the marriage relation. (Wis.) 515.

Divorce.

Utter desertion for three years as ground for

divorce is held to exist where for that time a wife persistently refuses to return to her husband although during the time he makes her a visit and stays with her for several nights. (Me.) 608.

A divorce on a cross-bill in favor of a non-resident is allowed notwithstanding general statutory provisions limiting divorces in favor of residents. (Mich.) 160.

A judgment of divorce is held not to estop the wife who obtained it from asserting that her husband was dead before the divorce, where he was not served in the action and his whereabouts were unknown. (Cal.) 411.

V. PERSONAL RIGHTS.

The right of private persons to object to the publication of their pictures or photographs is held not to extend to a public character such as a great inventor. (C. C. D. Mass.) 283.

An attempt to prevent the erection of a statue as a memorial of a deceased woman, on the ground that it was an invasion of the right to privacy, was not successful where the attempt was made by her relatives and it appeared

that the purpose of the statue was to do her honor, although in her lifetime she might have objected to it. (N. Y.) 286.

Post mortem.

The right of the proper officers to make a post-mortem examination without consent of the family of the deceased is sustained in the case of death from seemingly inadequate personal injury. (Md.) 540.

VI. TORTS; NEGLIGENCE; INJURIES.

Seduction.

The right of a betrothed person to recover for the seduction or the alienation of the affections of his affianced is denied in a Michigan case. (Mich.) 282.

Refusal of check.

The right of a trader or merchant to compensatory damages on account of the dishonor of his check when he had funds to meet it is sustained on the ground that it is a slander upon him in his business. (Minn.) 552.

False imprisonment.

False imprisonment procured by a railroad detective is held to render the company liable although he exceeded his authority and disobeyed instructions, where he acted within the scope of his authority. (Tenn.) 702.

Pollution of water.

An injunction against the connection of a sewer underdraining a cemetery with a spring brook from which water is used for domestic purposes is sustained, notwithstanding the water was also polluted to some extent from other sources. (Ill.) 109.

Selling dangerous article.

One who sells a folding bed knowing it to be unsafe, but representing it to be safe, is held liable to any person injured while using it on account of its defects. (Cal.) 224.

Mistake.

A mistake of an attorney in drawing a will is held to give no right of action to a son of the testatrix, who by the mistake is deprived of a benefit that the testatrix intended to give him. (Cal.) 862.

Negligence as to gas.

A gas company which does not exercise care to discover and remedy a leak in a street main when notified that gas is escaping into a cellar of a building abutting on a street is held chargeable with negligence. The same case holds that it is not negligence as matter of law to carry a lighted lamp or to ignite matches in a cellar filled with gas. (Md.) 785.

Negligence as to electric wires.

For the breaking of a telephone wire insecurely fastened above a trolley wire without any guard wires between them, joint liability of the telephone company and the street-railway company is sustained. (Ala.) 589.

The duty to make streets substantially as safe after dangerous electric wires have been placed in them as they were before is held to accompany a grant of the privilege to place such wires in streets; and proof that a broken telephone wire hanging across a feed wire of an electric railway obtained a deadly charge of electricity from the feed wire is held to be sufficiently made by the fact of such contact without anything to show any other source. (Md.) 572.

A detached electric wire hanging in a public alley so as to endanger public travel is prima facie evidence of negligence. (Colo.) 566.

Liability for injury caused by contact with a broken telephone wire which is charged with electricity from a trolley wire is upheld where the street-railway company had not ex-

ercised sufficient care to avoid accidents. The extent of such care necessary is held to correspond to the degree of the danger. (Ark.) 570.

An electric-light company may be guilty of actionable negligence in failing to take proper steps to learn the condition of its wires as well as in failing to repair them. (S. C.) 577.

Injury to a workman familiar with electric wires, who while standing on a wooden pole moving electric lamps touched an iron post sustaining a span wire of a trolley line and the span wire at the same time, thus completing the circuit, when the span wire had circuit breaks to prevent charging the post, is held not to create any liability on the part of the trolley company. (Wis.) 583.

Fire.

Storing cotton in a rented building without right when it was hired for the storage of vehicles is held to make the tenant liable for damage to the building by fire, if this would not have resulted except for the dangerous character of the property. (Tenn.) 604.

Railroad negligence.

A railroad is held liable for kicking a car around a curve down grade at a place where numerous people used the track without objection as a footpath, and a boy was struck by the car. (Wash.) 855.

A defect in a sidewalk across a railroad, which causes injury to a person driving a snow plow over it, is held to give him a right of action notwithstanding his unusual use of the walk, if the defect was such as to make the walk unsafe for ordinary purposes. (Mich.) 170.

Carrier's liability.

The liability of a carrier for abuse and insult to one passenger by a drunken and disorderly fellow passenger is sustained where the conductor failed to interfere. (Minn.) 551.

The duty to consider the safety of a drunken passenger on ejecting him from a train is affirmed in a case holding the carrier liable for his death caused by another train soon after. (Ala.) 372.

One assisting to carry a sick passenger from one car to another on request of the conductor is held to have a cause of action against the carrier for injury by negligence in the operation of the train during such removal. (Ohio) 261.

Negligence in boarding an electric street car in motion is held to be within the rule applicable to other street cars, rather than the rule applicable to steam railroads, and therefore a question for the jury. (Ill.) 331.

A civil engineer of a railroad company traveling in the course of his duty and upon a pass is in the position of an employee, and not of a passenger, with respect to the risk of injury arising from the want of a watchman at a bridge which the train crosses, when he is presumed to know that no watchman is kept there. (C. C. App. 5th C.) 321.

Respondent superior.

An assault by the agent of an express company upon a person to whom he had just re-

funded an overcharge is held to make the company liable. (Miss.) 390.

The exemption of a charity such as a hospital from the operation of the maxim *respondet superior* is made in a Connecticut case after elaborate discussion. (Conn.) 224.

Cattle diseased.

The liability of the owner of cattle which communicate disease to others while trespassing on lands insufficiently fenced in Texas is held to depend on his knowledge of their condition, although he knew they were liable to break fences. (Tex.) 669.

VII. PROPERTY RIGHTS.

For one creditor to keep another ignorant of a trade with the debtor for his own protection is held not to avoid the preference which he thereby gains. (Ark.) 609.

Wages due a clerk before and during the last illness of his employer are "wages of servants" within the meaning of a statute classifying claims against an estate. (Kan.) 538.

Adverse possession under a deed purporting to convey the interest of a remainderman, together with the payment of taxes for the period of seven years, is held to bar the estate in remainder notwithstanding the outstanding life estate. This is an exceptional case. The general rule that adverse possession does not run against remaindermen during the life estate is considered in 19 L. R. A. 839. (Ill.) 325.

Manure.

The right of a tenant to manure produced on leased premises by stock in excess of that maintainable by products of the premises is sustained, and it is held that he will not lose his property therein by intermixing it with that of the landlord without the latter's consent. (N. H.) 698.

Gift.

The validity of a gift *causa mortis* of shares in a national bank is sustained in a case in which nearly all the shares of stock in such bank were actually delivered to the donee in contemplation of death. The opinion very extensively reviews the law on this subject of gifts by delivery of this kind of property. (Mont.) 429.

Life estate.

A royalty on an oil or gas lease is held to be an incident of a life estate and therefore included in a reservation of a life use, although the grantor specifically excepted it, also a sale of a part of the royalty previously made. (W. Va.) 128.

On a refusal by a widow to take a life estate given her by will, it is held that a devisee whose share is diminished by the widow's election is entitled to the life interest which the widow refused, as compensation, as against remaindermen claiming to be accelerated, and for any deficit remaining in the devisee's share the other devisees must contribute. (Tenn.) 840.

Trademark.

The words "fireproof oil" are held descrip-

tive and therefore not subject to claim as a trademark for illuminating oil. (Ala.) 374.

A peculiar trademark case, the first of its kind, decides that a trademark cannot be had for such organic property as grape vines so as to prevent the use of the name of the parent stock by any person lawfully cultivating and selling its products. (C. C. App. 3d C.) 44.

Surface waters.

The doctrine as to surface waters in Minnesota is applied to justify the deepening of the natural drainage of a pond or marsh fed by surface waters, although in case of unusual rains the lands below may be more liable to be overflowed. (Minn.) 547.

Islands.

An island formed in a navigable river where land had formerly been washed away is held to belong to the owner of the remainder of the track only when it was formed by accretion beginning at the water line of such remaining land. (Ark.) 317.

Trust.

A fund contributed for the relief of sufferers from a fire by persons whose identity is not known is held to create a trust for the benefit of such sufferers which cannot be diverted by the trustees for the general benefit of the poor of the town, even after suitable relief has been afforded to the sufferers from the fire. (Me.) 118.

Effect of alienage.

The common-law rule against tracing descent through aliens is held revived in Illinois by repeal of a statute which had abrogated that rule, and a claim that provision for descent to next of kin avoided the rule by making the descent immediate to those persons is denied. (Ill.) 85.

Alienage of a son at the death of the testator is held not to bar his descendants from taking as heirs under an executory devise, where the disability of alienage was removed by statute before the time when the heirs were to be determined. (R. I.) 146.

The right of nonresident aliens to inherit from an alien resident is sustained under statutes prohibiting nonresident aliens from acquiring title except that a widow and heirs of aliens who have acquired lands in the state may hold by devise or descent for ten years. (Iowa) 177.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Mandamus to compel the surrender of the insignia of office to one having a certificate of election is held proper, but the title to the office is not adjudicated in such proceeding. (Or.) 342; (Fla.) 357.

A replevin suit for goods sold, discontinued 81 L. R. A.

before judgment, with payment of the value of the property replevined to satisfy the replevin bond, is held not to defeat the right to claim payment of the purchase price of the goods. (Md.) 799.

Injuries received outside of the state by an

employee of a railroad company whose line extends into the state are held to be within the Ohio statute making certain defects in railroad apparatus prima facie evidence of negligence. (Ohio) 651.

The rule as to a private action to abate a public nuisance is applied in denying an injunction by the owner of property abutting on a *cul de sac* against obstructing the way between his property and the closed end. (Wis.) 695.

Cases certified.

A certificate of the question whether or not a demurrer should be sustained to plaintiff's petition is held not sufficient to show a question to be decided under a statute requiring the very question to be decided to be certified. (Tex.) 392.

Attachment.

Shipping manufactured products out of the state to fill orders in the course of business is held to be a removal of property when the manufacturer is an insolvent corporation, that will sustain an attachment. (Miss.) 222.

An amendment to a complaint and affidavit for attachment, made after a general assignment for creditors, is held to discharge the attachment as to the assignee, where the amendment substitutes a different cause of action. (Minn.) 422.

Injunction.

An injunction against an elevated railroad in favor of an abutting owner whose easements are interfered with is denied, where his property has increased greatly in value and proportionately with other property in the vicinity by reason of the construction of the railroad. (N. Y.) 407.

An injunction against a default judgment was held not to be justified by the fact that defendant submitted his defense to an attorney

and relied upon the latter to present it. (Ky.) 33.

A default judgment upon a note given for a gaming consideration is held not to be subject to attack by injunction. (Ga.) 767.

Fraud is held not to be ground for attacking a judgment by injunction unless it was inequitable and the complainant had exercised due diligence. (Neb.) 747.

The fact that a judgment of a justice of the peace is void for want of jurisdiction is not sufficient to permit an injunction against its execution, where there is a remedy by certiorari to set it aside. (Tex.) 200.

Trespass.

Trespass is held not to be a proper remedy for the unnecessary cutting or trimming of trees on a sidewalk by employees when removing telephone wires. (Ala.) 193.

Principal and Surety.

The right of a surety to his discharge by the discharge of his principal is held to continue even after judgment against him authorizing him to file a bill for relief. (Ind.) 59.

Examination.

The power of a court to make an order for the examination of a horse whose condition was a question in dispute, so as to authorize a veterinary surgeon to go on the premises of the owner without his consent to make it, is denied in a Michigan case. (Mich.) 169.

Receivership.

An attempt to extend the doctrine which gives preferences over mortgages to claims for running expenses of a receivership was made ineffectually in a case of a receivership of a telegraph company to which a bank made a loan which was used in paying claims for which receivers' certificates might have been, but were not, issued. (N. Y.) 403.

IX. CRIMINAL LAW AND PRACTICE.

The constitutionality of the summary proceeding under the South Carolina dispensary act to obtain a restraining order against carrying on the unlawful business is sustained in a case of contempt for violating such order. (S. C.) 678.

The offense of receiving funds on deposit in a bank known to be insolvent, which is declared by the Pennsylvania statute to be embezzlement, is held not to be committed by receiving the funds, knowing the bank to be insolvent, if they are placed in a separate envelope with intent to return them, and this is done without making them at any time a part of the funds of the bank. (Pa.) 124.

Distribution of liquors by an incorporated social club to its members is held not to be a sale within the meaning of a license law. (N. Y.) 510.

31 L. R. A.

Signing another's name as agent is held not to constitute forgery. (Cal.) 831.

A statute making it unlawful to bet upon a horse race in another state, or to send money by telegraph to be wagered in another state on a horse race in a third state, is held to be within the police power. (Va.) 822.

The record of conviction of a principal offender is held admissible against an accessory as prima facie evidence that the principal committed the crime as charged. (Mont.) 294.

A judge presiding on a criminal trial is held incompetent to testify as a witness in the case. (Ark.) 465.

The right of jurors to act upon their personal knowledge of the mental condition of one accused of perjury is denied. (S. C.) 489.



INDEX TO NOTES.

(The General Index follows this.)

Affidavits. See ATTACHMENT.
Aliens; right to inherit, see DESCENT AND DISTRIBUTION.
 Inheritance by, from, or through, see DESCENT AND DISTRIBUTION.
Attachment; right to amend affidavit for:—Statutes permitting amendments; general statute of amendments; matter of substance or form; statute denying amendment; rule in absence of statute; additional affidavits; right to amend as against third person 422
Attorneys; negligence of, as a bar to injunction against judgment 36
Autopsy. See CORONER.
Banks; criminal liability for receiving deposit in bank knowing of its insolvency:—In general; constitutionality of statutes; effect of adopting existing nomenclature in defining the offense; liability in the absence of statute; who liable; liability of partnership; sufficiency of proof; other rulings 124
 Joint account in savings banks 454
Bills and notes; provision for renewal as affecting negotiability 234
Carriers; duty as to passenger taken ill during journey 261
 Duty as to furnishing proper cars for passengers:—In general; adoption of improvements; character of train 313
 Railroad employees or officers as passengers:—Riding in course of, or as part of employment; transportation to or from work; person riding for purposes of his own 321
Cases certified; definiteness of question to be certified:—whole case must not be sent up; whole case cannot be split up into distinct points; importance of questions; point of difference; question not general; question not abstract; question to be perfectly stated; question of fact not to be involved; necessary facts to be stated; as to sufficiency of evidence or indictment; as to demurrer; what will be considered; questions held proper; Illinois decisions; Iowa decisions; New Jersey decisions; Ohio decisions; Texas decisions; Wyoming decisions; criminal cases; tax cases 362
Contracts; impairment of obligation of, by police power as to electric wires 798
 Statute extending mortgagor's right of possession on foreclosure of pre-existing mortgages 721
Convicts. See HUSBAND AND WIFE.
Coroner; power of, to order post-mortem examination 540
Corpse. See CORONER.
 31 L. R. A.

Criminal law; effect of conviction of crime upon marriage relation 515
Descent and distribution; effect of state Constitutions and statutes upon the question of inheritance by or from an alien:—(I.) United States statutes; (II.) state Constitutions and statutes and their construction; (III.) decisions under English statutes 85
 Effect of statutes and Constitutions upon inheritance through an alien:—(I.) The English doctrine; (II.) the effect of state legislation 148
 Alien's right to inherit:—(I.) The common-law doctrine; (II.) upon what the right depends; (III.) power of the states to regulate; (IV.) lands granted for military services and colonization; (V.) inheritance of patent lands; (VI.) effect of annexation of territory or division of an empire; (VII.) the effect of naturalization; (VIII.) effect of marriage with an alien and residing abroad 177
Discovery; order to enter premises for examination 169
Divorce. See HUSBAND AND WIFE.
Electrical uses; liability for injuries by electric wires in highways:—(I.) General rules; (II.) danger of current; (III.) degree of care; (IV.) liability for broken, fallen, or sagging wires; (a) liability of owner; (b) presumption of negligence as to broken or fallen wires; (c) liability of party breaking them; (d) negligent delay in removing or repairing them; (e) municipal liability; (V.) failure to guard wires from falling wires of other owners; (VI.) concurrent liability; (VII.) wires charged by lightning; (VIII.) contributory negligence 568
 Police regulation of electric companies; (I.) In general; (II.) as to the occupation of highways or waters; (III.) as to guard wires; (IV.) as to the operation of electric lines; (V.) limitation of the police power: (a) limitations in state Constitutions: (1) impairment of obligation of contracts; (2) deprivation of property without due process of law; (3) class legislation; (b) limitations in Federal Constitution: (1) statutes requiring electric wires to be put underground; (2) statutes imposing penalties upon telegraph companies for not transmitting and delivering message properly; (3) statutes regulating telephone prices and requiring service on equal terms to all; (4) statutes imposing license fees on telegraph companies 798

Evidence. See also WITNESSES.

The right of jurors to act on their own knowledge of the facts id or relevant to the issue:—(I.) The general rule; (II.) modification thereof: (a) in general; (b) as to intoxicating liquors; (c) as to witnesses

489

Forfeiture. See MINES.

Forgery; by false assumption of authority in signing another's name as agent for him

831

Fraud; as ground of injunction against judgment when it was a defense to the original action

747

Participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors:—(I.) Necessity of participation; general doctrine; (II.) who are bona fide purchasers within the statute; (III.) what constitutes participation: (a) generally; (b) securing a preference; (c) knowledge of fraud, insolvency, etc.; (d) assumption of other debts as part of purchase price; (e) amount of property taken; (f) allowance of fair price; (g) security greater in value than debt; (h) security for overstated debt; (i) security for present and future advances; (j) inclusion of simulated debts; (k) reservation of benefits; (l) taking conveyance fraudulent on its face; (m) retention of possession; (n) failure to record; (o) other circumstances and conditions tending to show participation; (IV.) participation by agent; (V.) participation as between trustees and beneficiaries; (VI.) participation by one of several beneficiaries; (VII.) effect of other accompanying purposes besides that to defraud; (VIII.) effect of relationship or intimacy of the parties; (IX.) conveyances taken from a fraudulent grantee; (X.) presumption and burden of proof; (XI.) participation under bankruptcy and insolvency laws

600

Highways; as to injuries from electric wires in, see ELECTRICAL USES.

Police regulation as to use of, by electric wires

798

Husband and wife; the effect of a conviction and sentence of either husband or wife upon the marriage relation:—(I.) In general; (II.) necessity of a conviction; (III.) effect of an appeal from a conviction; (IV.) effect of commutation of the sentence or of a pardon; (V.) conviction in another state; (VI.) retroactive effect of statute; (VII.) allegation of infamous crime; (VIII.) where crime is prior to marriage; (IX.) conviction as desertion; (X.) classed with cruelty; (XI.) conviction as a bar to divorce by the party convicted

515

Injunction; negligence as a cause and as a bar to injunction against judgments:—(I.) As a cause for injunction against judgments; (II.) as a bar to injunctions against judgments: (a) in attending court; (b) in employing an attorney; (c) of attorney; (d) in ascertaining a defense; (e) in regard to evidence; (f) in asserting a defense; (g) delay in seeking

33

Enjoining judgments against or in favor of sureties:—(I.) Against sureties: (a) remedy at law as a bar to injunction; (b) valid defense must be shown; (c) in matters of negligence or for failure to make a legal defense; (d) in summary proceedings; (e) for newly discovered evidence; (f) where defense was prevented; (g) for equitable defenses; (h) on account of statutes; (i) pleading and parties; (j) injunction bonds; (II.) in favor of sureties

50

Against judgments for want of jurisdiction, or which are void:—(I.) In general; (II.) as to party; (III.) as to time; (IV.) as to venue; (V.) as to amount; (VI.) matter of process and service: (a) form; (b) time and manner; (c) fraud as to service; (d) acceptance of service; (e) party served; (f) service on corporation; (g) service on partners; (h) service at residence; (i) where there was no service as required by law; (j) where there was no notice; (VIII.) on account of appearance; (IX.) pleading and practice; (X.) where there was no judgment or it was set aside

200

Against judgments for defenses existing prior to their rendition:—(I.) failure of consideration: (a) generally; (b) in judgments for purchase money: (1) insolvency; (2) nonresidence; (3) rescission; (4) mistake; (5) title bonds; (6) defective title generally; (7) deficiency in amount of land; (8) fraud; (9) *res judicata*; (10) no cause of action for injunction; (11) sales by executors and administrators; (12) summary judgments; (13) court sales: (c) judgments in favor of purchasers; (II.) fraud: (a) where the defense is forgery or *non est factum*; (b) in obtaining a contract; (c) generally; (III.) public policy: (a) generally; (b) debt for Confederate money; (c) gambling debts; (d) usury; (IV.) set-off: (a) failure to assert at law; (b) parties; (c) unliquidated damages; (d) trial at law; (e) no set-off; (f) insolvency and nonresidence; (g) accounting; (h) equitable set-off; (i) in matters of an estate; (j) mutual agreements; (V.) payment: (a) failure to defend; (b) defense made; (c) equitable defenses; (d) summary proceedings; (e) pleading bill of discovery; (VI.) conditions; (VII.) partition and dower; (VIII.) as to party; (IX.) title to property; (X.) nonliability in general

747

Intoxicating liquors; rights of jurors to act on their own knowledge of

489

Judge. See WITNESSES.

Judgment; injunction against. See INJUNCTION.

Jurors. See EVIDENCE.

Justice of the peace. See also WITNESSES.

Power of, to order post-mortem examination

543

Landlord and tenant. See also MINES.

Rights of landlord and tenant in respect to manure on leased premises; English cases; American authorities; exceptions to the rule

606

Lightning. See ELECTRICAL USES.

Mandamus; to compel surrender of office:—(I.) general doctrine governing; (II.) ne-

cessity of a demand and a refusal; (III.) effect of such surrender; (IV.) sufficiency of title to support; (V.) special provisions relating to; (VI.) in the case of a private corporation; (VII.) when writ refused: (a) insufficiency of facts; (b) in case of a private party; (c) when there is another remedy; (d) in the absence of ouster; (e) prima facie title; (f) possession by an officer <i>de facto</i> ; (g) when the title is in issue; (h) question of election; (i) other relief sought; (j) relator's own act; (VIII.) English cases	342	Negligence. See ELECTRICAL USES.	
Maure. See LANDLORD AND TENANT.		Officers. See MANDAMUS.	
Master and servant. See CARRIERS.		Oil. See MINES.	
Mines; forfeiture of oil and gas lease; manner of enforcing forfeiture clause; waiver; estoppel; how forfeiture clause regarded; absence of obligation clause; effect of alternative provision for rent; who may set up forfeiture	673	Partnership; criminal liability for receiving deposit in insolvent bank	125
Mortgages. See CONTRACTS.		Post-mortem. See CORONER.	
Municipal corporations; liability for negligence as to electric wires	581	Principal and surety; enjoining judgment against or in favor of sureties	59
Naturalization; effect of, on inheritance	181	Privacy; law of	288
31 L. R. A.		Set-off; as ground of injunction against judgment when it existed before its rendition	747
		Street railways; liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.	
		Summary proceedings; injunction as to judgment by or against surety in	63
		Telegraphs. See ELECTRICAL USES.	
		Telephones; liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.	
		Trial. See EVIDENCE.	
		Witnesses; competency of judge as witness in a cause on trial before him:—(I.) Rule as to judges; (II.) justices of peace	465



GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ACCESSION.

A tenant does not lose his property in manure by intermixing it with manure of the same quality and value belonging to the landlord, without the latter's consent. *Pickering v. Moore* (N. H.) 648

ACCIDENT. See INSURANCE, 3-5.

ACCORD AND SATISFACTION.

A receipt in full given without protest on payment of the undisputed part of a claim after refusal to pay another part which is disputed, when the money is apparently accepted in full satisfaction, constitutes an accord and satisfaction. *Tanner v. Merrill* (Mich.) 171

ACCRETION. See WATERS, NOTES AND BRIEFS.

ACTION OR SUIT. See also ADMIRALTY, 2; BANKS, 2.

1. In all cases of purely public concern affecting the welfare of the whole people or the state at large, the action of a court can be invoked only by such executive officers of the state as are by law intrusted with the discharge of such duties. *State, Taylor, v. Lord* (Or.) 473

2. An action for personal injuries caused by negligence is transitory, and may be maintained in any place where the defendant is found, if there be no reason why the court should not entertain jurisdiction. *Mexican Nat. R. Co. v. Jackson* (Tex.) 276

3. The right of the owner of property destroyed by fire to recover damages from another by whose fault it was burned is, as against the defendant, unaffected by the fact that he may have already received full payment for his loss by insurance, and that the insurer is entitled to be subrogated to the claim. *Anderson v. Miller* (Tenn.) 604

4. Bringing a suit in replevin for goods sold, and discontinuing it before judgment, without obtaining any benefit therefrom, because the value of the goods was paid by the plaintiff to satisfy his replevin bond, does not estop him from claiming payment of the purchase price out of the assets of the estate of the purchaser. *Bolton Mines Co. v. Stokes* (Md.) 789

31 L. R. A.

NOTES AND BRIEFS.

Action; misjoinder of causes. 461
Election of remedy. 789

ADMIRALTY. See also APPEAL AND ERROR, 2, 7; COURTS, 5.

1. A court of admiralty has jurisdiction of a suit by personal representatives of a passenger killed by collision between vessels, under a state statute giving a right of action for death by negligence, as the tort is maritime. *The Willamette* (C. C. App. 9th C.) 715

2. Recovery for personal injuries or death due to collision cannot be had by libelants intervening after the vessel has been released on stipulation under the original libel. *Id.*

NOTES AND BRIEFS.

Admiralty; exclusiveness of jurisdiction of. 239

Liability for death of person caused by collision; state statute creating lien on vessel. 716

ADOPTION. See CONTRACTS, 4; PARENT AND CHILD, NOTES AND BRIEFS.

ADVERSE POSSESSION.

1. Possession for seven years by one claiming under a deed purporting to convey the interest of a remainderman, and sufficient to constitute color of title, coupled with payment of taxes for the same period, will bar the estate in remainder, notwithstanding the existence of the outstanding life estate, where the remainderman is under no disability and could have paid the taxes. *Nelson v. Davidson* (Ill.) 325

2. A deed purporting on its face to convey the title of land to the grantee is sufficient to constitute claim and color of title in the grantee, although the title, when traced back to its source, is not apparently legal and valid. *Id.*

NOTES AND BRIEFS.

Adverse possession; as against remainderman. 325

AFFIDAVIT. See ATTACHMENT, NOTES AND BRIEFS; ESTOPPEL, 2.

ALIENATION OF AFFECTIONS.
See SEDUCTION.

877

ALIENS. See also CONFLICT OF LAWS, 1; DESCENT AND DISTRIBUTION.

NOTES AND BRIEFS.

Right to inherit, see DESCENT AND DISTRIBUTION.

Inheritance by, from, or through, see DESCENT AND DISTRIBUTION.

ANIMALS. See also CONSTITUTIONAL LAW, 17, 24, 25; TRIAL, 6.

1. Knowledge of the owner of cattle that the fence of another person was insufficient cannot make the former liable for trespass by his cattle passing through such imperfect fence. *Clarendon Land I. & A. Co. v. McClelland* (Tex.) 669

2. Knowledge that cattle are liable to break fences is necessary in order to make the owner liable in Texas for permitting them to run at large. *Id.*

3. Failure of a land owner to comply with his duty to inclose his lands with a fence sufficient to exclude cattle of all sizes and kinds of ordinary disposition as to breaking fences will prevent his recovering any damages resulting therefrom by trespassing cattle. *Id.*

4. The owner of cattle is liable for their communicating a disease to others, if he knew or had good reason to believe that they could communicate it, and still let them run at large. *Id.*

5. Knowledge of the owner that cattle were breachy, but without knowledge or good reason to believe that they were liable to communicate disease, will not make him responsible for the effect of such disease actually imparted to the cattle of another person in consequence of their breaking a fence. *Id.*

6. Cattle known to be diseased may be placed by the owner in his own pasture without making him liable for communicating the disease, unless he is negligent in the manner of keeping them. *Id.*

NOTES AND BRIEFS.

Animals; liability for communicating disease. 669

APPEAL AND ERROR.

1. The omission of the noncollusion clause from a cross-bill in a divorce suit is not fatal on appeal, but the court may allow it to be supplied. *Clutton v. Clutton* (Mich.) 160

2. Practice on appeal in an admiralty case to a territorial supreme court is regulated by rules and usages of courts of admiralty, and not by territorial statutes. *Braithwaite v. Jordan* (N. D.) 238

3. Evidence outside of the transcript is inadmissible on appeal to show that a motion stated therein to be made by one of the parties was in fact made by the other. *Norwegian Plow Co. v. Bollman* (Neb.) 747

4. The sufficiency of evidence to go to the jury or to sustain a verdict cannot be passed upon on appeal, further than to ascertain if at the close of the plaintiff's case there was evidence tending to prove the facts alleged in his declaration, and whether at the close of all the

testimony the evidence, with all the inferences which the jury could justifiably draw from it, was insufficient to support a verdict for plaintiff. *Cicero & P. R. Co. v. Meizner* (Ill.) 331

Undertaking.

5. Failure of the court to fix the amount of an undertaking on appeal does not prevent its enforcement, if the respondent has treated the undertaking as sufficient and thereby waived the defect. *Braithwaite v. Jordan* (N. D.) 238

6. A good common-law obligation supported by a sufficient consideration is made by an undertaking to secure a stay of proceedings on appeal in an admiralty case, even if a mere cost bond might have been sufficient, where the respondent treats the undertaking as entitling the appellant to a stay. *Id.*

7. A bond reciting judgment for delivery of a vessel to the claimant in an admiralty case, when given to secure a stay of proceedings, is in the nature of a stipulation for value, which is valid as a voluntary bond when claimant refrains from disturbing the appellants in possession of the vessel pending an appeal. *Id.*

Waiver of error or defense.

8. The right of a defendant to be sued in the division of the district of Washington in which he resides is waived by appearing in another division and having the action transferred to that of his residence. *The Willamette* (C. C. App. 9th C.) 715

9. A party cannot complain on appeal of a ruling which he procured to be made. *Norwegian Plow Co. v. Bollman* (Neb.) 747

10. An error in instructions cannot be complained of by a party who subsequently asks and obtains the same instructions. *Cicero & P. R. Co. v. Meizner* (Ill.) 331
Queen City Mfg. Co. v. Blalack (Miss.) 222

11. A defendant in attachment who appears in open court and consents that judgment may be entered for the full sum demanded cannot on appeal, where the declaration, notes, and open accounts sued on, are absent from the record, without exception taken at the trial on the ground that they were not filed, assert that the debt sued for was not due, or that the notes and accounts were not filed. *Queen City Mfg. Co. v. Blalack* (Miss.) 222

12. The objection that the ground of an attachment sued out on a large demand consisting of many items, some of which are due and others not, is maintainable only as to a few of them as representing debts fraudulently contracted, must be made in the trial court to be available on appeal. *Id.*

Grounds of reversal.

13. Failure of an instruction to explain the meaning of a word which might mislead the jury is not ground for reversal, if a proper charge upon the subject was not requested. *Clarendon Land I. & A. Co. v. McClelland* (Tex.) 669

14. An explanation of a charge, given without objection, is not error where it does not lay down a different proposition of law from that contained in such instruction. *Mitchell v. Charleston Light & P. Co.* (S. C.) 577

15. Refusal of an instruction as to how far

intent constitutes fraud is not reversible error if a proper disposition of the case can be arrived at from the acts of the parties without regard to the intent. *Rice v. Wood* (Ark.) 609

16. Admission of testimony by the presiding judge on a trial for murder, reflecting on the good faith of defendant in a previous application for a continuance, is reversible error although the testimony is subsequently excluded and no objection was taken to the competency of the judge as a witness, where the competency of the evidence was objected to. *Rogers v. State* (Ark.) 465

17. The enforcement of a rule that attorneys who testify in the case cannot, without permission of the court, argue the case to the jury, is not reversible error, where counsel did not, before testifying, explain his position and request the court's permission to sum up. *State v. Gleim* (Mont.) 294

Termination of controversy.

18. Reversal of an erroneous injunction decree against making a bust of a deceased person for exhibition at a public fair will not be refused because the fair has closed, if there is also the purpose of placing the bust permanently in a proper place as a memorial to the deceased. *Schuyler v. Curtis* (N. Y.) 286

APPORTIONMENT. See ELECTION DISTRICTS.

ASSIGNMENT. See BANKS, 4.

ASSIGNMENT FOR CREDITORS. See INSOLVENCY.

ASSOCIATIONS. See LIMITATION OF ACTIONS, 2.

ASSUMPSIT.

NOTES AND BRIEFS.

To recover money paid for illegal securities. 71

ATTACHMENT. See also CONFLICT OF LAWS, 3.

1. The shipping by an insolvent corporation of its manufactured products out of the state to fill orders by which the goods are to be delivered in other states, so that they remain its property when sent out of the state, is a removal of its property beyond the state which constitutes a ground for attachment, although its business cannot be successfully conducted unless the property is sent outside the state for sale. *Queen City Mfg. Co. v. Blalack* (Miss.) 222

2. An attachment is discharged as to an assignee for creditors of the defendant by an amendment to the complaint and affidavit for attachment, made after the assignment, which substitutes an entirely different and distinct cause of action. *Heidel v. Benedict* (Minn.) 422

3. Sureties on an indemnity bond to a sheriff to cause him to levy an attachment may be held liable as principals to the owners of the property attached if the attachment is wrongful. *Rice v. Wood* (Ark.) 609
31 L. R. A.

NOTES AND BRIEFS.

See also RECEIVERS.

Attachment; right to amend affidavit for:—Statutes permitting amendments; general statute of amendments; matter of substance or form; statute denying amendment; rule in absence of statute; additional affidavits; right to amend as against third person. 422

ATTORNEY GENERAL.

The mere signature of the attorney general in his official capacity, to a complaint or bill shown to be that of a private relator, is not sufficient to impress it with the functions and capacity of an information competent to put in motion the machinery of the courts, whereby they will take cognizance of questions pertaining to the high prerogative powers of the state, or affecting the whole people in their sovereign capacity. *State, Taylor, v. Lord* (Or.) 473

ATTORNEYS. See also APPEAL AND ERROR, 17.

An attorney is not liable to a son for even gross negligence in so drawing the will of the mother as not to carry out her desires in the disposition of her property, even though the son suffers great pecuniary loss thereby, there having been no privity of contract between the son and the attorney. *Buckley v. Gray* (Cal.) 862

NOTES AND BRIEFS.

Attorneys; negligence of, as a bar to injunction against judgment. 36

ATTORNEYS' FEES. See CONSTITUTIONAL LAW, 9, NOTES AND BRIEFS.

AUTOPSY. See CORONER, NOTES AND BRIEFS; CORPSE.

BANKS. See also CORPORATIONS, 13; OFFICERS, 2, 3, 5; WILLS, 2.

1. The refusal to honor a check when there are funds in a bank against which it is drawn gives the drawer a right of action against the bank, if he is a trader or merchant. *Sjendsen v. State Bank* (Minn.) 552

2. The holder of an unaccepted check cannot maintain an action against the bank for refusal to pay it, although there stands to the credit of the drawer on the bank books a sum more than sufficient to meet it. *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank* (Ohio) 653

3. A banker who receives money, knowing that he is insolvent, but puts it into a special envelope with intent to return it to the depositor, which is afterwards done, without making the money at any time part of the funds of the bank, is not guilty of receiving money from a depositor with knowledge that the bank is insolvent, which under Pa. Laws 1889, § 1, is declared to be embezzlement. *Com. v. Junkin* (Pa.) 124

4. A transfer of a savings bank account to a new account in the names of the former depositor and his wife, making it subject to the

order of either and to survivorship on the death of either, partakes somewhat of the nature of an equitable assignment, and entitles the wife to the fund after the husband's death. *Metro-politan Sav. Bank v. Murphy* (Md.) 454

NOTES AND BRIEFS.

See also BONDS.

Banks; liability for refusing check. 552

Right of holder of check against. 654

Criminal liability for receiving deposit in bank knowing of its insolvency:—In general; constitutionality of statutes; effect of adopting existing nomenclature in defining the offense; liability in the absence of statute; who liable; liability of partnership; sufficiency of proof; other rulings. 124

Joint account in savings banks. 454

BARBERS. See CONSTITUTIONAL LAW, 6, 22.

BETTING. See also CONFLICT OF LAWS, 4.

NOTES AND BRIEFS.

On horse race in other state. 823

BILLS AND NOTES. See also CON-TRACTS, 9; CORPORATIONS, 8, 9; GUAR-ANTY.

An option indorsed upon the back of a nego-tiable note for its extension for a definite time, by giving a new note at the option of the mak-ers and indorsers similar to the original, does not destroy its negotiability. *Annis-ton Loan & T. Co. v. Stickney* (Ala.) 234

NOTES AND BRIEFS.

Bills and notes; provision for renewal as af-fecting negotiability. 234

BONDS. See also APPEAL AND ERROR, 5-7; ATTACHMENT, 3.

1. Bonds given by the board of education of a school district to obtain money which was not borrowed or used for any purpose for which the board was authorized by its charter to issue bonds are void. *Normal School Dist. Bd. of Edu. v. Blodgett* (Ill.) 70

2. An officer is not an insurer of the safety of public funds in his hands, on a bond faith-fully to perform his duties and to collect and pay over moneys, but is responsible only for the exercise of good faith, diligence, prudence, caution, and a disinterested effort to keep and preserve the fund for those entitled. *State, Overton County, v. Copeland* (Tenn.) 844

3. The loss of public money by a bank fail-ure will not prevent liability of the county treasurer upon his bond to pay the money as the commissioners shall direct, although he was not negligent in selecting the bank and the county has not provided a suitable and safe place in which to deposit the money. *Fairchild v. Hedges* (Wash.) 851

NOTES AND BRIEFS.

Bonds; of officers, liability for loss of public money by bank failure. 851

31 L. R. A.

BUILDING AND LOAN ASSOCIA-TIONS. See COMMERCE, 1; CONSTITU-TIONAL LAW, 7; CONTRACTS, 14; TAXES, 1.

BURDEN OF PROOF. See EVIDENCE, NOTES AND BRIEFS.

BUST. See APPEAL AND ERROR, 18; IN-JUNCTION, 11, 12; PRIVACY, 3.

CANAL. See CONSTITUTIONAL LAW, 23.

CAPITAL. See also CONSTITUTIONAL LAW, 3-5; CONTRACTS, 1.

1. There can be no irrepealable law to pre-vent the removal of the seat of state govern-ment, as this involves a governmental subject. *Edwards v. Leueur* (Mo.) 815

2. The power to select and afterwards to change its own seat of government if deemed expedient is necessarily implied in a state Con-stitution providing for a republican form of government not repugnant to the Constitution of the United States, and making no limitation upon its political or governmental power or the power to manage its own internal affairs. *Id.*

NOTES AND BRIEFS.

Capital, of state, constitutional amendment changing; implied contract as to. 817

CARRIERS. See also CONSTITUTIONAL LAW, 16; COURTS, 7; EVIDENCE, 8.

1. One who purchases a ticket for a regular passenger train has a right to be conveyed in a passenger coach instead of a baggage car, unless the latter is as safe a vehicle as can be procured by the utmost care and diligence. *Baltimore & P. R. Co. v. Swann* (Md.) 313

2. A woman who takes passage in a baggage car, when no passenger cars are provided for a passenger train, and pressing domestic duties call for her immediate transportation, does not thereby renounce her right as a passenger to safety and protection. *Id.*

3. Reasonable effort at least to make a bag-gage car safe and convenient for a passenger is necessary when this is the only vehicle that can be furnished for passengers in a regular passenger train. *Id.*

4. A passenger who becomes sick on a rail-road train is entitled to such care from the car-rier as is fairly practicable for it to give with the facilities at hand, without thereby unduly delaying the train or unreasonably interfering with the safety and comfort of other passen-gers. *Lake Shore & M. S. R. Co. v. Salzman* (Ohio) 261

5. A passenger who aids in carrying another who has become sick on the train, into another car on the conductor's request in order that he may be treated by a physician, can re-cover against the carrier for injuries sustained by falling between the car platforms, which was caused by the negligence of the carrier's servants. *Id.*

6. A civil engineer of a railroad company traveling on duty for the company, upon a pass exempting the company from liability for

injuries to person or property, occupies the position of an employee, and not that of a passenger upon the train upon which he is carried. *Texas & P. R. Co. v. Smith* (C. C. App. 5th C.) 321

7. Insult to and abuse of a passenger by a drunken and disorderly fellow passenger, which the conductor permits to continue in his presence without interference, renders the carrier liable to damages. *Lucy v. Chicago G. W. R. Co.* (Minn.) 551

8. The intoxication and misbehavior of a passenger which will authorize his expulsion from a train will not justify his expulsion without exercising due care for his safety, having reference to time, place, and surroundings. *Louisville & N. R. Co. v. Johnson* (Ala.) 372

9. The ejection from a train at night, of a passenger known to be drunk and irresponsible, at a place from which he can escape only by following the roughly ballasted railroad track and crossing cattle guards on one side and a bridge over a creek on the other, renders the railroad company liable where he is killed by another train soon after. *Id.*

10. The cursing, abuse, and maltreatment of a person by an agent of an express company, immediately after refunding to such person overcharges which he had come to the office to obtain, and the delivery of a receipt therefor, are part of the *res geste* and makes the company liable for the tort. *Richberger v. American Express Co.* (Miss.) 390

11. To board or depart from an electric car while in motion is not negligence *per se*. *Cicero & P. R. Co. v. Meizner* (Ill.) 331

NOTES AND BRIEFS.

Carriers; duty as to passenger taken ill during journey. 261

Duty as to furnishing proper cars for passengers:—In general; adoption of improvements; character of train. 313

Railroad employees or officers as passengers:—Riding in course of or as part of employment; transportation to or from work; person riding for purposes of his own. 321

Compelling to furnish facilities for business of other roads. 48

Liability for abuse of customer by servant. 390

Duty to protect passenger. 551

CASE.

One who sells a folding bed, representing it to be safe for use when he knows it to be dangerous, is liable for injuries caused by defects in the bed to any person who uses it, although there may be no privity of contract between them. *Lewis v. Terry* (Cal.) 220

CASES CERTIFIED.

The "very question to be decided," which is required to be certified by the court of civil appeals, under the Texas statutes, is not presented by a certificate of the question whether or not a demurrer should be sustained to plaintiff's petition. *Waco Water & L. Co. v. Waco* (Tex.) 392

31 L. R. A.

NOTES AND BRIEFS.

Cases certified: definiteness of question to be certified:—Whole case must not be sent up; whole case cannot be split up into distinct points; importance of questions; point of difference; question not general; question not abstract; question to be perfectly stated; question of fact not to be involved; necessary facts to be stated; as to sufficiency of evidence or indictment; as to demurrer; what will be considered; questions held proper; Illinois decisions; Iowa decisions; New Jersey decisions; Ohio decisions; Texas decisions; Wyoming decisions; criminal cases; tax cases. 392

CATTLE. See **ANIMALS.**

CENSUS. See **EVIDENCE**, 2.

CHARITIES.

1. A charitable corporation maintaining a hospital is not liable for injuries caused by personal wrongful neglect of servants who have been selected with due care. *Hearns v. Waterbury Hospital* (Conn.) 224

2. A fund contributed for the relief of sufferers from a fire, by persons whose identity is lost so that a surplus cannot be returned to them, must be expended for the benefit of such sufferers, and cannot be capitalized for the support of the town poor generally. *Doyle v. Whalen* (Me.) 118

3. Sufferers from a fire for whose benefit a fund has been donated by individuals unknown may maintain a bill to compel the trustees to expend the fund for their benefit, if the trustees have undertaken to capitalize the fund for the general benefit of the poor of the town. *Id.*

NOTES AND BRIEFS.

Charities; liability for negligence of servants. 224

CHECKS. See also **BANKS**, 2; **DAMAGES**, 1.

NOTES AND BRIEFS.

Right of holder against bank. 654

CIVIL ENGINEER. See **MASTER AND SERVANT**, 3.

CIVIL SERVICE. See also **CONSTITUTIONAL LAW**, 1; **STATUTES**, 3.

The constitutional provisions respecting the powers and duties of the superintendent of public works, which the New York Constitution of 1894 adopted from the former Constitution, must be read and understood in connection with the new section of the Constitution requiring civil service appointments to be made according to merit, ascertained so far as practicable by competitive examinations. *People, McClelland, v. Roberts* (N. Y.) 399

NOTES AND BRIEFS.

Civil service; constitutional provisions as to; department of public works. 399

CLERK. See also EXECUTORS AND ADMINISTRATORS.

The power given by statute to a clerk of court to issue injunction orders cannot be exercised by his deputy under a statute providing that any duty enjoined upon a ministerial officer and any act permitted to be done by him may be performed by his lawful deputy. *Payton v. McQuown* (Ky.) 83

CLUB. See INTOXICATING LIQUORS, NOTES AND BRIEFS.**COLLISION.** See ADMIRALTY.**COLUMBIAN EXPOSITION.** See COUNTRIES.**COMITY.** See COURTS, 3.**COMMERCE.**

1. Freedom of commerce between the states is not interfered with by Ky. Stat. § 4228, requiring every building and loan association to pay into the treasury annually 2 per cent of its annual gross receipts. *Southern Bldg. & L. Assn. v. Norman* (Ky.) 41

2. A statute making it unlawful to make or record a bet upon any race of animals in another state is a proper exercise of the police power of the state, and not an unlawful interference with interstate commerce. *Ex parte Lacy* (Va.) 822

3. An exemption of manufacturers who have paid taxes on capital employed, from the provisions of a statute imposing a license tax upon peddlers, renders the statute unconstitutional as a regulation of commerce when applied to a nonresident acting as an agent or employed in the sale of goods owned and manufactured by a nonresident corporation. *Com. v. Myers* (Va.) 379

4. An ordinance prohibiting the business of itinerant merchants to be carried on without a license is not invalid as a regulation of interstate commerce, as applied to one who purchases bankrupt stocks wherever he can obtain them to the best advantage and sometimes buys them in other states, when it makes no discrimination between merchants whose goods are imported into the state and those whose goods are manufactured or purchased in the state, and does not impose any burden on sales in original packages brought into the state. *Carrollton v. Bazzette* (Ill.) 522

NOTES AND BRIEFS.

Commerce; interstate, as affected by license tax. 379

Interstate; statute as to bets on horse race in other state. 828

COMMON LAW. See also DESCENT AND DISTRIBUTION, 1.

1. The repeal of a statute which abrogated a common-law rule revives that rule. *Beavan v. Went* (Ill.) 85

2. A statutory adoption of the common law of England, so far as applicable and of a 31 L. R. A.

general nature and not in conflict with special enactments, does not preclude the consideration of the expositions of the common law by judicial authorities of our own country in determining what the common law is. *Leyson v. Davis* (Mont.) 429

CONFLICT OF LAWS.

1. The status as a legitimate heir of an alien born before the marriage of his parents is to be determined by the law of their domicile. *De-Wolf v. Middleton* (R. I.) 146

2. The law of Mexico must be applied to the rights of the parties in an action against a railroad company by an employee for a personal injury sustained in that country, in which the contract of service was made. *Mexican Nat. R. Co. v. Jackson* (Tex.) 276

3. Attaching the lines and property of a telegraph company in other states, after a receiver has been appointed in the state of which the attachment creditor is a citizen and the creditor served with a copy of an injunction against interfering with the receivership, is a violation of the injunction, and can give the creditor no lien which can be asserted in an equitable administration of the assets in the state where the receiver was appointed. *Farmers' Loan & T. Co. v. Bankers' & N. Teleg. Co.* (N. Y.) 403

4. Forwarding money by telegraph to another state to be wagered on a horse race to take place in a third state may be made a criminal offense in the state from which the money is sent, although it is lawful to make such wagers in the state in which the wager is made. *Ex parte Lacy* (Va.) 822

CONSTABLE. See LEVY AND SEIZURE, 2.**CONSTITUTIONAL LAW.** See also CAPITAL; EVIDENCE, 7, 9; SEARCH AND SEIZURE; STATUTES, 3.

1. The self-executing mandate of N. Y. Const. 1894, art. 5, § 9, declaring that civil service appointments "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations, which, so far as practicable, shall be competitive," requires the courts in a proper case to pronounce appointments made without compliance with its requirements illegal. *People, McClelland, v. Roberts* (N. Y.) 399

2. A statute providing that the insurance commissioner shall prepare, approve, and adopt a printed form of a policy of fire insurance, to conform as near as can be made applicable to that used in a certain other state, is an unconstitutional attempt to delegate to him legislative power. *Dowling v. Lancashire Ins. Co.* (Wis.) 112

Constitutional amendments.

3. The establishment of the seat of government of a state is a proper subject of constitutional control, and therefore of constitutional amendment. *Edwards v. Lesueur* (Mo.) 815

4. Conditions imposed and powers delegated by a proposed constitutional amendment to change the location of the seat of state government, whereby, in addition to the vote of the people which the existing Constitution requires

for an amendment, donations of property and the erection of state buildings, to be approved and accepted by a commission, are made a condition of the change of location, will not make the proposed amendment inoperative, since upon the vote of the people adopting the amendment the conditions will be imposed and the powers delegated by the Constitution itself.

Id.

5. A vote in favor of a proposed constitutional amendment, taken by yeas and nays and entered in full on the legislative journals in full compliance with the constitutional provisions on this subject, is sufficient without having the resolution read on different days or in other respects taking the course required for ordinary legislation.

Id.

Equal protection of laws.

6. A statute permitting barbers in two localities of the state only, to pursue their business during certain hours on Sunday, does not deny to barbers in other places the equal protection of the laws, since it affects all within the same localities alike. *People v. Hannon* (N. Y.) 689

7. The equal protection of the laws is not denied to foreign building and loan associations doing business within the state, by Ky. Stat. § 4228, requiring such associations to pay into the treasury annually 2 per cent of their annual gross receipts. *Southern Bldg. & L. Assn. v. Norman* (Ky.) 41

Equal rights; discrimination.

8. A statute authorizing the mayor and certain other officers to issue a license "to such persons as they find proper persons to engage in a temporary or transient business," for a fee not less than \$1 nor more than \$100 as the authority issuing such license may direct, and making such business a misdemeanor except in the sale of products of a farm or the sea,—is, so far as it applies to ordinary and lawful business, a violation of the Connecticut Bill of Rights, declaring that all men "are equal in rights, and that no man or set of men is entitled to exclusive public emoluments or privileges from the community." *State v. Conlon* (Conn.) 55

9. A statute allowing reasonable attorneys' fees in an action to recover possession of land taken by a railroad company, without compensation, for its right of way, is not unconstitutional on the ground of class discrimination. *Cameron v. Chicago, M. & St. P. R. Co.* (Minn.) 553

Due process of law.

10. Deprivation of a remedy is equivalent to the deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. *Normal School Dist. Bd. of Edu. v. Blodgett* (Ill.) 70

11. A right of defense is a remedy of the defendant within the constitutional protection of rights. *Id.*

12. A complete defense under the statute of limitations is property within the protection of a constitutional guaranty of due process of law. *Id.*

13. A school district or municipal corporation has the same constitutional protection that 31 L. R. A.

an individual would have against the abrogation by statute of its already complete defense under the statute of limitations. *Id.*

14. Failure to provide for a notice to the person whose property may be affected by a local assessment, and to give opportunity to appear and contest the legality, justice, and correctness of the assessment, at some stage in the proceedings before it becomes final, renders the statute authorizing such assessments void for want of due process of law. *Violett v. Alexandria* (Va.) 882

15. A statute making the issue of improvement bonds conclusive of the validity of an assessment, and permitting the issue of the bonds without actual notice to the owners of the property assessed or on published notice only, within forty days after the assessment is finally determined, is unconstitutional as providing for deprivation of property without due process of law. *Hayes v. Douglas County* (Wis.) 213

16. A statute absolutely requiring a railroad company to carry freight for the same rates that any other company may accept for hauling the same freight between the same points, although by a shorter line, without giving the right of judicial investigation by due process of law, and no matter how great disparity in the length of such hauls may be,—is unconstitutional as a deprivation of property without due process of law. *State, Board of Transp. v. Sioux City, O. & W. R. Co.* (Neb.) 47

17. The owner of hogs is not deprived of his property without due process of law by making it unlawful to permit them to run at large. *Haigh v. Bell* (W. Va.) 131

18. Due process of law is not furnished by a judgment pronounced without opportunity to be heard by a court of competent jurisdiction, in accordance with the provisions of a statute, unless that statute accords with the provisions of the fundamental law. *People v. Hannon* (N. Y.) 689

Police power.

19. Every man's liberty and property are to some extent subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. *Id.*

20. The physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good, as to make laws tending to promote that object proper under the police power. *Id.*

21. The limitation on the legislative exercise of the police power is that such a statute must have a reasonable connection with the welfare of the public. *Id.*

22. A statute prohibiting barbers from carrying on their trade on Sunday is a constitutional exercise of the police power to promote the public health. *Id.*

23. A canal used for the carriage of water for hire is affected by a public interest and subject to legislative regulation in respect to the distribution of the water. *White v. Farmers' Highline C. & R. Co.* (Colo.) 828

24. An act making it unlawful for the owner of hogs to permit them to run at large is an

exercise of the police power. *Haigh v. Bell* (W. Va.) 131

25. A county court in West Virginia, which has superintendence and administration of the internal and fiscal affairs of the county, though shorn of general judicial power, may be given by the legislature authority, upon petition of a certain number of voters, to adopt a certain statute respecting the running at large of hogs. *Id.*

NOTES AND BRIEFS.

Constitutional law; police power as to license of occupation. 55

Delegation of power to insurance commissioners. 113

Due process in assessment. 382

As to attorneys' fees in a particular class of cases. 553

Police power as to Sunday law; class legislation. 689

Amendment changing seat of government. 817

CONTEMPT.

Appearing and answering as to the merits on a charge of contempt will prevent any attack for lack of jurisdiction of the person, on a decision that the party is in contempt. *Ex parte Keeler* (S. C.) 678

CONTINUANCE. See APPEAL AND ERROR, 16.

CONTRACTS. See also CONFLICT OF LAWS, 2; CORPORATIONS, 11, 12; LOTTERY; MUNICIPAL CORPORATIONS, 2-6.

1. An implied contract against the removal of the seat of state government from its original location is not made with property owners at that place by its location there. *Edwards v. Lesueur* (Mo.) 815

2. A contract for its "requirements" of coal for a certain season, made by a lumber company, is not void for uncertainty and for want of mutuality, when it was evidently meant to call for the amount of coal which the corporation should need in its business for such season, and not merely what it might choose to require of the other party. *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 529

3. An oral contract to manufacture and furnish ironwork for a brick building according to special designs and measurements, suitable only for use in that particular building, is not within the statute of frauds as a sale of personal property. *Heintz v. Burkhard* (Or.) 508

4. An oral contract for the adoption of a child as an heir may be recognized and enforced after performance of the consideration. *Nowack v. Berger* (Mo.) 810

5. Marriage constitutes such part performance by a woman of a contract in consideration of marriage as to prevent the operation of the statute of frauds in respect to the contract. *Id.*

6. The surrender of a child by his mother to the custody and control of a man whom she

marries, in pursuance of an oral contract by which, in consideration of the marriage and of the services of the child, the husband agrees to give the child a share of his estate equal to that which an heir would inherit, constitutes an independent, additional, and valuable consideration which will amount to part performance of the contract, and take the case out of the operation of Mo. Rev. Stat. 1889, § 5186, prohibiting an action on a contract in consideration of marriage unless it is in writing. *Id.*

Illegality.

7. A contract to allow another to control the voting of stock, based upon a promise of the latter to secure an office in the corporation for the owner of the stock, is illegal; and such illegal promise, although only a part of the consideration of the contract, renders the whole contract void. *Gage v. Fisher* (N. D.) 557

8. A contract for the privilege of ordering any quantity of coal not exceeding 12,000 tons is not an option contract in violation of Ill. Crim. Code, § 130, where it is made as a modification of a prior disputed contract, with the intention of limiting the quantity to be ordered, without relieving the purchaser from an obligation under the prior agreement to purchase the amount required in a certain business. *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill.) 529

9. A note given in consideration of concealing from the maker's wife and from the public his criminal intimacy with another woman cannot be enforced. *Case v. Smith* (Mich.) 282

10. Affirmative relief in equity against an illegal contract by a corporation to transfer its entire plant and business to another company, and a conveyance in pursuance thereof, may be given to the extent of an injunction against interference with the title or possession of the original corporation, where before actually surrendering the possession of its property, or receiving all the consideration, it repudiated the whole scheme and tendered back all that it had ever received, and has kept the tender. *McCutcheon v. Merz Capsule Co.* (C. C. App. 6th C.) 415

Effect; rescission; action.

11. The share which a person is entitled to from an estate of a person who had agreed to give the former a specified share thereof cannot be diminished because of a gift by will of a portion of the estate to the children of the distributee. *Nowack v. Berger* (Mo.) 810

12. A purchase of stock at an exorbitant price, to secure control of the corporation, will not be rescinded on the ground that the seller had threatened to break his contract to give the purchaser control of the stock for voting purposes, and sell it to the opposing faction. *Gage v. Fisher* (N. D.) 557

13. The employment of an attorney by a mother to draw her will, in which a provision was made for one of her sons, is not a contract made for the benefit of the latter, within Cal. Civ. Code, § 1559, providing that a third person may enforce a contract entered into between others for his benefit, so as to entitle such son to recover from the attorney for his gross mistake in so writing the will as to de-

prive the son of the provision designed by the testatrix for his benefit. *Buckley v. Gray* (Cal.) 862

Impairing obligation.

14. The obligation of previous contracts of subscription to a foreign building and loan association doing business within the state is not impaired by Ky. Stat. § 4228, imposing an annual tax of 2 per cent on the annual gross receipts of all such associations. *Southern Bldg. & L. Assn. v. Norman* (Ky.) 41

15. A contract giving a consumer of water the right to draw and take from a canal all he may be entitled to on tender or payment of the amount due therefor, if the owner of the canal fail or refuse to comply with the contract, is not protected against legislative interference by a subsequent statute prohibiting such acts and regulating the distribution of water from such canals, but giving a remedy for the enforcement of the right to receive all the water to which the contract entitles him. *White v. Farmers' Highline C. & R. Co.* (Colo.) 828

16. General remedies afforded by state jurisprudence and practice, entirely aside from anything contained in a contract, never constitute any part of its obligation, and may be changed from time to time. *Beverly v. Barnitz* (Kan.) 74, Rev'd in *Barnitz v. Beverly*, 168 U.S. 118, 41 L. ed. —.

17. A remedy agreed upon in a contract itself, with the sanction of the state law, is indistinguishable from the obligation, and constitutes a part of it. *Id.*

18. A change in the remedy on foreclosure of a mortgage by Kan. act 1893, making it unnecessary to having an appraisal fixing the amount to be obtained on the sale, and hastening the time for sale in certain cases, but, on the other hand, extending for a year, at most, the time when the purchaser can get a deed, during which the mortgagor is entitled to possession, but for which he must pay interest on the sale price in case of redemption,—does not impair the obligation of a contract, as it merely changes the general remedy, and the mortgage in that state is a mere security, vesting no title and giving no right of possession either before or after breach. *Id.*

19. A statute extending the time for redemption upon the sale of mortgaged premises does not impair the obligation of the contract made by a pre-existing mortgage. *State, Thomas Cruse Sav. Bank v. Gilliam* (Mont.) 721

NOTES AND BRIEFS.

See also CORPORATIONS.

Contracts; impairment of obligation by change of remedy. 74

Illegality of consideration. 282

Unlawful combinations in restraint of trade. 418

Statute of frauds as to contract for labor and materials. 508

Definiteness of provisions; validity of option. 530

Prohibited by statute. 743

Illegality of. 798

Statute of frauds; part performance; in case of adoption of child. 810

31 L. R. A.

Impairment of obligation of, by police power as to electric wires. 798

Statute extending mortgagor's right of possession on foreclosure of, pre-existing mortgages. 721

CONVICTS. See HUSBAND AND WIFE, 8, NOTES AND BRIEFS.

CORONER. See also CORPSE, 1.

NOTES AND BRIEFS.

Power of, to order post mortem examination. 540

CORPORATIONS. See also CONTRACTS, 7, 12; EVIDENCE, 14; GIFT, 2-4; LIMITATION OF ACTIONS, 8; RECEIVERS, 2; SPECIFIC PERFORMANCE; WRIT AND PROCESS.

1. A corporation receiving its charter from one state cannot hold corporate meetings in another for the purpose of organizing, electing officers, or performing any strictly corporate functions in its organization. *Duke v. Taylor* (Fla.) 484

2. An attempted organization of a corporation in one state, under a charter granted in another state, does not constitute it a *de facto* corporation so as to relieve the members from liability as partners, as to give an association such a status the attempted organization must be under semblance of authority, which does not exist in the case supposed. *Id.*

3. Corporations are not bound by false and simulated entries upon their records unless they have estopped themselves to deny their truth. *City Electric Street R. Co. v. First Nat. Exch. Bank* (Ark.) 535

4. A sole stockholder of a corporation has no title, legal or equitable, to its property, which he can convey by a deed in his own name. *Parker v. Bethel Hotel Co.* (Tenn.) 706

Name.

5. The right of a corporation to the exclusive use of a name as against another organization using the same name does not follow from the fact that the latter is doing an unlawful business. *Grand Lodge A. O. U. W. v. Graham* (Iowa) 133

6. The certificate of the auditor as to the right of a corporation to a name is not binding upon another body claiming the right to the name. *Id.*

7. The right to use the name "Grand Lodge of the Ancient Order of United Workmen of Iowa" cannot be claimed by a seceding body merely because it has become incorporated, to the exclusion of the body from which it seceded, which previously had used the name and continued to do so without incorporation. *Id.*

Contracts.

8. The president and secretary of a corporation have no inherent power to execute negotiable notes in its name. *City Electric Street R. Co. v. First Nat. Exch. Bank* (Ark.) 535

9. The exercise of the power to make negotiable notes by officers of a corporation does not raise a presumption of their authority to

do so, in the absence of a usage or custom from which such authority can be implied. *Id.*

10. A corporation as such has no power to create a debt by borrowing money with which to purchase its own stock,—especially when it is in failing circumstances. *Adams & W. Co. v. Deyette* (S. D.) 497

11. A sale of the entire manufacturing plant, including patents, processes, and goodwill, of a corporation, with an agreement that it would never again engage in the same business, made in consideration of stock in a new corporation, without intending to wind up the affairs of the former, but with the object of continuing its corporate life and activity, to be exercised through the other corporation, is *ultra vires* and void. *McCutcheon v. Merz Capsule Co.* (C. C. App. 6th C.) 415

12. The consent of stockholders cannot legalize or vitalize a void illegal contract by which a corporation attempts to transfer all its property to another company in consideration of shares in the latter. *Id.*

Stock.

13. A transfer on the books of a national bank is not necessary to give to a donee or purchaser an equitable title to the shares. *Leyron v. Davis* (Mont.) 429

14. An entry on the books of a corporation is not necessary to vest a vendee of shares of stock with all the title which the vendor had, notwithstanding a provision in the charter or by-laws that no transfer shall be complete or effectual without registration. *Parker v. Bethel Hotel Co.* (Tenn.) 706

15. Information that a certificate of stock is in a condition for transfer, given by a person in charge of the office of a corporation in response to an inquiry, on the faith of which a broker guaranteed its genuineness, estops the corporation from denying its liability to indemnify him or his assignee against loss on account of the fact that the certificate was spurious and worthless. *Jarvis v. Manhattan Beach Co.* (N. Y.) 776

16. The title of the true owner of a lost or stolen certificate of stock in a corporation may be asserted against any one subsequently obtaining its possession, even if the holder is a bona fide purchaser. *Knox v. Eden Musee American Co.* (N. Y.) 779

17. Directing an employee to cancel surrendered certificates of stock does not give him any authority, expressed or implied, to act as agent in issuing them, so as to bind the corporation by his wrongful use of them to secure a personal loan. *Id.*

18. Permitting surrendered certificates of stock to remain uncanceled in the safe of the corporation to which an employee has access, and relying upon him to cancel the certificates as he was directed to do, is not such negligence as will make the corporation liable for his fraudulent use of them to secure a personal loan about three weeks later, if the company did not know or have reason to suspect that he was dishonest, although a by-law requiring the cancellation of the surrendered certificates was not complied with. *Id.*

Liability of directors.

19. Dividends paid by the directors of a corporation when it is realizing a net profit on its business, and when the assets as honestly estimated by them exceed its liabilities, will not render them individually liable under a charter imposing such liability for dividends paid when the company is insolvent, although the assets prove to have been largely overestimated and the company in fact insolvent. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* (Tenn.) 593

20. Consent to the creation of indebtedness of a corporation in excess of its assets, which will make directors individually liable therefor under a statute imposing such liability, must be given in their capacity as directors. *Id.*

21. The term "indebtedness," in the charter of a corporation making directors liable personally for indebtedness in excess of capital stock paid in, includes bonded indebtedness. *Id.*

22. The term "capital stock paid in," in the charter of a corporation making directors liable for debts in excess of such stock, means the amount subscribed by the stockholders, and not the total value of the assets. *Id.*

23. Although the directors' liability for indebtedness of a corporation in excess of the capital stock is available only in favor of creditors whose debts were illegally contracted, yet it cannot be enforced by each creditor individually, but must be enforced by a bill filed for the benefit of all creditors similarly situated. *Id.*

Dissolution; winding up.

24. Nonuser of the franchise of a corporation, and the sole proprietorship of all its capital stock, will not constitute a dissolution of the corporation without a judicial adjudication thereof. *Parker v. Bethel Hotel Co.* (Tenn.) 706

25. The existence of a corporation or its title to property cannot be attacked collaterally on the ground of its dissolution or forfeiture of franchise, until dissolution has been judicially pronounced. *Id.*

26. A creditor of a corporation may, without obtaining judgment against it, maintain a bill under the Tennessee statutes to wind up its affairs, if, after sustaining large losses, it has suspended business with no preparation for resumption, and has executed trust deeds in favor of certain creditors covering practically all its assets, while its claim to solvency is based upon extravagant valuations of its assets. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* (Tenn.) 593

27. A sale of property in a suit to wind up an insolvent corporation is not made subject to the provisions as to redemption, in a statute governing sales in foreclosure proceedings or under decrees for the payment of money, by the fact that in the suit are filed cross bills seeking preferences in the assets, if the decree refuses to recognize such claims, but leaves the assets unencumbered thereby. *Blair v. Illinois Steel Co.* (Ill.) 269

Preference of creditors.

28. Trust deeds in favor of certain creditors, executed by a corporation after sustaining heavy losses and suspending business and when it cannot meet its accruing liabilities, will be

set aside. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.* (Tenn.) 593

29. An insolvent corporation has no authority to prefer creditors. *Adams & W. Co. v. Deyette* (S. D.) 497

But see cases following.

30. Directors and officers of an insolvent corporation can dispose of its property in good faith to pay or secure corporate debts, even though the result is to give some creditors a preference over others. *Illinois Steel Co. v. O'Donnell* (Ill.) 265

31. Relationship of a creditor of an insolvent corporation to one or more of its directors or officers will not prevent the giving of a valid security as a preference to such creditor. *Id.*

32. A preference given by an insolvent corporation to a creditor, having no indorsement or guaranty from its directors, is not unlawful though she is an aunt of three of the directors. *Blair v. Illinois Steel Co.* (Ill.) 269

33. Valid securities may be given to its directors by a corporation, although it is in fact insolvent, where it is a going concern doing a large business, and the securities are given for money loaned at the same time in good faith to enable the company to carry on the purposes of its incorporation. *Illinois Steel Co. v. O'Donnell* (Ill.) 265

34. Subsequent insolvency of a corporation which has borrowed money when solvent from officers or directors will not affect their rights of action to recover such loans and enforce their securities. *Id.*

35. Judgment notes of a corporation, renewed after its insolvency, are in the same position with respect to the right of the corporation to make preferences as prior judgment notes for which the renewals were given. *Id.*

36. A preference by an insolvent corporation, of creditors whose debts have been guaranteed by directors of the corporation, is not invalid although made without the requirement or knowledge of the creditors, unless it otherwise appears that it was made for the benefit of the directors or guarantors, and not for that of the creditors themselves. *Blair v. Illinois Steel Co.* (Ill.) 269

37. The filing in a suit to dissolve a corporation and close up its business, of cross-bills in the nature of creditors' bills, and of prayers to set aside a deed of trust on the property, will not operate to give the creditors praying such relief preference over the other creditors of the corporation. *Id.*

38. A party loaning money to an embarrassed corporation subsequently adjudged insolvent, and taking security therefor, cannot in equity claim a lien on its mortgaged property or the proceeds thereof, in preference to a pre existing mortgage, no matter for what purpose the loan was made or how the money loaned was applied, providing the mortgage bondholders were not parties to the transaction. *Farmers' L. & T. Co. v. Bankers' & N. Teleg. Co.* (N. Y.) 403

NOTES AND BRIEFS.

Corporations; validity of agreement to control stock. 558

31 L. R. A.

Liability of directors for excessive indebtedness; preference of creditors. 594

Liability for acts of agent. 702

Dissolution of. 706

Liability for information as to certificate of stock. 776

Liability for fraudulent transfer or issue of stock. 779

Conflicting rights as to name. 184

Preference among creditors of. 265, 271

Gift of stock *causa mortis*. 436

Foreign organization or meetings outside of state. 485

Dealing with director; preference of creditors. 497

Power of officers as to negotiable paper. 535

CORPSE. See also CORONER, NOTES AND BRIEFS.

1. A coroner may lawfully order a post mortem examination without the consent of the family of the deceased, where death has resulted from an injury which seems to him insufficient alone to produce death. *Young v. College of Physicians & S.* (Md.) 540

2. A post mortem examination made by a medical examiner in the exercise of his duty, when required by a coroner, does not render him liable for mutilating the body without the consent of the family of the deceased, if the work was done with ordinary decency and without wantonly disfiguring the body. *Id.*

COSTS.

1. A limitation of the amount of costs to \$30 when the law determines their amount, under Wis. Rev. Stat. § 2918, subs. 7, § 2921, is erroneous. *Hayes v. Douglas County* (Wis.) 218

2. A city is not liable for costs in a suit to enforce an ordinance. *Carrollton v. Bazzette* (Ill.) 522

COTENANCY.

One of two tenants in common of a quantity of manure may rightfully take away his share without the intervention of a court to make the division. *Pickering v. Moore* (N. H.) 698

COUNTIES. See also CONSTITUTIONAL LAW, 25.

The expense of placing blocks of stone from a county in a state building at the Columbian World's Fair cannot be made a county tax. *Hayes v. Douglas County* (Wis.) 218

COURTS. See also DEBT.

1. An unconstitutional apportionment law may be declared void by the courts, notwithstanding the fact that such statute is an exercise of political power. *Denny v. State, Basler* (Ind.) 726

2. A court of equity will not assume to determine the constitutionality of a legislative act unless the case comes within some recog-

nized ground of equity jurisdiction, and presents some actual or threatened infringement of the rights of property on account of such unconstitutional legislation. *State, Taylor, v. Lord* (Or.) 473

3. No principle of comity requires state courts to refuse to take cognizance of an action on an undertaking to secure a stay of proceedings on appeal in an admiralty case. *Braithwaite v. Jordan* (N. D.) 238

4. A stipulation for value in a possessory action, unlike stipulations for value in other cases, can be enforced in any court having jurisdiction of an action of debt for the amount due on the stipulation. *Id.*

5. An action on an undertaking to secure a stay of proceedings on appeal in an admiralty case is not an integral part of the original case, or a proceeding to enforce the judgment therein, or within the exclusive jurisdiction of admiralty, but is within the jurisdiction of a state court. *Id.*

6. The appointment of a receiver by a Federal court after a judgment in a state court establishing a mechanic's lien against specific property and directing a sale of it to satisfy the demand will not defeat the right of the lien claimants to have the property sold on execution under the judgment. *Rogers & B. Hardware Co. v. Cleveland Bldg. Co.* (Mo.) 335

7. Courts have no power to make an arrangement of the business intercourse of common carriers such as they think ought to be made, because such function is legislative rather than judicial. *State, Board of Transportation, v. Sioux City, O. & W. R. Co.* (Neb.) 47

Causes of action arising in other country.

8. A court will not undertake to adjudicate rights which originated in any other state or country under statutes materially different from the law of the forum in relation to the same subject. *Mexican Nat. R. Co. v. Jackson* (Tex.) 276

9. It is for the court whose jurisdiction is invoked to determine whether or not the law of a foreign country by which the right claimed must be determined is such that it can properly and intelligently be administered by that court, with due regard to the rights of the parties. *Id.*

10. Jurisdiction of an action for personal injuries sustained in any other country by a railroad employee will not be entertained by a Texas court, where the foreign law which governs the case permits what is termed "extraordinary indemnity" in a sum which the judge might deem proper considering the plaintiff's social position, and also provides for subsequent judgments for additional damages afterwards arising out of the same injury, as well as for a reduction of the judgment in case of an increased earning capacity of the injured person. *Id.*

Rules of decision.

11. Courts will not assume to pass upon constitutional questions unless properly before them. *State, Taylor, v. Lord* (Or.) 473

12. The constitutionality of a statute giving women the right to hold office will not be passed

upon in a collateral proceeding. *Stevens v. Carter* (Or.) 342

13. The rule of *stare decisis* does not bind the court in deciding the constitutionality of a statute, where no property right or contract between the parties is involved. *Denny v. State, Basler* (Ind.) 726

14. The construction of provisions of the Federal Constitution by the Supreme Court of the United States must be followed by the state courts in all matters to which such provisions are applicable. *State, Board of Transp. v. Sioux City, O. & W. R. Co.* (Neb.) 47

NOTES AND BRIEFS.

Courts; of state, jurisdiction on undertaking in admiralty. 239

Jurisdiction of cause of action arising in foreign state. 276

Exclusiveness of jurisdiction on appointment of receiver. 335

CREDITORS' BILL.

1. Creditors whose executions cannot be levied upon their debtor's property because it is in the hands of a receiver are not, because of failure to levy executions, precluded from attacking the validity of a deed of trust which has been given by the debtor as being in fraud of their rights. *Blair v. Illinois Steel Co.* (Ill.) 269

2. Jurisdiction to set aside a trust deed is acquired, although complainants in the original bill in which such relief was sought were not judgment creditors of the grantor, where a cross bill to foreclose the deed is filed in the suit, making numerous parties defendants with a requirement to answer, which they do by attacking the deed, and upon issues so formed the question of the validity of the deed is submitted by the parties for decision. *Id.*

CRIMINAL LAW. See also CONFLICT OF LAWS, 4.

A fine of not less than \$200 nor more than \$1,000, and imprisonment for not less than ninety days nor more than one year, for violation of a restraining order under the South Carolina dispensary act of 1894, § 22, are not within the constitutional provision against excessive fines or cruel and unusual punishments. *Ex parte Keeler* (S. C.) 678

NOTES AND BRIEFS.

See also BETTING.

Criminal law; effect of conviction of crime upon marriage relation. 515

CROSS-BILL. See APPEAL AND ERROR, 1.

CUSTOM.

A usage to be good and one of which the courts will take judicial notice must be general and of such long standing as to have become a part of the law itself. *City Electric Street R. Co. v. First Nat. Ech. Bank* (Ark.) 535

DAMAGES.

1. General compensatory damages, and not merely nominal damages, may be recovered by a merchant or trader for the dishonor of his check when he had funds to meet it. *Scendesen v. State Bank* (Minn.) 552

2. The measure of damages for partial destruction of a building is the reasonable cost of restoring it so that it will be as valuable as it was before, considering its age and depreciation; and it is not the cost of a new building the same as that destroyed. *Anderson v. Miller* (Tenn.) 604

3. A verdict of \$15,000 is not excessive for injury to a boy who was run over by a car and one of his legs crushed so that amputation was necessary. *Roth v. Union Depot Co.* (Wash.) 855

NOTES AND BRIEFS.

Damages; offset of benefits in eminent domain case. 408

DANGEROUS AGENCY. See NEGLIGENCE, NOTES AND BRIEFS.

DEATH. See ADMIRALTY, NOTES AND BRIEFS.

DEBT.

A common-law action of debt will not be denied on the ground that the plaintiff has in another tribunal a more speedy and simple remedy which is equally efficacious,—especially where this would deprive him of the right to a trial by jury. *Braithwaite v. Jordan* (N. D.) 288

DEDICATION.

The express refusal of a city to accept a plat with a certain strip designated thereon as a street, and the inclosure and use of one end of the strip as private property, on which the owners are compelled to pay assessments for improvements on another street, preclude a finding that this portion was a public road or street. *Mahler v. Brumder* (Wis.) 695

NOTES AND BRIEFS.

Dedication; of highway; acceptance of. 695

DEFENSE. See CONSTITUTIONAL LAW, 11, 12.

DEFINITION. See LICENSE, 2.

DEPUTY. See CLERK.

DESCENT AND DISTRIBUTION.
See also CONFLICT OF LAWS, 1; WILLS, 3.

1. The common-law rule that one citizen cannot inherit from another where kinship must be traced through a nonresident alien cannot be rejected as repugnant or inapplicable to our institutions or the condition of things in this country, under a statutory adoption of the general principles of the common law so far as applicable. *Beavan v. Went* (Ill.) 85

2. A statutory provision that an estate shall descend in equal parts to next of kin does not 31 L. R. A.

make the descent to collateral kindred immediate so as to avoid the effect of alienage of ancestors through whom kinship is traced. *Id.*

3. *It seems* that one who becomes a domiciled resident of a foreign country becomes an alien within the operation of the law which excludes aliens from inheritance. *De Wolf v. Middleton* (R. I.) 146

4. The alienage of a son, which would prevent his inheritance at the time of the death of the testator, who made an executory devise to his heirs at law according to the statute of descents, will not exclude a descendant of the son from this class, where a statute passed before the time of determining the heirs has removed the disability of alienage. *Id.*

5. Nonresident aliens may inherit from an alien resident land situated in a state whose statutes prohibit nonresident aliens from acquiring title to land in the state, except that the widow and heirs of aliens who have acquired lands in the state may hold such lands by devise or descent for a period of ten years. *Easton v. Huott* (Iowa) 177

NOTES AND BRIEFS.

Descent and distribution; effect of state Constitutions and statutes upon the question of inheritance by or from an alien:—(I.) United States statutes; (II.) state Constitutions and statutes and their construction; (III.) decisions under English statutes. 85

Effect of statutes and Constitutions upon inheritance through an alien:—(I.) The English doctrine; (II.) the effect of state legislation. 146

Alien's right to inherit:—(I.) The common-law doctrine; (II.) upon what the right depends; (III.) power of the states to regulate; (IV.) in lands granted for military services and colonization; (V.) inheritance of patent lands; (VI.) effect of annexation of territory or division of an empire; (VII.) the effect of naturalization; (VIII.) effect of marriage with an alien and residing abroad. 177

DISCOVERY.

An order of court that a veterinary surgeon may be sent on the premises of a party against his will to examine a horse whose condition is in dispute, provided the owner or any person he may select shall accompany such surgeon, is in excess of the power of the court. *Martin v. Elliott* (Mich.) 169

NOTES AND BRIEFS.

Discovery; by entry on premises for examination. 169

Order to enter premises for examination. 169

DISEASE. See ANIMALS, 4-6.

DIVORCE. See APPEAL AND ERROR, 1; JUDGMENT, 4; HUSBAND AND WIFE, 4, 5, NOTES AND BRIEFS.

DOWER. See WILLS, 4.

DRUNKENNESS. See CARRIERS, 8, 9.

ELECTION DISTRICTS. See also *Estoppel*, 8.

1. The injustice of allowing but one representative to a county, while other counties having a similar population are given a voice in the election of more than one representative, must be avoided wherever possible. *Denny v. State, Basler* (Ind.) 726

2. Double districts in which two or more counties are grouped and given a voice in the election of more than one senator or representative, when neither of them has a voting population equal to the ratio for one senator or representative, cannot be created under Ind. Const. art. 4, § 5, requiring apportionment among counties according to the male inhabitants above twenty-one years of age, and § 6, providing that where more than one county shall constitute a district they must be contiguous. *Id.*

3. The approximation to the dual constitutional requirements of county representation and proportionate popular representation, in the enactment of an apportionment law by the legislature, is not reviewable by the courts except for gross abuse of discretion and providing both objects contemplated in the Constitution are kept in view. *Id.*

4. The obligation of observing a constitutional requirement as nearly as possible in an apportionment act becomes of binding force under the Constitution, when the exact requirement cannot be observed. *Id.*

5. The requirement that legislative apportionment shall be according to the number of inhabitants, in Ind. Const. art. 4, § 5, is no less binding than the provision that counties united in a district must be contiguous, or that no county for senatorial apportionment shall be divided. *Id.*

6. A valid apportionment law can be passed only once for each enumeration period, under Ind. Const. art. 4, § 4, providing for an enumeration every six years, and § 5, requiring an apportionment at the session next following the enumeration. *Id.*

7. An unconstitutional apportionment law, even if it has been declared constitutional by one of the lower state courts, will not preclude the enactment by the legislature of a valid apportionment law. *Id.*

NOTES AND BRIEFS.

Election districts; power of courts as to apportionment law. 727

ELECTRICAL USES AND APPLIANCES. See also *EVIDENCE*, 5, 11, 12, 21-24; *HIGHWAYS*, 1; *TRIAL*, 14-16.

1. An electric-light company may be guilty of actionable negligence in failing to take proper steps to receive information concerning the condition of its wires, as well as in not repairing them within a reasonable time after receiving notice of their bad condition. *Mitchell v. Charleston Light & P. Co.* (S. C.) 577

2. The care exercised to prevent the escape of a dangerous current of electricity from wires suspended over streets in populous cities or towns must be commensurate with the great
31 L. R. A.

danger that exists, although the owners of such wires are not insurers against accidents. *City Electric Street R. Co. v. Conery* (Ark.) 570

3. The escape of electricity from wires suspended over streets, through any other wires that may come in contact with them, must be prevented so far as it can be done by the exercise of reasonable care and diligence. *Id.*

4. A grant of the privilege to encumber the public highway with poles and electric wires which, though insulated, carry a deadly current, imposes upon those having such privilege the duty of so managing affairs as not to injure persons lawfully on the streets, and of making the street substantially as safe for them as it was before. *Western U. Tele. Co. v. State, Nelson* (Md.) 572

5. Reasonable care and caution in the use of an electric current by a street-railway company is required for the safety of the employees of an electric-light company which is engaged by the railway company to move electric lamps during the operation of the railway. *Huber v. La Crosse City R. Co.* (Wis.) 583

6. The coiling of a trolley wire over a span wire pending continuation of the line, thereby charging the span wire with electricity, is not negligence which will render the street-railway company liable to an experienced workman familiar with such wires and their insulation, who is injured by contact with the span wire while standing on a wooden pole moving electric lamps, where the span wire had circuit breaks to prevent its charging the iron posts which sustained it, and injury from it could be sustained only by one who completed the circuit between it and the iron posts by touching them both at the same time. *Id.*

7. A telephone company and an electric-railway company are jointly liable for negligence when both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and a telephone wire insecurely suspended over it, and especially when they permit a broken telephone wire to remain suspended across the trolley wire. *McKay v. Southern Bell Tele. & Tele. Co.* (Ala.) 589

8. A telephone company is not excused for negligence in the maintenance of a wire insecurely fastened above a dangerous trolley wire, because the railroad company was chargeable with the duty of maintaining guard wires between the electric wires, and failed to do so. *Id.*

9. An electric-railway company maintaining a trolley wire charged with a dangerous current without guard wires between it and an insecure telephone wire over it, and negligently permitting the telephone wire to remain suspended over the trolley wire after it has fallen upon it, cannot escape liability by showing how other trolley wires are erected and maintained by prudent and well-managed electric-railway companies. *Id.*

NOTES AND BRIEFS.

Electrical uses; liability for injuries by electric wires in highways:—(I.) General rules; (II.) danger of current; (III.) degree of care; (IV.) liability for broken, fallen, or sagging

wires: (a) liability of owner; (b) presumption of negligence as to broken or fallen wires; (c) liability of party breaking them; (d) negligent delay in removing or repairing them; (e) municipal liability; (V.) failure to guard wires from falling wires of other owners; (VI.) concurrent liability; (VII.) wires charged by lighting; (VIII.) contributory negligence. 568

Police regulation of electric companies:—(I.) In general; (II.) as to the occupation of highways or waters; (III.) as to guard wires; (IV.) as to the operation of electric lines; (V.) limitation of the police power: (a) limitations in state Constitutions: (1) impairment of obligation of contracts; (2) deprivation of property without due process of law; (3) class legislation; (b) limitations in Federal Constitution: (1) statutes requiring electric wires to be put underground; (2) statutes imposing penalties upon telegraph companies for not transmitting and delivering message properly; (3) statutes regulating telephone prices and requiring service on equal terms to all; (4) statutes imposing license fees on telegraph companies. 798

ELECTRIC LIGHTS. See ELECTRICAL USES AND APPLIANCES, 1; MUNICIPAL CORPORATIONS, 7-11.

ELECTRIC RAILWAYS. See CARRIERS, 11.

ELEVATED RAILWAYS. See INJUNCTION, 2.

EMBEZZLEMENT. See BANKS, 8.

EMINENT DOMAIN.

1. The connection of mines and ore houses with a market is a public use in Montana, which will authorize a railroad company to acquire a right of way for that purpose by right of eminent domain. *Butte, A. & P. R. Co. v. Montana U. R. Co.* (Mont.) 298

2. The magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad in Montana to construct branches to mines and mining works as public uses, by virtue of the law of eminent domain. *Id.*

3. The exercise of the right of eminent domain to acquire land for a railroad is not precluded by the facts that the road is owned by a private corporation and is built for the benefit of private mines and ore houses, where the state laws make all railroads public highways, open to use by all who wish to do so. *Id.*

4. The use for which property already held for public use may be condemned need not be a different one, under a statute permitting such condemnation for a more necessary public use. *Id.*

5. Land belonging to a railroad company by way of easement, and not actually in use by it or not actually necessary for the enjoyment of its franchise, is, with respect to the power of eminent domain, upon the same footing as the land of an individual citizen, if there is a necessity that it should be taken for another use. *Id.*

6. Absolute necessity is not necessary to en-

able one railroad to condemn a portion of another's right of way for its tracks, under a statute forbidding such appropriation unless the use to which it is to be applied is a "more necessary public use." *Id.*

7. A case of necessity is presented, within Mont. Code Civ. Proc. § 601, permitting one railroad company to condemn a portion of the right of way of another, when the latter, traversing a mountain side in a mining section, has within its right of way tracks unused and in all reasonable probability not necessary for future use, and another road seeking the same objective point is obliged to take a part of such right of way to avoid circuitry, a different grade, much greater cost, and serious damage to mining properties, and would be obliged in any event to parallel the adversary road a part of the way. *Id.*

8. A railroad to be constructed along the side of a mountain may be permitted to condemn for its right of way a portion of the right of way of a former road, where such portion is occupied by unexcavated rock and dirt, and there is no immediate prospect of the other road needing it, and its tracks are to be placed far enough away from the other's so as not to interfere with its operations; while that location is by far the most practicable that can be found, any other route would impinge as much upon the other road as this does, would affect many mining operations, would be enormously expensive, less convenient, and the one chosen manifestly best serves the interests of the public. *Id.*

9. A street may be opened across depot grounds of a railroad company, under general authority conferred on cities and towns for opening streets and condemning lands for such purposes without any express provision as to crossing railroads, where the inconvenience to the company will be inconsiderable as compared with the benefit to the public. *Chicago, M. & St. P. R. Co. v. Starkweather* (Iowa) 188

10. The question of damages to be awarded upon the crossing of one railroad by another may be referred to commissioners, under a statute providing that courts may regulate and determine the place and manner of making crossings. *Butte, A. & P. R. Co. v. Montana U. R. Co.* (Mont.) 298

NOTES AND BRIEFS.

Eminent domain; by railroad; taking land of other company. 302

EQUITY. See also COURTS, 2.

Equity cannot be successfully invoked to inflict injury or damage to the defendant, without securing any substantial right or benefit to the plaintiff. *Mahler v. Brumder* (Wis.) 695

NOTES AND BRIEFS.

Equity; remedy in, barred by usury. 706

ESTOPPEL. See also ACTION OR SUIT, 4.

1. After an insurance organization has been allowed to proceed in its business, with full knowledge and acquiescence of the insurance authorities of the state, for a series of years, during which many of its members have by

age and disability become unable to procure any other insurance, a rival organization which has all the time had knowledge of the facts and failed to take action is estopped from contesting the legality of such business. *Grand Lodge A. O. U. W. v. Graham* (Iowa) 133

2. Affidavits stating that at the time of marriage the affiant was the wife of another man do not estop her from subsequently denying that fact and explaining that the affidavits were made upon the strength of a rumor. *Hunter v. Hunter* (Cal.) 411

3. The people of the state cannot be estopped from asking for a determination of the validity of an apportionment law, by failing to bring the matter to a decision until after a legislature has been chosen in pursuance of the act. *Denny v. State, Basler* (Ind.) 726

NOTES AND BRIEFS.

Estoppel; by decree of divorce. 412

EVIDENCE.

Judicial notice.

1. Courts will not take judicial knowledge of the laws of another state under which a corporation is claimed to have been created, but proof of such laws must be made. *Duke v. Taylor* (Fla.) 484

2. Judicial notice will be taken of a census or other enumeration made under the authority of the state or of the United States, and also of the location, boundaries, and juxtaposition of the several counties of the state. *Denny v. State, Basler* (Ind.) 726

3. The court can take notice of its own records in another case, either on suggestion of counsel or upon its own motion. *Id.*

4. It is matter of common knowledge that property lying in the vicinity of a street improvement often derives important benefits therefrom, although not fronting upon or directly contiguous thereto. *Hayes v. Douglas County* (Wis.) 213

5. It is a matter of common knowledge that electricity is used for the purpose of transmitting sound by telephone and messages by telegraph, and also for generating light and producing power. *State, Laclede Gaslight Co. v. Murphy* (Mo.) 798

6. Jurors cannot act upon their personal knowledge of the mental condition of one accused of perjury, in arriving at a verdict. *State v. Gaymon* (S. C.) 489

Presumptions and burden of proof.

7. A statute prescribing the circumstances that shall constitute prima facie evidence of a fact in issue on trial in the courts of the state is within the authority of the legislature, and may be made applicable to a cause of action which arose outside of the state. *Pennsylvania Co. v. McCann* (Ohio) 651

8. Injury to a passenger on a train is prima facie evidence of the carrier's negligence. *Baltimore & P. R. Co. v. Swann* (Md.) 313

9. The rule that defects in railroad apparatus shall be prima facie evidence of negligence on the part of the corporation in an action for injuries received by an employee, which is prescribed by the Ohio act of April 2, 31 L. R. A.

1890, regulating railroads in the state, applies to all railroad companies any part of whose line of railway extends into the state, whether the injury complained of was received within or without the state. *Pennsylvania Co. v. McCann* (Ohio) 651

10. The burden of showing that plaintiff's fence was defective when entered by defendant's cattle cannot be cast upon the defendant in an action of trespass. *Clarendon Land, I. & A. Co. v. McClelland* (Tex.) 669

11. An injury from contact with a broken telephone wire hanging over and in contact with the feed wire of an electric railway affords a prima facie presumption of negligence on the part of the owners of the wires. *Western U. Teleg. Co. v. State, Nelson* (Md.) 572

12. That an electric wire had become disconnected or detached from its fastening, and hung down in a public alley so as to endanger public travel, is of itself prima facie evidence of negligence upon the part of the company maintaining it. *Denver Consol. Elec. Co. v. Simpson* (Colo.) 566

13. The presumption in favor of the legality of a marriage regularly solemnized will prevail over the presumption of the continuance of the life of a former husband who has been absent and unheard of for less than seven years. *Hunter v. Hunter* (Cal.) 411

14. That a note is executed by persons as president and secretary of a company which is the purported maker does not create a presumption that it is a corporation rather than a partnership. *Duke v. Taylor* (Fla.) 484

Best; documentary.

15. The commission of the governor of Florida is the best evidence in mandamus proceedings, of the person entitled to the office, until it is annulled by a judicial determination in proceedings in the nature of quo warranto. *State, Lamar, v. Johnson* (Fla.) 357

16. Upon the trial of one charged as being accessory to a crime, the record of the conviction of the alleged principal is admissible as prima facie evidence that the latter committed the crime as charged. *State v. Gleim* (Mont.) 294

17. A copy of proofs of loss mailed to an insurance company, and a postal card acknowledging their receipt, are admissible in evidence to show that the proofs were seasonably furnished, although the proofs will not be competent evidence of the facts therein contained. *Dowling v. Lancashire Ins. Co.* (Wis.) 112

Relevancy and weight.

18. Testimony of a funeral director that he never received a body after post mortem examination that was in condition for the family to see, without being prepared, is admissible in an action for unlawfully cutting and mutilating a body by post mortem examination. *Young v. College of Physicians & S.* (Md.) 540

19. Evidence that defendant, charged with murder, had filed a motion for continuance for the absence of an alleged material witness, and that his attorneys, when notified that they might take the testimony of such witness to be used on an application for bail, took no steps

to procure it,—is inadmissible. *Rogers v. State* (Ark.) 265

20. Testimony that a person controlled and directed the voting of stock standing in the name of another is admissible in support of a claim by the former that it was given to him. *Leyson v. Davis* (Mont.) 429

21. Evidence that notice was given to an electric company prior to an accident from a fallen wire, that the wire was down, is admissible upon the issue of negligence in omitting to exercise due care in building the line and in failing to maintain it in good repair. *Denver Consol. Elec. Co. v. Simpson* (Colo.) 566

22. Direct proof that defendants, charged with negligence in respect to electric wires, were the parties who maintained them, is not necessary when the defendants, although pleading the general issue, impliedly admit that fact by the conduct of the trial, including cross-examination of witnesses, and fail to suggest that the wires were maintained by any other parties. *McKay v. Southern Bell Teleph. & Teleg. Co.* (Ala.) 589

23. That a broken telephone wire from which a person received a deadly charge of electricity obtained the electric charge from its contact with the feed wire of an electric railway may be inferred by the jury without violence, on evidence that it had been hanging over the feed wire for two weeks and rubbing against it when swayed by the wind, although the insulation of the feed wire is not proved to be imperfect, where there is nothing to show any other source of the electric charge. *Western U. Teleg. Co. v. State, Nelson* (Md.) 572

24. Evidence that electricity was communicated from a trolley wire to a telephone wire may be sufficient without any positive testimony as to their contact, when it is shown that the telephone wire hung over the other and became broken so that one end rested on the ground, where there is no other reasonable theory to explain how the telephone wire became charged with electricity. *City Electric Street R. Co. v. Conery* (Ark.) 570

25. To produce moral certainty the evidence must be such that the juror would venture to act upon the conviction produced by it, in matters of the highest concern and importance to his own interests. *State v. Gleim* (Mont.) 294

NOTES AND BRIEFS.

See also WITNESSES.

Evidence; the right of jurors to act on their own knowledge of the facts in or relevant to the issue:—(I.) The general rule; (II.) modification thereof: (a) in general; (b) as to intoxicating liquors; (c) as to witnesses. 489

Of conviction of principal defendant on trial of accessory. 295

Burden of proof as to. 332

Burden of proof as to marriage. 412

EXECUTION. See JUDICIAL SALE, 2; LEVY AND SEIZURE, 1.

EXECUTORS AND ADMINISTRATORS.

All wages due a clerk for services rendered before as well as during the last illness of a deceased. 31 L. R. A.

ceased employer fall within the second class of claims against his estate, and are included in the term "wages of servants," as used in § 80 of the "Kansas Act Respecting Executors and Administrators and the Settlement of the Estates of Deceased Persons." *Cawood v. Wolfley* (Kan.) 538

NOTES AND BRIEFS.

Executors and administrators; classification of claims for wages. 538

EXPLOSION. See also GAS.

NOTES AND BRIEFS.

Of gas, liability for. 785

EXPRESS COMPANY. See CARRIERS, 10.

NOTES AND BRIEFS.

Liability for abuse of customer by agent. 390

FALSE IMPRISONMENT. See MASTER AND SERVANT, 1, 2.

FENCES. See ANIMALS, 3; EVIDENCE, 10; NUISANCES, 2.

FINE. See CRIMINAL LAW.

FIRE. See ACTION OR SUIT, 3; LANDLORD AND TENANT, 1; PROXIMATE CAUSE, 2.

FOLDING BED. See CASE.

FORFEITURE. See MINES, NOTES AND BRIEFS; SUNDAY.

FORGERY.

Signing another's name as his agent, and adding one's own initials to show agency, in the presence of the person who pays over money on the faith of such signature, is not forgery, although the claim of authority is false and may constitute some other crime. *People v. Bendit* (Cal.) 831

NOTES AND BRIEFS.

Forgery; by false assumption of authority in signing another's name as agent for him. 831

FRAUD.

1. It is not fraud for one creditor to try to keep another ignorant of a trade he is seeking to make with the debtor for no other purpose than his own protection. *Rice v. Wood* (Ark.) 609

2. Fraud cannot be imputed to an honest creditor because in taking his debtor's stock of goods to settle his claim he advised him to keep the money he had in bank and his accounts. *Id.*

NOTES AND BRIEFS.

Fraud; liability for false representations. 220
As ground of injunction against judgment when it was a defense to the original action. 747

Participation by creditor in fraudulent intent of debtor which will make a transfer to pay or secure his debt invalid as to other creditors:—(I.) Necessity of participation; general doctrine; (II.) who are bona fide purchasers within the statute; (III.) what constitutes participation: (a) generally; (b) securing a preference; (c) knowledge of fraud, insolvency, etc.; (d) assumption of other debts as part of purchase price; (e) amount of property taken; (f) allowance of fair price; (g) security greater in value than debt; (h) security for overstated debt; (i) security for present and future advances; (j) inclusion of simulated debts; (k) reservation of benefits; (l) taking conveyance fraudulent on its face; (m) retention of possession; (n) failure to record; (o) other circumstances and conditions tending to show participation; (IV.) participation by agent; (V.) participation as between trustees and beneficiaries; (VI.) participation by one of several beneficiaries; (VII.) effect of other accompanying purposes besides that to defraud; (VIII.) effect of relationship or intimacy of the parties; (IX.) conveyances taken from a fraudulent grantee; (X.) presumption and burden of proof; (XI.) participation under bankruptcy and insolvency laws. 609

GAS. See also LIFE TENANTS; MINES.

A gas company is guilty of negligence rendering it liable for injuries from an explosion of gas which has escaped from its pipes under a sidewalk into a cellar, in the absence of contributory negligence, where the fact that the gas was escaping was called to the attention of two of its employees who, without making any investigation, assumed that it was due to a defective meter and merely furnished a new meter. *Consolidated Gas Co. v. Crocker* (Md.) 785

NOTES AND BRIEFS.

See also MINES.

Gas; negligence in respect to. 785

GIFT. See also CHARITIES, 2, 3.

1. A gift *causa mortis* is not limited to the event of the donor's failure to return from a trip on which he is about to start, by his statement that he wants the donee to have it if he does not come back or if anything happens, where this remark is made after an actual delivery without qualification of the gift, and in response to encouraging words respecting his prospects of life. *Leyson v. Davis* (Mont.) 429

2. A gift of shares of stock in a national bank may be made *causa mortis* by actual delivery as a gift, without indorsement on the certificates or any assignment in writing or transfer on the books of the company,—at least where there is no assignment or power of attorney on the back of the certificates, and the by laws require no blank for such purpose, or nothing except a transfer on the books of the bank. *Id.*

3. Certificates of stock in a bank are sufficiently delivered to sustain a gift *causa mortis* when handed to the donee by the donor, with words indicating a gift in case of the donor's death, spoken on the eve of the latter's departure. 81 L. R. A.

ure on a trip which was but a desperate fight for life, or to prolong the life which he felt that he must soon lose. *Id.*

4. A gift of shares of stock *causa mortis* is not defeated by the subsequent use, without the donor's knowledge or consent, of a proxy executed by him before the gift was made, when it is filled out by the donee and the voting upon it is done under his directions. *Id.*

NOTES AND BRIEFS.

Gift; *causa mortis*, of bank stock. 436

GOVERNOR.

NOTES AND BRIEFS.

Injunction against. 474

GUARANTY.

A guaranty of the payment of interest on a note runs only until the maturity of the note. *Reclor v. McCarthy* (Ark.) 121

NOTES AND BRIEFS.

Guaranty; of interest, construction of. 131

GUARDIAN AND WARD.

No notice to an infant under fourteen years of age is necessary in a proceeding for the appointment of a guardian of the person of such child. *Board of Children's Guardians v. Shutter* (Ind.) 740

HABEAS CORPUS.

1. Release from imprisonment for contempt of court cannot be obtained by habeas corpus, unless the proceedings in which the person was adjudged guilty of contempt are null and void, in whole or in part. *Ex parte Keeler* (S. C.) 678

2. A prisoner committed by a justice of the peace for trial by the county court on the charge of a misdemeanor which is exclusively within the jurisdiction of the justice is entitled to release by habeas corpus. *Ex parte Lacy* (Va.) 822

HEALTH. See CONSTITUTIONAL LAW, 20 22; CORPSE.

HIGHWAYS. See also DEDICATION; EMINENT DOMAIN, 9; NUISANCES, 2.

1. The right to lay electric-light wires in the streets of a city by virtue of a franchise to lay pipes, fixtures, or other things for the purpose of lighting the city, is subject to the municipal control of the streets and the general police power to regulate and restrict the manner in which such wires, tubes, and cables may be secured or supported and insulated,—especially when the franchise was given before the use of electricity for such purposes was known. *State, Laclede Gaslight Co. v. Murphy* (Mo.) 798

2. Road commissioners, who under the Massachusetts statute have in respect to roads the powers formerly possessed by selectmen and surveyors of highways, are, while acting within the scope of their powers and duties, public officers, and not servants of the town.

for whose acts the town is liable. *McManus v. Weston* (Mass.) 174

3. Acts in the nature of repairs to or improvements of an existing way are within the terms "making and repairing," in a statute conferring power on road commissioners, so that in performing them they will act as public officers, although the work is ordered by the county commissioners, is unusual and extensive in character, and provided for by a special appropriation by the town, and a statute requires towns to complete roads according to the lay-out or order of the county commissioners. *Id.*

NOTES AND BRIEFS.

As to injuries from electric wires in, see ELECTRICAL USERS.

See also RAILROADS.

Highways; liability for acts of commissioners. 174

Private action for obstruction of. 695

Police regulation as to use of, by electric wires. 798

HOGS. See CONSTITUTIONAL LAW, 17, 24, 25.

HOMESTEAD.

The owner of a part of an undivided block in a city where other blocks are subdivided into lots is entitled to hold as a homestead only a tract equal in area to the average size of platted lots in that part of the city. *Heidel v. Benedict* (Minn.) 422

HOMICIDE.

One who fires a shot necessarily fatal, in self-defense, is not guilty of homicide in firing another shot which also would be fatal, after the other party has abandoned the conflict, where the last shot did not contribute to or hasten death. *Rogers v. State* (Ark.) 465

HORSE RACE. See COMMERCE, 2; CONFLICT OF LAWS, 4.

HOSPITAL. See CHARITIES, 1.

HOUSE OF CORRECTION. See WATERS, 3.

HUSBAND AND WIFE. See also CONTRACTS, 5, 6; ESTOPPEL, 2; EVIDENCE, 13; JUDGMENT, 4.

1. The power of the legislature over the subject of marriage as a civil status is unlimited and supreme, except as restricted by the Constitution. *State v. Duket* (Wis.) 515

2. A statute providing that a sentence to imprisonment for life shall operate as an absolute dissolution of the marriage of the party does not violate the provision of Wis. Const. art. 4, § 24, that the legislature shall never grant any divorce. *Id.*

3. The reversal of a sentence to imprisonment for life on account of error, but not for want of jurisdiction, does not operate to restore the marriage relation of the convict, which 31 L. R. A.

had been dissolved by the sentence under Wis. Rev. Stat. § 2355. *Id.*

4. A divorce from a wife for "utter desertion continued for three consecutive years" may be granted under Me. Rev. Stat. chap. 60, § 2, where she deserts her husband and remains away from him for the full period continuously, and unreasonably refuses to return, although once during that time he visits her and for two or three nights occupies the same bed with her. *Danforth v. Danforth* (Me.) 608

5. A nonresident defendant in a divorce suit brought by a resident of the state may be granted a divorce on a cross-bill, although the marriage and cause of divorce took place out of the state and the general provisions in How. (Mich.) Ann. Stat. § 6231, say that in such case a divorce shall not be granted unless the party exhibiting the petition or bill therefor has resided in the state one year. *Clutton v. Clutton* (Mich.) 160

NOTES AND BRIEFS.

Husband and wife; jurisdiction for divorce where one party is a nonresident. 160

Validity of marriage; effect of divorce as an estoppel. 413

Divorce for desertion. 608

The effect of a conviction and sentence of either husband or wife upon the marriage relation:—(I.) In general; (II.) necessity of a conviction; (III.) effect of an appeal from a conviction; (IV.) effect of commutation of the sentence or of a pardon; (V.) conviction in another state; (VI.) retroactive effect of statute; (VII.) allegation of infamous crime; (VIII.) where crime is prior to marriage; (IX.) conviction as desertion; (X.) classed with cruelty; (XI.) conviction as a bar to divorce by the party convicted. 515.

INCOMPETENT PERSONS. See INSURANCE, 2.

INDICTMENT.

The statutory abolition of the distinction between accessories before the fact and principals will not render a subsequent indictment charging a person as being an accessory in common-law form insufficient. *State v. Gleim* (Mont.) 294

NOTES AND BRIEFS.

Indictment; against accessory. 294

INFANTS. See also GUARDIAN AND WARD; NEGLIGENCE, 1; RAILROADS, 4.

The guardianship, custody, and control of minors being within the jurisdiction of the circuit court in Indiana, its judgment committing an infant to the custody of a board of children's guardians is not void on collateral attack, although it assumes to act under an unconstitutional statute. *Board of Children's Guardians v. Shutter* (Ind.) 740

INFORMATION. See ATTORNEY GENERAL.

INJUNCTION. See also APPEAL AND ERROR, 18; CLERK; TRIAL, 1.

1. An injunction against a wrongful or fraudulent imitation of a distinctive label used by a manufacturer or trader can be granted, although the label is not a trademark and contains no word, sign, or symbol which can be protected as such. *Scott v. Standard Oil Co.* (Ala.) 374

2. An injunction will not be granted in favor of an abutting owner against the maintenance of an elevated railroad in a street in front of his property, interfering with easements in the street appurtenant to his property without making compensation therefor, where he is unable to show any actual damage to his property, or loss suffered by reason of the presence and operation of the railroad, because on account of it the value of his property has increased greatly and in proportion to the general increase of values of property in the vicinity. *O'Reilly v. New York Elev. R. Co.* (N. Y.) 407

3. The connection of a sewer underdraining a cemetery with a spring brook, water from which is used for domestic purposes, watering animals, and making ice for domestic use, may be enjoined at the instance of riparian owners who will be injured by it. *Barrett v. Mt. Greenwood Cemetery Assn.* (Ill.) 109

4. An injunction to prevent the connection of a sewer with a spring brook the water of which is used for domestic purposes will not be refused because the water is already polluted to some extent from other sources. *Id.*

To protect personal rights; privacy.

5. The jurisdiction of equity to grant injunctions is founded on rights of property, and does not extend to a matter affecting an exclusively personal right. *Cortiss v. E. W. Walker Co.* (C. C. D. Mass.) 283

6. There is no such real mental distress or injury as will justify equity in enjoining a violation of the right of privacy by making a statue of one of plaintiff's relatives, if the facts fail to furnish any clear or sure foundation for a reasonable man to claim that any injury to his feelings has been or would be caused by the action taken or to be taken by defendant. *Schuyler v. Curtis* (N. Y.) 286

7. The use of plates made from a picture or photograph, for insertion in a publication, will be enjoined where the pictures were obtained on conditions which have not been complied with, as the publication would be a violation of confidence, or breach of contract. *Cortiss v. E. W. Walker Co.* (C. C. D. Mass.) 283

8. Erroneous claims respecting the services of a deceased person in whose honor persons are seeking to erect a memorial, which cause adverse newspaper comment, furnish no ground for injunction against the memorial in favor of her relatives, who have made no attempt to rectify the error. *Schuyler v. Curtis* (N. Y.) 286

9. Relatives of a deceased person cannot enjoin the erection of a memorial to her because the work is undertaken without their consent by strangers, if there is an honest purpose to do honor to her, which is carried out in an ap-

propriate and orderly manner by reputable individuals. *Id.*

10. That the erection of a statue in his honor would have been disagreeable to a person's ancestor in his lifetime is not a sufficient cause for real mental injury or distress to such person because of the erection of such statue after such ancestor's death, to entitle such person to enjoin such erection. *Id.*

11. The making of a bust of a deceased person will not be enjoined on the ground of fraud upon the public because no likeness of her is accessible for a model, if the idea of actual likeness has been abandoned and the bust is to be made an ideal one,—at least where no fraudulent intent is shown. *Id.*

12. No ground for enjoining the making by a woman's society of a bust of a deceased woman, in favor of her descendants, is shown by the fact that the same society contemplates the exhibition of the bust in the same room of a public fair building in which they are to exhibit one of another woman with whose objects and work the ancestor had no sympathy, if the two busts are designed to represent totally distinct classes of persons. *Id.*

Against officers.

13. The state suing in its corporate capacity for the protection of its property rights stands in no different or better position than an individual in respect to an injunction against public officers. *State, Taylor, v. Lord* (Or.) 473

14. A private individual cannot have public officers enjoined from using public funds, unless some civil or property rights are being invaded, or, in other words, he is going to get hurt by the transaction. *Id.*

15. A commission named by the legislature, of which the governor is a constituent part, and which is empowered to perform service which it would otherwise be the duty of the governor to perform, and which is governmental in its nature, pertaining to *publici juris*, and affecting the welfare of the people at large,—is not subject to an injunction from the courts. *Id.*

16. The location of a site for a public institution, the purchase of a tract of land therefor at that place, the employment of an architect to draw plans, etc., for the building, and the letting of contracts therefor by a commission of which the governor is a member,—are matters governmental and executive in their nature, with which the courts cannot interfere by injunction. *Id.*

17. An injunction against the enforcement of a tax levy because of an irregularity, even if it renders the levy void, will not be granted unless the tax is excessive or unequal and unjust. *Hayes v. Douglas County* (Wis.) 213

Against judgments.

18. Although a judgment of a justice of the peace is void because he has no jurisdiction of defendant, yet its execution will not be enjoined if defendant has a right to a writ of certiorari to set the judgment aside. *Texas Mexican R. Co. v. Wright* (Tex.) 200

19. A judgment at law will not be enjoined on the ground of fraud where it does not appear that such judgment is inequitable, or it is

disclosed that plaintiff had failed to exercise due diligence in asserting his rights. *Norwegian Plow Co. v. Bollman* (Neb.) 747

20. A judgment regularly rendered, even though by default and on a note given for a gambling consideration, is binding as against the parties and their privies, and its enforcement will not be restrained by a court of equity. *Owens v. Van Winkle Gin & M. Co* (Ga.) 767

21. No injunction against a default judgment is justified by the facts that defendant submitted the facts constituting his defense to an attorney, with the request to prepare an answer, and then went to his home in another county relying on the attorney's promise to do so, but that for some reason unknown to defendant the answer was not filed. *Payton v. McQuown* (Ky.) 33

22. A suit to enjoin a judgment against a surety will not lie on the ground that the principal's liability has been subsequently discharged, where a statute permits the surety under such circumstances to file a bill to review the judgment against him for newly discovered matter, without affecting that in favor of his principal. *Michener v. Springfield Engine & T. Co.* (Ind.) 59

NOTES AND BRIEFS.

Injunction; negligence as a cause and as a bar to injunction against judgments:—(I.) As a cause for injunction against judgments; (II.) as a bar to injunctions against judgments: (a) in attending court; (b) in employing an attorney; (c) of attorney; (d) in ascertaining a defense; (e) in regard to evidence; (f) in asserting a defense; (g) delay in seeking. 33

Enjoining judgments against or in favor of sureties:—(I.) Against sureties: (a) remedy at law as a bar to injunction; (b) valid defense must be shown; (c) in matters of negligence or for failure to make a legal defense; (d) in summary proceedings; (e) for newly discovered evidence; (f) where defense was prevented; (g) for equitable defenses; (h) on account of statutes; (i) pleading and parties; (j) injunction bonds; (II.) in favor of sureties. 59

Against judgments for want of jurisdiction, or which are void:—(I.) In general; (II.) as to party; (III.) as to time; (IV.) as to venue; (V.) as to amount; (VI.) matter of process and service: (a) form; (b) time and manner; (c) fraud as to service; (d) acceptance of service; (e) party served; (f) service on corporation; (g) service on partners; (h) service at residence; (i) where there was no service as required by law; (j) where there was no notice; (VIII.) on account of appearance; (IX.) pleading and practice; (X.) where there was no judgment or it was set aside. 200

Against judgments for defenses existing prior to their rendition:—(I.) Failure of consideration: (a) generally; (b) in judgments for purchase money: (1) insolvency; (2) nonresidence; (3) rescission; (4) mistake; (5) title bonds; (6) defective title generally; (7) deficiency in amount of land; (8) fraud; (9) *res judicata*; (10) no cause of action for injunction; (11) sales by executors and administrators; (12) summary judgments; (13) court sales; (c) judgments in 31 L. R. A.

favor of purchasers; (II.) fraud: (a) where the defense is forgery or *non est factum*; (b) in obtaining a contract; (c) generally; (III.) public policy: (a) generally; (b) debt for Confederate money; (c) gambling debts; (d) usury; (IV.) set-off: (a) failure to assert at law; (b) parties; (c) unliquidated damages; (d) trial at law; (e) no set-off; (f) insolvency and nonresidence; (g) accounting; (h) equitable set-off; (i) in matters of an estate; (j) mutual agreements; (V.) payment: (a) failure to defend; (b) defense made: (c) equitable defenses; (d) summary proceedings; (e) pleading bill of discovery; (VI.) conditions; (VII.) partition and dower; (VIII.) as to party; (IX.) title to property; (X.) nonliability in general. 747

Against elevated railroad; to prevent multiplicity of actions. 407

To restrain executive action. 474

INSANITY. See INSURANCE, 2.

INSOLVENCY.

A bill of sale in satisfaction of debts cannot be turned into an assignment by the fact that the creditor agrees to pay other claims against the debtor, if the inability is absolute and not dependent on the disposition made of the property. *Rice v. Wood* (Ark.) 609

INSURANCE. See also ACTION OR SUIT, 3; CONSTITUTIONAL LAW, 2; ESTOPPEL, 1.

1. Issuing an insurance policy when the insurance agent has full knowledge of the existence of encumbrances is a waiver of conditions in the policy against such encumbrances. *Douling v. Lancashire Ins. Co.* (Wis.) 112

2. The right of recovery of an insane beneficiary under a policy of life insurance is not forfeited by his killing the insured under such circumstances as would cause the killing to be murder if he were sane. *Holdom v. Ancient Order United Workmen* (Ill.) 67

3. A provision that death "from accidents that shall bear no external and visible marks" is not insured against by a life insurance policy means that there must be external and visible evidence that death was accidental, and does not exclude liability for death caused by accidentally and involuntarily breathing illuminating gas while asleep. *Menneiley v. Employers' Liability Assur. Corp.* (N. Y.) 686

4. A provision that death "from anything accidentally taken, administered, or inhaled" is not insured against, applies only where something has been voluntarily and intentionally although mistakenly taken, administered, or inhaled. *Id.*

5. The words "inhaling gas," in a provision describing causes of death against which a policy does not insure, apply only to cases where gas is inhaled intentionally, voluntarily, and consciously. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

Insurance; forfeiture by act of insane beneficiary. 68

Subrogation of insurer to action against party causing loss. 604

Accident; inhaling gas. 686

INTEREST.

Unearned interest must be subtracted from the amount of recovery, in entering judgment before maturity by the voluntary act of the payee of notes on which interest has been paid in advance. *Illinois Steel Co. v. O'Donnell* (Ill.) 265

INTOXICATING LIQUORS.

The distribution of intoxicating liquors to members of a social club upon the written order of a member at a price fixed by the officers of the club, designed to cover the purchase price and disbursements in serving, where the club was incorporated for a legitimate purpose to which the furnishing of liquors to its members is merely incidental, does not constitute a sale within the meaning of N. Y. Laws 1892, chap. 401, prohibiting sales of such liquors without a license, but making no provision whereby such a club can obtain a license. *People v. Adelphi Club* (N. Y.) 510

NOTES AND BRIEFS.

Intoxicating liquors; rights of jurors to act on their own knowledge of. 489

Validity of sale by club. 510

ISLANDS. See **WATERS**, 1.

ITINERANT MERCHANTS. See **COMMERCE**, 4; **LICENSE**, 2, 3.

JUDGE. See **WITNESSES**, **NOTES AND BRIEFS**.

JUDGMENT. See also **INFANTS**; **INJUNCTION**, 18-22; **INTEREST**.

1. A judgment in an action brought by an individual is not conclusive in a subsequent action to which he is not a party or even a relator, although both cases turn on the constitutionality of a statute. *Denny v. State, Basler* (Ind.) 726

2. A judgment is not necessarily void because the court bases it on a void statute, if the court has jurisdiction of the subject derived from other sources. *Board of Children's Guardians v. Shutter* (Ind.) 740

3. The determination of a motion is not *res judicata* so as to prevent the parties from drawing the same matters in question again in the action. *Heidel v. Benedict* (Minn.) 422

4. A decree of divorce in favor of a wife, rendered without service on the husband and when his whereabouts were unknown, does not estop her from alleging subsequently that he was dead before the divorce was granted. *Hunter v. Hunter* (Cal.) 411

5. A surety against whom a default judgment is taken, after which the principal's liability is discharged for failure of consideration, may file a bill under Ind. Rev. Stat. 1894, § 627, to review the judgment against him for newly discovered matter, without disturbing that in 81 L. R. A.

favor of his principal. *Michener v. Springfield Engine & T. Co. (Ind.)* 59

NOTES AND BRIEFS.

Judgment; injunction against, see **INJUNCTION**.

Of divorce; effect as estoppel. 412

JUDICIAL SALE.

1. A purchaser at chancery sale of the unexpired term of a leasehold is not chargeable with the contract rental of the original lease for the balance of the term. *Tradesman Pub. Co. v. Knoxville Car Wheel Co. (Tenn.)* 593

2. A sheriff's sale for \$250, of property worth from \$40,000 to \$50,000, under a description so misleading that the sheriff did not know what property he was selling, on account of which he failed to give notice according to his custom to mortgagees, who had paid off or compromised other liens on the property and supposed that all were thus satisfied,—may be set aside on the application of such mortgagees although the owner of the fee of the property, who is insolvent, does not complain. *Rogers & B. Hardware Co. v. Cleveland Bldg. Co. (Mo.)* 335

JURORS. See **EVIDENCE**, 6, **NOTES AND BRIEFS**; **TRIAL**, 1, 2.

JUSTICE OF THE PEACE.

NOTES AND BRIEFS.

See also **WITNESSES**.

Power of, to order post mortem examination. 543

LABEL. See **INJUNCTION**, 1.

LACHES. See **LIMITATION OF ACTIONS**, 1.

LANDLORD AND TENANT. See also **ACCESSION**; **JUDICIAL SALE**, 1; **MINES**; **RECEIVERS**, 2.

1. The unauthorized storage of cotton by a tenant in a building hired for the storage of vehicles makes him liable for injury resulting to the building by fire which is due to the more dangerous nature of the cotton. *Anderson v. Miller* (Tenn.) 604

2. A tenant has a right to manure produced on the leased premises by stock in excess of that maintainable by the products of the premises, from fodder produced elsewhere. *Pickering v. Moore* (N. H.) 698

NOTES AND BRIEFS.

See also **MINES**.

Landlord and tenant; rights of landlord and tenant in respect to manure on leased premises; English cases; American authorities; exceptions to the rule. 606

LEVY AND SEIZURE. See also **ATTACHMENT**, 3.

1. Depot grounds are subject to execution sale under a constitutional provision that "real and personal property" of a railroad corporation, or "any part thereof, shall be liable to ex-

ecution and sale in the same manner as the property of individuals." *Texas Mexican R. Co. v. Wright* (Tex.) 200

2. A constable is not precluded from levying on the real estate of a railroad corporation by the fact that a car is pointed out as subject to levy, if the car is not delivered into his possession as required by Tex. Rev. Stat. art. 2287. *Id.*

LIBEL. See also BANKS, 1.

NOTES AND BRIEFS.

By defamatory picture or statue. 288

LICENSE. See also COMMERCE, 3, 4; CONSTITUTIONAL LAW, 8.

1. An ordinance providing that persons who "temporarily reside in" a municipality must obtain a license before they can sell goods in a certain manner is invalid by reason of its discrimination against nonresidents. *Carrollton v. Bazzette* (Ill.) 522

2. An ordinance requiring itinerant merchants to pay a license fee is not limited to peddlers, but applies to a merchant who takes his stock of goods from city to city doing business for a few weeks only in each place. *Id.*

3. A license fee of \$10 for each day's business carried on by an itinerant merchant, without any discrimination on account of the extent of business or the length of time it may be carried on, is invalid because unnecessarily burdensome and in general restraint of trade and prohibitory of the business. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW.

License; discrimination as to nonresidents. 379

Amount of fee; when excessive. 523

LIFE TENANTS. See also ADVERSE POSSESSION; MINES, NOTES AND BRIEFS.

1. A reservation of a life use of land conveyed includes the right to a royalty on an oil and gas lease as an incident of the life estate, notwithstanding an express exception that the grantee takes subject to any lease for oil or gas or any sale of royalty for oil or gas made by the grantor, while he had previously sold a portion of his royalty. *Koen v. Bartlett* (W. Va.) 128

2. A life tenant is entitled to the profits of mines of oil or gas which are open when his life estate begins, or are lawfully opened and worked during the existence of his estate, unless he is restrained by covenant or agreement. *Id.*

LIGHTNING. See ELECTRICAL USES, NOTES AND BRIEFS.

LIMITATION OF ACTIONS. See also ADVERSE POSSESSION; CONSTITUTIONAL LAW, 12, 13, 15.

1. The defense of laches does not generally apply where the situation of the parties has not been altered, and one has not been put in a 31 L. R. A.

worse condition by the delay of the other. *Parker v. Bethel Hotel Co.* (Tenn.) 708

2. Litigation as to the right to offices in an association will not suspend the running of the statute against an action by one rival body against the other to establish the exclusive use to a name. *Grand Lodge A. O. U. W. v. Graham* (Iowa) 133

3. Delay in procuring a certificate of the right to a corporate name will not enlarge the time for bringing an action to establish an exclusive right to it, which accrued at the time of incorporation, when the certificate was not required. *Id.*

4. An amendment adding the words "of Baltimore city" to the name of the defendant, sued as the "Western Union Telegraph Company," and which was the party intended to be sued, although the person served was general manager in the state of a foreign corporation bearing that name as well as president and manager of the Baltimore company, does not add a new party or operate as the equivalent of bringing a new suit, with respect to a plea of the statute of limitations. *Western U. Teleg. Co. v. State, Nelson* (Md.) 572

LOTTERY.

1. An agreement by one person to take all the chances on a proposed scheme to raffle off property, thereby eliminating all the elements of chance and fixing a definite price for the property, is not unlawful. *Thornhill v. O'Rear* (Ala.) 792

2. A sale of lots to be drawn by the purchasers, and the advantages of location, character, size, or condition as between lots of the same class to be determined wholly by lot, while one prize lot is to be given to some one of the purchasers as the result of chance, is contrary to public policy and void. *Lynch v. Rosenthal* (Ind.) 835

NOTES AND BRIEFS.

Lottery; invalidity of lottery contract. 835

MANDAMUS.

1. Mandamus will lie to compel the delivery of the insignia of an office to one having a certificate of election thereto, and who has qualified thereunder, irrespective of his eligibility. *Stevens v. Carter* (Or.) 342

2. The courts in mandamus proceedings will compel delivery of the insignia and property of a public office for the time being, to one having a prima facie title to such office, without adjudicating the actual title. *State, Lamar, v. Johnson* (Fla.) 357

3. Mandamus to put into possession of the property and insignia of a public office one having the certificate of election and the commission to hold the office cannot be defeated by a claim that the election was illegal, and that the prior incumbent is entitled to hold as an officer *de facto* until proper election and qualification of his successor. *Id.*

4. To defeat a mandamus proceeding to compel the incumbent of an office whose term has expired to turn over the insignia of the office to an alleged successor, it must appear that he

has a colorable title to the office and is in possession of it and discharging the duties thereof under a claim of right. *Stevens v. Carter* (Or.) 342

5. An alternative writ of mandamus to compel the surrender by a prior incumbent of a public office, of the office room and documents, need not allege the eligibility of the person elected. *State, Lamar, v. Johnson* (Fla.) 357

6. An alternative writ of mandamus to compel the surrender by a prior incumbent of a public office, of the office room and documents, need not allege in specific words that his term has expired or that a successor has been elected, but it is sufficient if such election and expiration follow as a necessary consequence from the words used. *Id.*

NOTES AND BRIEFS.

Mandamus; to compel surrender of office:—(I.) General doctrine governing; (II.) necessity of a demand and refusal; (III.) effect of such surrender; (IV.) sufficiency of title to support; (V.) special provisions relating to; (VI.) in the case of a private corporation; (VII.) when writ refused: (a) insufficiency of facts; (b) in case of a private party; (c) when there is another remedy; (d) in the absence of ouster; (e) prima facie title; (f) possession by an officer *de facto*; (g) when the title is in issue; (h) question of election; (i) other relief sought; (j) relator's own act; (VIII.) English cases. 342

MANURE. See ACCESSION; COTENANCY; LANDLORD AND TENANT, 2, NOTES AND BRIEFS.

MARRIAGE. See HUSBAND AND WIFE.

MASTER AND SERVANT. See also CARRIERS, 10; CHARITIES, 1.

1. An express order for an unlawful arrest by an agent of a railroad company is not necessary to render the company liable if the arrest was procured by the agent acting within the scope of his employment. *Eichengreen v. Louisville & N. R. Co.* (Tenn.) 702

2. False imprisonment of an innocent person on a charge of attempting to pass counterfeit money, which is procured by a railroad detective while acting within the scope of his authority, renders the railroad company liable, although in this particular matter he exceeded his authority and acted contrary to his instructions respecting the caution to be exercised. *Id.*

3. A civil engineer whose duties are to look after the building and maintenance of railroad bridges and trestles assumes the risk of injury from the failure of the company to provide a watchman at a bridge which gives way under the train upon which he is traveling in discharge of his duties, as he must be presumed to know that no watch is kept upon such bridge. *Texas & P. R. Co. v. Smith* (C. C. App. 5th C.) 821

4. A railroad official particularly charged with the care and maintenance of the bridges upon the line of the railroad is at fault for failure to maintain a sufficient watch upon a bridge, which will prevent recovery for his death from the fall of such bridge under the 81 L. R. A.

train upon which he is traveling in the discharge of his duties. *Id.*

NOTES AND BRIEFS.

See also CARRIERS; CHARITIES; EXPRESS COMPANY.

Master and servant; liability for wrongful acts of servant. 702

MAXIMS.

1. A man must use his own so as not to injure another. *Giffillan v. Schmidt* (Minn.) 547

2. No one shall be both judge and witness in the same cause. *Rogers v. State* (Ark.) 465

3. Res ipsa loquitur. *Western U. Teleg. Co. v. State, Nelson* (Md.) 572

4. Stare decisis. *Denny v. State, Busler* (Ind.) 728

MAYOR. See PARLIAMENTARY LAW.

MEMORIAL. See INJUNCTION, 8, 9.

MINES. See also LIFE TENANTS.

1. An agreement to furnish pipes, fixtures, and plumbing for supplying the lessor's house, included in a lease for oil and gas purposes, and to leave the pipes and fixtures if the well ceases to be a paying one, must be construed to apply only if gas is obtained by the lessee. *Evans v. Consumers' Gas Trust Co.* (Ind.) 673

2. A provision in an oil and gas lease, that it shall be null and void on failure of the lessee to perform his agreement, is no defense to him for breach of his agreement, but merely gives the lessor an option to declare it void for that reason. *Id.*

NOTES AND BRIEFS.

Mines; right of life tenant as to oil and gas. 128

Forfeiture of oil and gas lease; manner of enforcing forfeiture clause; waiver; estoppel; how forfeiture clause regarded; absence of obligation clause; effect of alternative provision for rent; who may set up forfeiture. 673

MORTGAGE. See also CONTRACTS, 18, 19, NOTES AND BRIEFS.

NOTES AND BRIEFS.

Mortgage; necessity of registry. 405

MOTION. See JUDGMENT, 3.

MUNICIPAL CORPORATIONS. See also CONSTITUTIONAL LAW, 13; COSTS, 2; HIGHWAYS, 1; LICENSE; PARLIAMENTARY LAW; QUO WARRANTO; STATUTES, 4, 5; WATERS, 3.

1. The equitable claim of a city to jurisdiction over territory which a void statute has declared to be annexed to it will not be disturbed at the instance of the state, without any suggestion of anticipated benefits by so doing, where for more than four years the city has exercised authority over such territory to the exclusion of prior incorporations which the void statute purported to abolish. *State, West, v. Des Moines* (Iowa) 186

2. A city may contract for the disposal of sewage from the outfall of sewers, although this is outside the corporate limits. *McBean v. Fresno* (Cal.) 794

3. A contract by a municipal board, extending for more than one year or beyond the term of office of the board which makes it, if it is fair, just, and reasonable, prompted by the necessities of the situation, or in its nature advantageous to the municipality, is not invalid as a surrender or suspension of the legislative power of the municipal authorities. *Id.*

4. Subsequent appropriations for installments coming due on a contract made by city authorities in violation of statute prohibiting contracts for which appropriations had not already been made cannot operate as a ratification of the contract so as to make it binding. *Indianapolis v. Wann* (Ind.) 743

5. The liability incurred by a city contract to pay an annual sum during a period of years for the disposal of sewage is, within the meaning of a constitutional provision that any liability "exceeding in any year the income and revenue provided for it for such year" shall be void, to be deemed the amount annually payable, and not the aggregate for the whole time of the contract. *McBean v. Fresno* (Cal.) 794

6. A contract for street lights for five years at a certain price per light per year, payable monthly, made by the executive department of public works, when no appropriation for the purpose had been made except for a month or two in advance, is void, where the statute provides that no executive department shall bind the city by a contract, agreement, or in any way, to any extent beyond the amount of money at the time already appropriated by ordinance for the purpose, and that all contracts and agreements, expressed or implied, and all obligations of any and every sort, beyond such existing appropriations, are absolutely void. *Indianapolis v. Wenn* (Ind.) 743

7. No vote is required to render a town subject to the obligations of the Massachusetts act of 1891, chap. 370, as to the purchase of property for the establishment of a light plant, in addition to the two votes provided by § 3 of the act, that it is expedient for the town to exercise the authority conferred by the act. *Citizens' Gaslight Co. v. Wakefield* (Mass.) 457

8. A petition to compel a town which has elected to establish a light plant to purchase a plant already in operation, as required by Mass. act 1891, chap. 370, is not wholly defeated by the fact that the poles carrying the light wires in the highways were not legally located. *Id.*

9. The schedule of property which the owner of a light plant wishes to sell to a town which has elected to establish one under the Massachusetts act of 1891, chap. 370, need not be sufficiently particular to sustain a decree for specific performance, or such as would be required in a formal conveyance of property. It is sufficient if it would enable the commissioners to identify the property and intelligently make an adjudication as to what shall be sold and purchased. *Id.*

10. Ratification by a gas and electric-light corporation of the action of its board of directors

in electing in due time to sell its property to a town which has decided to establish a light plant, under the Massachusetts act of 1891, chap. 370, before the town has changed its position, will make the act binding, although it was not within the thirty days given the corporation in which to act. *Id.*

11. A town which elects to avail itself of the provisions of a statute enabling it to establish a light plant cannot attack the act as unconstitutional because it gives the owner of an existing plant the option to compel it to purchase that, and makes no provision for a jury trial as to value. *Id.*

12. A specification of the items in detail which make up a general fund for which a city tax levy is made is not necessary under a charter which requires the statement to specify only the amount required, and directs the levy of such sums as may be sufficient for lawful purposes. *Hayes v. Douglas County* (Wis.) 213

13. Estimates by the board of public works and the comptroller, required by the charter of the city of Superior under Wis. Laws 1891, chap. 124, do not limit the power of the common council in fixing the amount for which a tax levy may be ordered, as they are required to "levy such sums of money as may be sufficient." *Id.*

NOTES AND BRIEFS.

Municipal corporations; liability for negligence as to electric wires.	581
Validity of annexation; contest of annexation.	187
Compelling purchase of light plant by.	458
<i>Ultra vires</i> contract of.	743
Validity of contract of; amount of indebtedness.	795

NAME. See CORPORATIONS, 5-7; PARTNERSHIP, NOTES AND BRIEFS.

NATURALIZATION.

NOTES AND BRIEFS.

Effect of, on inheritance.	181
----------------------------	-----

NEGLIGENCE. See also CASE; RAILROADS, 4; TRIAL, 4, 5, 14-16.

1. Negligence of a parent cannot be imputed to a child in an action brought for the benefit of the child, injured by the negligence of another. *Roth v. Union Depot Co.* (Wash.) 855

2. The doctrine of comparative negligence is no longer the law in Illinois. *Cicero & P. R. Co. v. Meirner* (Ill.) 331

3. The concurring negligence of two parties makes both liable to a third party injured thereby, if the injury would not have occurred from the negligence of one of them only. *City Electric Street R. Co. v. Conery* (Ark.) 570

NOTES AND BRIEFS.

See also ELECTRICAL USES; GAS.

Negligence; in sale of dangerous article. 220

NEW TRIAL.

1. A new trial will not be granted where it is apparent that the result of another would probably be the same. *Leyson v. Davis* (Mont.) 429

2. A new trial on the ground of newly discovered evidence is not warranted in an action for injuries caused by a defective electric wire, by the fact that the record at police headquarters does not show that notice of the defect was sent in as stated by a patrolman who testified that he reported the defect before the accident happened. *Denver Consol. Elec. Co. v. Simpson* (Colo.) 566

NOTICE. See GUARDIAN AND WARD.

NUISANCES.

1. Special or peculiar damages differing, not merely in degree, but in kind, from those which are deemed common to all, must be suffered in order to give a private party a right of action to abate a public nuisance. *Mahler v. Brumder* (Wis.) 695

2. A private party cannot maintain an action to enjoin the obstruction of a public road or street which is a *cul de sac*, by a fence between his property and the end of the road, merely because he purchased his premises with reference to a plat which indicated the existence of such road. *Id.*

NOTES AND BRIEFS.

Nuisance; prevention of. 109

OFFICERS. See also BONDS, 2, 3; CIVIL SERVICE; MANDAMUS.

1. The incumbent of an office cannot, because of the ineligibility of his successor, hold over after his official term has expired and his successor has been elected and qualified, unless such ineligibility has been established in the manner prescribed by law. *Stevens v. Carter* (Or.) 342

2. The official acts of public officers in an office created by an unconstitutional statute, performed before it has been declared unconstitutional by an authoritative decision by the courts of the state, cannot be collaterally attacked. *State v. Gardner* (Ohio) 660

3. The liability of a county trustee who gives a bond faithfully to perform the duties of his office and collect and pay over school taxes is fixed, not merely by the terms of his bond, but by the laws relating to his office. *State, Overton County, v. Copeland* (Tenn.) 844

4. An officer is not to be considered as a debtor for public funds in his hands which he has no right to use in any way except for the purposes of his trust: and he holds them, not strictly as a special bailee, but as a trustee clothed with legal duties and liabilities. *Id.*

5. A deposit of public funds in a bank of undoubted standing and reputation is not negligence or want of proper business prudence and caution on the part of an officer. *Id.*

NOTES AND BRIEFS.

See also BONDS; MANDAMUS.

31 L. R. A.

Officers; *de facto* under unconstitutional statute. 660

OIL. See LIFE TENANTS; MINES, NOTES AND BRIEFS.

OPTION. See CONTRACTS, 8.

PARENT AND CHILD. See also CONTRACTS, 4.

The duty of the children of poor persons to maintain them to the extent of their ability, under Dak. Comp. Laws, § 2612, although no mode of procedure for enforcing it is prescribed, makes such children liable to the county when it has furnished necessary support to an indigent and helpless parent. *McCook County v. Kammos* (S. D.) 461

NOTES AND BRIEFS.

Parent and child; oral contract for adoption. 810

PARLIAMENTARY LAW.

1. A mayor can vote only to break a tie, and not to make one, in the election of a city officer "by joint convention of the city council," under a charter which provides "that the mayor shall preside in the board of aldermen and joint meetings of the two boards, but shall have only a casting vote," although another provision declares that "the mayor, board of aldermen, and common council shall constitute the city council." *Brown v. Foster* (Me.) 116

PARTNERSHIP.

Insolvent members of an insolvent firm cannot use the partnership property to pay their individual debts, leaving the partnership debts unpaid. *Jackson Bank v. Durfey* (Miss.) 470

NOTES AND BRIEFS.

Partnership; criminal liability for receiving deposit in insolvent bank. 125

Right to use of name on dissolution. 657

PEDDLERS. See also COMMERCE, 3, 4.

NOTES AND BRIEFS.

Invalidity of license tax on. 379

PHOTOGRAPHS. See also INJUNCTION, 7; PRIVACY, 2.

For a photographer to make additional copies from a negative of a picture from which a customer has procured a certain number of copies to be made is breach of contract as well as a violation of confidence. *Cortiss v. E. W. Walker Co.* (C. C. D. Mass.) 283

PICTURE. See INJUNCTION, 7; PRIVACY, 2, 3.

PLEADING. See also APPEAL AND ERROR, 1; LIMITATION OF ACTIONS, 4.

1. Under the reformed procedure a court having both law and equity jurisdiction cannot dismiss a bill to enjoin the enforcement of a judgment merely because the facts stated do

not entitle complainant to such relief, if it can be so amended as to entitle him to some relief. *Michener v. Springfield Engine & T. Co. (Ind.)* 59

2. A defendant who is brought into a suit by cross-bill may himself file a cross-bill where it is necessary to do complete justice and terminate the litigation, under a statute providing that any defendant may, after filing his answer, exhibit and file his cross-bill. *Blair v. Illinois Steel Co. (Ill.)* 269

POOL SELLING. See STATUTES, 6.

POOR AND POOR LAWS. See PARENT AND CHILD.

NOTES AND BRIEFS.

Compelling relatives to support or reimburse town for support. 462

POST MORTEM. See CORONER, NOTES AND BRIEFS; CORPSE; EVIDENCE, 18.

PRINCIPAL AND SURETY. See also ATTACHMENT, 8; INJUNCTION, 22; JUDGMENT, 5.

A surety will be discharged, even after judgment against him, by the discharge of the principal because of matters inherent in the transaction. *Michener v. Springfield Engine & T. Co. (Ind.)* 59

NOTES AND BRIEFS.

Principal and surety; enjoining judgment against or in favor of sureties. 59

PRIVACY. See also INJUNCTION, 6, 7.

1. The publication of the life of an inventor, whether he is regarded as a public or a private character, cannot be enjoined as an invasion of the right of privacy, since the freedom of the press is a constitutional right. *Cortiss v. E. W. Walker Co. (C. C. D. Mass.)* 283

2. The picture or photograph of a public person—such as a great inventor—may lawfully be published in a newspaper, magazine, or book, if a copy can be obtained without breach of contract or violation of confidence. *Id.*

3. A woman's right of privacy, in so far as it includes the right to prevent the public from making pictures, busts, or statues of her to commemorate her worth or services, does not survive her so that it can be enforced by her relatives. *Schuyler v. Curtis (N. Y.)* 286

NOTES AND BRIEFS.

Privacy; law of. 283

Injunction to protect. 288

PRIVATE ACTION. See ACTION OR SUIT, 1; INJUNCTION, 14; NUISANCES.

PROCESS. See WRIT AND PROCESS.

PROXIMATE CAUSE.

1. Negligence is the proximate cause of an accident only when under all the circumstances the accident might have been reasonably foreseen by a man of ordinary intelligence and 31 L. R. A.

prudence. It is not enough that the accident is the natural consequence of the negligence. *Huber v. La Crosse City R. Co. (Wis.)* 588

2. The proximate cause of damages to a building by fire when cotton is stored therein without right is the storage of the cotton therein, if except for that the fire could have been extinguished with little or no damage. *Anderson v. Miller (Tenn.)* 604

PUBLICATION. See PRIVACY, 1.

PUBLIC IMPROVEMENTS. See also CONSTITUTIONAL LAW, 14, 15.

1. An assessment upon abutting property for street improvements, levied according to benefits, is not a violation of Va. Const. art. 10, § 1, requiring taxation to be equal and uniform upon all property according to value. *Violet v. Alexandria (Va.)* 382

2. An ordinance for a local assessment by the front foot is not authorized by a statute providing for assessments according to benefits. *Id.*

3. An assessment for a street improvement, levied only upon property fronting thereon and made by the frontage rule, is invalid when the law requires it to be made according to benefits. *Hayes v. Douglas County (Wis.)* 213

4. Assessments upon property according to the frontage of each lot, made without actual view of the property or considering the actual benefits accruing to each parcel, are invalid where the law requires the lots to be assessed "in proportion to the benefits secured thereto," even if the property abutting or fronting on the improvement is made an assessment district. *Id.*

5. The failure of an assessment made by the frontage rule to show upon its face that it was made according to the benefits accruing to each parcel, when the statute requires such benefits to be taken as the measure of the assessment renders it void. *Id.*

6. An appeal from an assessment, which permits a review only of the amount assessed, is not such a remedy as will preclude a suit to set aside the assessment when it is unequal and void. *Id.*

7. Payment by a property owner of his proportion of an assessment is not a condition precedent to relief against the assessment, when that is made in entire disregard of the statute so that it is presumed to be unequal. *Id.*

NOTES AND BRIEFS.

Public improvements; validity of assessments. 215

Validity of assessments for; uniformity; theory as to benefits. 382

PUBLIC MONEY.

NOTES AND BRIEFS.

Action by taxpayer to prevent misuse of. 475

QUO WARRANTO.

Leave to a taxpayer to prosecute an action of quo warranto to contest annexation to a

city, given under Iowa Code, § 3848, is conclusive against an attack made in the quo warranto proceedings on the ground that his interest was trivial. *State, West, v. Des Moines* (Iowa) 186

RAFFLE. See LOTTERY.

RAILROADS. See also EMINENT DOMAIN, 1-3, 5-9; EVIDENCE, 9; LEVY AND SEIZURE.

1. A railroad seeking to cross another should be permitted to employ, and required to pay, the necessary watchman at such crossing. *Butte, A. & P. R. Co. v. Montana U. R. Co.* (Mont.) 298

2. The liability of a railroad company for failure to keep a sidewalk across its track in fit and safe condition, as required by law, is not affected by the fact that a right of action might possibly exist for the same defect against a municipality. *Jeffrey v. Detroit, L. & N. R. Co.* (Mich.) 170

3. A man injured while driving a span of horses with a snow plow across a railroad track in cleaning a sidewalk is not precluded by his unusual use of the walk from maintaining an action against the railroad company for a defect in the walk caused by missing planks, if the accident was due to failure to keep the crossing in a reasonably safe and suitable condition for ordinary use. *Id.*

4. A child should not be held to the same degree of care in avoiding danger while walking on a railroad track as a person of mature years and accumulated experience. *Roth v. Union Depot Co.* (Wash.) 855

5. Kicking cars out of sight around a curve on a down grade, without any person on them, in a thickly settled community, where it is the custom to use the track as a footpath without objection from the railroad company, and it is known that from fifty to one hundred people a day walk upon the track, and the cars are not usually sent this way, is such gross and wilful negligence that the railroad company will be liable for a child killed by a car thus kicked, —especially where two of them were kicked on parallel tracks at the same time, —although the child had no right to use the track. *Id.*

NOTES AND BRIEFS.

Railroads; duty as to sidewalk at crossing. 170
Right to open highway across. 183
Duty as to licensees on track. 855

RATIFICATION. See MUNICIPAL CORPORATIONS, 4.

RECEIPT. See also ACCORD AND SATISFACTION.

NOTES AND BRIEFS.

Conclusiveness of. 171

RECEIVERS. See also CONFLICT OF LAWS, 8; CORPORATIONS, 88; COURTS, 6.

1. A loan by a bank to an embarrassed telegraph company which is in pressing need of \$1 L. R. A.

money to meet its current expenses, and which uses the money in paying debts of a character for which receivers' certificates were authorized to be issued, will not give the bank a lien on the assets superior to a first mortgage on the property, if neither the bank nor the persons who were paid out of the loan obtained receivers' certificates. *Farmers' Loan & T. Co. v. Bankers' & N. Teleg. Co.* (N. Y.) 403

2. A claim for rent for property leased to a corporation which has been placed in the hands of a receiver, in a suit in which the lessor joins, which accrues subsequently to his appointment, cannot be made a preferred claim against the funds in his hands, unless he in fact adopts the lease. *Tradesman Pub. Co. v. Knorrville Car Wheel Co.* (Tenn.) 593

NOTES AND BRIEFS.

See also COURTS.

Receivers; effect of order appointing; attachment of assets. 405

REFERENCE. See EMINENT DOMAIN, 10.

RELIGIOUS SOCIETIES.

The majority of the members of a Free Will Baptist society cannot against the will of the minority transfer property obtained for the use and benefit of that denomination, which holds the doctrines of Arminius, to the Baptist denomination, which is Calvinistic, notwithstanding a provision in the manual of church government of the Free Baptist denomination to the effect that a church in good standing may have a letter of dismission and recommendation to another evangelical denomination, as this appears to refer to the church as an ecclesiastical, rather than as a purely legal, body. *Park v. Champlin* (Iowa) 141

NOTES AND BRIEFS.

Religious societies; rights of factions as to property. 141

REMAINDER. See ADVERSE POSSESSION; WILLS, 5.

REMEDY. See CONSTITUTIONAL LAW, 10.

REPLEVIN. See ACTION OR SUIT, 4.

RESUME.

For résumé of contents of book, see 865

REVIEW. See JUDGMENT, 5.

SAVINGS BANKS. See BANKS, 4; WILLS, 2.

SCHOOLS. See BONDS, 1; CONSTITUTIONAL LAW, 13; TAXES, 2-4, NOTES AND BRIEFS.

SEARCH AND SEIZURE.

The constitutional protection against unreasonable seizures is violated by entering a private inclosure and taking away from the possession of the owner under order of court a wrecked boiler, engine, and other materials for use as exhibits on a prosecution of another

person for criminal negligence in causing the explosion of the boiler. *Newberry v. Carpenter* (Mich.) 163

SEAT OF GOVERNMENT. See CAPITAL, NOTES AND BRIEFS; CONSTITUTIONAL LAW, 3-5; CONTRACTS, 1.

SEDUCTION.

A betrothed person has no right of action for the seduction or alienation of the affections of his affianced. *Case v. Smith* (Mich.) 282

SEIZURE. See SEARCH AND SEIZURE.

SERVICE. See WRIT AND PROCESS.

SET-OFF AND COUNTERCLAIM.
See also PLEADING, 2.

NOTES AND BRIEFS.

As ground of injunction against judgment when it existed before its rendition. 747

SHIPPING. See ADMIRALTY.

SPECIFIC PERFORMANCE.

A contract to give a minority stockholder the right to control the stock of another and vote it at a stockholders' meeting, for the sole purpose of securing control of the corporation by the use of such stock, will not be specifically enforced in equity. *Gage v. Fisher* (N. D.) 557

STATE. See ACTION OR SUIT, 1; ATTORNEY GENERAL; COURTS, 2; INJUNCTION, 13.

STATE CAPITAL. See CAPITAL; CONSTITUTIONAL LAW, 8-5; CONTRACTS, 1.

STATUTE. See APPEAL AND ERROR, 18; INJUNCTION, 10-12; PRIVACY, 3.

STATUTE OF FRAUDS. See CONTRACTS, 3-6.

STATUTES. See also COMMON LAW, 1.

1. The construction placed upon a statute penal in character by public officers charged with the duty of executing its provisions for many years may properly be considered in determining the legislative intention. *People v. Adelphi Club* (N. Y.) 510

2. A practical interpretation of a statute, accepted as correct for nearly three quarters of a century, is entitled to respectful consideration by the courts. *Brown v. Foster* (Me.) 116

3. The re-enactment of the New York civil service law after the adoption of the Constitution of 1894 is not necessary in order to make it applicable to the department of public works, to which it could not apply under the Constitution in force when the act was passed, as the new Constitution not only adopts the principle of the law, but declares "such acts of the legislature . . . as are now in force shall be and continue the law of this state subject to such alterations as the legislature shall make." *People, McClelland, v. Roberts* (N. Y.) 399

4. A statute for the annexation of territory to all cities having more than a specified population is within a constitutional provision against local legislation, when there is but one city in the state to which it can apply. *State, West, v. Des Moines* (Iowa) 186

31 L. R. A.

5. An act providing for annexation to a city is one for the incorporation of a city within the meaning of a constitutional provision against local or special laws for this purpose. *Id.*

6. Pool selling is the only form of betting or wager that is punishable by a statute which prohibits bets and wagers of all kinds, but the title of which is "An Act to Prevent Pool Selling, etc." *Ex parte Lacy* (Va.) 822

7. The words "and so forth" in the title of a statute cannot supply an omission when the title is less comprehensive than the body of the statute. *Id.*

NOTES AND BRIEFS.

Statutes; sufficiency of title; embracing more than one object. 823

STIPULATION. See COURTS, 4.

STOCK. See CORPORATIONS; GIFT, 2-4; SPECIFIC PERFORMANCE.

STOLEN PROPERTY. See CORPORATIONS, 16.

STREET RAILWAYS. See also CARRIERS, 11; ELECTRICAL USES AND APPLICATIONS, 5-7, 9.

NOTES AND BRIEFS.

Liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.

SUBROGATION.

NOTES AND BRIEFS.

See also INSURANCE.

To party who has paid debts. 405

SUMMARY PROCEEDINGS. See also TRIAL, 1.

NOTES AND BRIEFS.

Injunction as to judgment by or against surety in. 63

SUNDAY. See also CONSTITUTIONAL LAW, 6, 22.

The fact that forfeits were deposited on Sunday to bind the parties to an agreement which was invalid because made on that day does not give one of them any right to recover his deposit after the holder has executed the transaction on a subsequent day by delivering the forfeit to the other party before he was notified not to do so. *Thornhill v. O'Rear* (Ala.) 792

NOTES AND BRIEFS.

Sunday; validity of Sunday law; class legislation. 689

TAXES. See also CONTRACTS, 14; MUNICIPAL CORPORATIONS, 12, 13; COUNTIES; INJUNCTION, 17.

1. The requirement of Ky. Stat. § 4228, that every foreign building and loan association doing business within the state shall pay into the treasury annually 2 per cent of its annual gross receipts, does not violate Ky. Const. § 174, requiring all nonexempt property, whether owned by natural persons or corporations, to be uniformly taxed in proportion to its value, but providing that nothing shall

prevent a taxation based on "franchises." *Southern Bldg. & L. Assn. v. Norman* (Ky.) 41

2. A school district cannot, if it can recover at all, recover from another district which has collected taxes upon lands within the former, through a mistake of the clerk as to the location of the lands, a greater sum than it would have collected had there been no mistake. *Walser v. Board of Education* (Ill.) 329

3. A school district cannot recover from another district which has collected taxes upon lands within the former, through a mistake of the clerk as to the location of the lands, any of the taxes so collected, although the rate per cent of the tax as extended in the former was thereby made greater than it otherwise would have been, where the full amount of the levy made by its board of education was collected, as the district does not become a trustee for one taxpayer of an excessive amount collected from another. *Id.*

4. Taxpayers in one school district who voluntarily pay a tax for another district levied by mistake upon their lands cannot recover back the amount paid, where the books were kept open for inspection by them, and the means of knowledge existed to learn and know all the facts, although they supposed that they were paying the tax of the district in which their lands were situated. *Id.*

NOTES AND BRIEFS.

Taxes; for what purpose authorized. 215

Right to recover on payment to wrong school district. 329

TELEGRAPHS. See ELECTRICAL USES, NOTES AND BRIEFS; RECEIVERS.

TELEPHONES. See also ELECTRICAL USES, 7.

NOTES AND BRIEFS.

Liability for negligence as to dangerous electric currents on wires, see ELECTRICAL USES.

TERRITORIAL COURTS. See APPEAL AND ERROR, 2.

TRADEMARK.

1. Prior use of a name by other persons is sufficient to defeat a trademark, although it was not a commercial use and was only for a short period, if it was such that the name had already become extensively recognized and well known before it was claimed as a trademark. *Hoyt v. J. T. Lovett Co.* (C. C. App. 3d C.) 44

2. The words "Green Mountain" cannot be appropriated by an individual as a trademark for grape vines and grapes which are the natural product of the Green Mountains, to the exclusion of others who deal in similar articles originating in the same locality. *Id.*

3. An organic article which by the law of its nature is reproductive, and derives its chief value from its innate vital powers independently of the care, management, or ingenuity of man,—such as seeds, plants, or vines,—cannot be the subject of a trademark so as to prevent the use of the name of the parent stock by any person cultivating and selling its products. *Id.*
81 L. R. A.

4. The words "fireproof oil" cannot be claimed as a trademark for an illuminating oil, since the words are descriptive of oil which is not inflammable although it is not literally proof against fire. *Scott v. Standard Oil Co.* (Ala.) 374

NOTES AND BRIEFS.

Trademark; validity of. 374

TRADENAME. See also CORPORATIONS, 7.

A purchaser of the assets and goodwill of a trading partnership upon a sale either by the partners directly or through a receiver or a corporation organized by him to carry on the business, and to which he transfers the property, is entitled to make use of the firm name for the purpose of continuing the business as its successor. *Snyder Mfg. Co. v. Snyder* (Ohio) 657

TREES. See TRESPASS.

TRESPASS. See also ANIMALS, 1.

The unreasonable cutting or trimming of trees on a sidewalk by employees who have authority to cut or trim trees so far as is necessary in removing telephone wires which they have been lawfully ordered to remove will not sustain an action of trespass by the abutting lot owners against the employer. *Southern Bell Teleph. & Teleg. Co. v. Francis* (Ala.) 193

TRIAL. See also EVIDENCE, NOTES AND BRIEFS.

1. A summary proceeding for a restraining order against carrying on a business declared by the legislature to be a common nuisance is not a case within the scope of the constitutional guaranty of the right of trial by jury. *Ex parte Keeler* (S. C.) 678

2. A person who has a fixed opinion as to the guilt or innocence of a person charged as principal in a crime is not a competent juror upon the trial of one charged as accessory. *State v. Gleim* (Mont.) 294

Questions for jury.

3. The extent of the intoxication of a passenger, the conductor's knowledge of his condition, and the safety of the place at which he was ejected, are questions for the jury. *Louisville & N. R. Co. v. Johnson* (Ala.) 372

4. The exercise of due care or caution in boarding an electric street car while in motion is a question for the jury. *Cicero & P. R. Co. v. Meizner* (Ill.) 331

5. Carrying a lighted coal-oil lamp into a cellar, with knowledge that a large amount of illuminating gas has escaped therein, and the lighting of matches therein, do not, as a matter of law, preclude recovery for injuries from explosion of such gas, where it is not certain that the explosion was the result thereof, but the lapse of time and other circumstances admit of a finding that it might have been due to other causes, and the question is for the jury. *Consolidated Gas Co. v. Crocker* (Md.) 785

6. The liability of cattle to communicate a disease cannot be assumed as matter of law, on

account of the fact that they came from a particular locality. *Clarendon Land I. & A. Co. v. McClelland (Tex.)* 669

Instructions.

7. An instruction, the substance of which is contained in an instruction given, is properly refused. *Mitchell v. Charleston Light & P. Co. (S. C.)* 577

8. The trial judge is not required to strike out from a request to charge a part which renders it defective, and charge the remainder. *Id.*

9. A general request to put an instruction in writing does not cover a remark of the court in response to a remark of counsel in his argument. *Rogers v. State (Ark.)* 465

10. The court cannot instruct the jury as to what weight should be given to testimony, even if it relates to admissions of the accused. *State v. Gleim (Mont.)* 294

11. An instruction in a criminal case depending upon circumstantial evidence, that the jury must not be "satisfied beyond a reasonable doubt of each link in the chain of circumstances" relied upon to establish guilt, but that it is sufficient if they are "satisfied beyond a reasonable doubt that defendant is guilty,"—is erroneous. *Id.*

12. A statement by the court that great "bodily injury" is a "felony committed on the person" is erroneous. The question must to a great extent be left to the judgment of the jury. *Rogers v. State (Ark.)* 465

13. An instruction requested by a carrier, comparing the injuries received by a passenger on a baggage car and those to which a passenger would have been liable in a regular passenger coach, is properly refused. *Baltimore & P. R. Co. v. Swann (Md.)* 313

14. An instruction that no blame would attach to defendant from the falling of a wire charged with electricity and its remaining on the ground in a public thoroughfare, unless it was allowed for an unreasonable time to remain there "after notice," is properly refused. *Mitchell v. Charleston Light & P. Co. (S. C.)* 577

15. An instruction that if a "cyclone that could not be anticipated or reasonably foreseen" was the cause of the fall of a wire charged with electricity, and defendant company was not negligent in allowing it to remain for an unreasonable time, it would not be liable,—is not misleading where the judge also instructs that, if the accident was due to the wires being improperly erected or maintained or to their being allowed to remain on the streets an unusually long time, the company would be liable. *Id.*

16. An instruction that a company maintaining an electric wire carrying a dangerous current, over a public street or alley, is not an insurer of the safety of passersby, but in constructing its line and maintaining the same is bound to the utmost degree of care and diligence,—that is to the highest degree of care, skill, and diligence,—so as to make the same safe against accidents so far as such safety can be by the use of such care and diligence be secured,—is not erroneous, although it is better to instruct the jury that the company is bound 31 L. R. A.

to exercise that reasonable care and caution which would be exercised by a reasonably cautious and prudent person under the same circumstances. *Denver Consol. Elec. Co. v. Simpson (Colo.)* 566

Submission of questions.

17. There is no abuse of discretion in refusing to set aside a submission which is claimed to have been made under the mistaken belief that no answer had been filed, where, although the answer was not filed on the day it was due, it had been on file for several months, which fact by the exercise of ordinary diligence could have been discovered by counsel before entering the order of submission. *Payton v. McQuown (Ky.)* 33

18. Giving or withholding from the jury questions for special findings of fact is within the discretion of the trial court, under Colo. Code 1887, § 199, providing that in any case in which the jury render a general verdict they may be required by the court to find specially upon any particular questions of facts, to be stated to them in writing. *Denver Consol. Elec. Co. v. Simpson (Colo.)* 566

USAGE. See CUSTOM.

USURY.

The defense of usury cannot be set up by an assignee for certain creditors among whom is not included the one claiming the usurious debt, where the assignee has no property chargeable with the payment of that debt in common with others, and the assets coming to him will not be affected by the fact that such usury does or does not exist. *Parker v. Bethel Hotel Co. (Tenn.)* 706

NOTES AND BRIEFS.

Usury; to bar remedy in equity. 706

VETERINARY SURGEON. See DISCOVERY.

VOTERS AND ELECTIONS.

1. The official announcement of the result of an election by the proper canvassing board is of binding force as to the fact of an actual election, until reversed or set aside by a court of competent jurisdiction. *State, Lamar, v. Johnson (Fla.)* 357

2. A statute making it an indictable offense to vote without presenting to the judges of election an original poll-tax receipt, or a certified duplicate copy thereof, or a certificate of a constable or deputy collector or else an affidavit of the voter that he has paid his poll tax and that his receipt is lost or misplaced, is within the power of the legislature, even as applied to a voter who has actually paid his poll tax, where the Constitution requires "satisfactory evidence" of such payment, and also gives the legislature power to enact laws "to secure the freedom of elections and the purity of the ballot box." *State v. Old (Tenn.)* 837

WAGES. See EXECUTORS AND ADMINISTRATORS.

WATERS—WRIT AND PROCESS.

WATERS. See also CONSTITUTIONAL LAW, 28; CONTRACTS, 15; INJUNCTION, 3, 4.

1. An island formed in a navigable river where land has been washed away years before does not belong to the owner of the remainder of the tract, unless the formation of the island is made by accretions beginning at the water line of his remaining land. *Wallace v. Driver* (Ark.) 317

2. Deepening the natural line of drainage at the outlet of a pond or marsh fed entirely by surface water, without doing anything more than is necessary in the interests of good husbandry, does not constitute a cause of action in favor of the owner of lower lands on which the water will be more liable to overflow or will overflow in greater quantities in case of unusually heavy rains, where it does not appear that he cannot protect himself at small expense compared with the benefits resulting to the upper proprietor from the improved drainage of his lands. *Gilfillan v. Schmidt* (Minn.) 547

3. Water need not be furnished without pay by an incorporated board of water commissioners having no source of revenue for the running expenses of the waterworks except the water rates, to a house of correction which is under the control, for the most part, of a board of inspectors, and not of the city council, although the city is obliged to pay the expenses so far as they exceed the earnings of the institution, since any such burden should be laid upon the whole body of taxpayers of the city, and not upon those only who are private consumers of water. *Detroit v. Board of Water Comrs.* (Mich.) 463

NOTES AND BRIEFS.

Waters; right to land made by accretion. 317
Rights as to surface waters. 547

WILLS. See also DESCENT AND DISTRIBUTION, 4.

1. Children cannot be deprived of their rights in property given them by will, by the fact that a contract by the testator to give property to their father, which was not carried out, is enforced against the estate. *Nowack v. Berger* (Mo.) 810

2. An entry of an account in a savings bank, in the names of husband and wife, subject to the order of either and to survivorship on the death of either, made by a transfer of funds from a former account in the name of the husband alone, but designating his wife as the person to whom payment should be made in the event of his absence or death, makes the new account entirely separate and distinct, so that the testamentary character of the old account will not inhere in the new one and make it admissible to probate. *Metropolitan Sav. Bank v. Murphy* (Md.) 454

3. Testator's intent that the heirs are to be ascertained by the statute in force when the executory devise take effect appears where a devise giving the fee to daughters provides that if they leave no surviving issue the estate "on their decease" shall be divided among his 31 L. R. A.

heirs at law according to the statute of descents, their heirs and assigns forever,—especially where there would be at his death but one heir recognized by law besides the daughters, because of the alienage of a son who was nevertheless recognized by the will as a beneficiary. *De Wolf v. Middleton* (R. I.) 146

4. Other devisees must contribute to make up a deficit in a devise caused by a widow's election to take dower instead of a gift under the will, where the refused share of the widow given to the disappointed devisee is not sufficient to supply the loss to such devisee. *Latta v. Brown* (Tenn.) 840

5. The right of remaindermen to be accelerated and immediately to enter upon and enjoy the use of land devised subject to a widow's life estate, which arises when she refuses to take under the will, is subject to the superior right of a disappointed devisee whose share is diminished by the widow's election to have compensation for such loss by taking the life interest which the widow refused. *Id.*

NOTES AND BRIEFS.

Wills; deficit caused by widow's election; accelerating remaindermen. 840

WITNESSES.

1. A judge cannot testify as a witness in a criminal trial over which he is presiding, under Sand. & H. (Ark.) Dig. § 2965, providing that the judge may be called as a witness by either party, but that in such case it is in the discretion of the court to order the trial to take place before another judge or jury. *Rogers v. State* (Ark.) 465

2. A party to a contract with a deceased person, as well as to a cause of action against his estate, is incompetent to testify in the case. *Nowack v. Berger* (Mo.) 810

3. The credibility of a witness cannot be impeached by showing that she was addicted to the morphine habit, unless it is shown that she was under the influence of the drug when the incident occurred of which she has testified at the trial, or unless her memory is impaired. *State v. Gleim* (Mont.) 294

4. A defendant in a criminal case cannot be questioned as to matters wholly remote from the question of guilt or innocence of the crime charged, so as to amount to a general assault upon his character. *Id.*

NOTES AND BRIEFS.

Witnesses; competency of judge as witness in a cause on trial before him:—(I.) Rule as to judges; (II.) justices of peace. 465

WORLD'S FAIR. See COUNTIES.

WRIT AND PROCESS.

Service of process on the persons who were last elected president and secretary of a corporation which has been defunct for several years, and one of whom has claimed to be the sole stockholder and owner of the assets, where they appear and answer in a suit to wind up its affairs, must be regarded as having been made on them officially as well as individually. *Parker v. Bethel Hotel Co.* (Tenn.) 706

W
f
H
t
t
e
r

